Parental Alienation: What a Concept!

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Body

Judicial opinions abundant in facts and rich in thoughtful analysis are as rare as a white peacock. Hon. Richard A. Dollinger, J.S.C. has delivered such a rarity in J.F. v. D.F., 61 Misc.3d 1226(A), 2018 N.Y. Slip Op. 51829[U], a determination of a contentious custody dispute. This 27,000-word exegesis presents a myriad of multi-faceted intellectual gems requiring multiple reads to fully mine its trove. Indeed, more than one column article will be required to address its many aspects. This article will address the court's development of a specific definition of the complex, controversial and emotionally-charged term, "parental alienation."

Facts of the Case

The parties entered into a custody agreement with respect to their daughters, ages 7, 13 and 15 at the time of the trial that is the subject of the decision being discussed. The agreement provided for joint legal custody and designated the father as primary custodial parent. It established a shared parenting schedule with the children spending two days each week with one parent, the remaining five with the other, then flipping the arrangement during the second week. The agreement provided for a week-to-week rotation during the summer. Judgment was entered in November 2013. The post-judgment festivities began almost at once, with multiple proceedings occupying 2014 and 2015. In 2017 the parties launched what the court dubbed yet "another litigation war of attrition" that led to the decision under discussion.

The mother, an attorney, fired off her opening salvo with a petition for sole custody, claiming that the father, a college professor, was inhibiting the children's development by refusing to take them to certain activities. She sought to modify the agreement to permit the two older daughters to spend the entire week with her during the school year. The father returned fire, claiming, inter alia, that the mother had violated the agreement by scheduling activities on his parenting time without his approval. He also sought sole custody based on his claim that the mother had alienated the children from him. All applications were consolidated and were the subject of a multi-day hearing conducted over the course of a month, at the conclusion of which the court conducted a Lincoln hearing (Lincoln v. Lincoln, 24 N.Y.2d 270 (1969)) with the three daughters.

Prior to submission of summations by the parties and the attorney for the children, the trial judge made temporary findings and concluded that the evidence established "sufficient parental alienation" to require modification of the parties' agreement. The court modified its parenting time provisions, giving each parent a week on and week off during the school year with a mid-week meal for the non-residential parent. The temporary order continued the parties' joint custody but modified its terms by establishing "zones of interest" for each parent.

Melissa De Jesus

Unfortunately, after signing the temporary order, the judge who conducted the hearing and signed the order died. The parties stipulated pursuant to Judiciary Law §21 that the matter could be decided by another judge based on the trial record. Thus situated, the matter landed on the desk of Justice Dollinger. Importantly, he stated at the outset that "This court did not utilize any of the work of the prior judge or her law clerk in reaching this determination." In effect, Justice Dollinger would determine the case based upon his own review of the record, unconstrained by the temporary findings of the prior judge.

The Definitional Quest

Justice Dollinger began discussion with a detailed exploration and analysis of parental alienation, a concept that, in his words, "sidled its way into New York's family law largely as a result of aggressive parent reaction to changes in their relationships with their children after a divorce." After setting forth a valuable disquisition of the history of the concept of parental alienation, referencing both behavioral science literature and case law, the court focused on the fact that judicial discussion of parental alienation has often spoken in terms of an "unjustified frustration" of parental access. Justice Dollinger, concluded, however, that "a more demanding definition" of parental alienation was required, one that would more explicitly describe what constitutes "unjustified behavior." In deriving such a definition, the court borrowed "from a comparable tort-law cousin: the tort of intentional infliction of emotional distress," the elements of which are "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress."

The court then propounded the simple word substitution of "parental alienation" for "emotional distress" to create "an equivalence between this tort designed to protect an individual's emotional status and the family law concept to protect and preserve a parent's relationship with their children." The court postulated that "if the substitution works" the definitional contours of the parental alienation construct would emerge, consisting of "four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe alienation of any parent from a child; (iii) a causal connection between the alienating conduct and the child's rejection of a parent; and (iv) severe parental alienation." The court then refined its definition further:

When analyzed in this light, parental alienation, as a legal concept, requires (1) that the alleged alienating conduct, without any other legitimate justification, be directed by the favored parent, (2) with the intention of damaging the reputation of the other parent in the children's eyes or which disregards a substantial possibility of causing such, (3) which proximately causes a diminished interest of the children in spending time with the non-favored parent and, (4) in fact, results in the children refusing to spend time with the targeted parent either in person, or via other forms of communication.

The derived definition is, to put it softly, constrictive. Facing such a mountainous standard one might expect that many a litigative alpinist will fail to conquer the summit. In the case at bar, the court found that the father's proof of the mother's alleged alienating conduct fell short and dismissed his claim of parental alienation.

Analysis

Apart from its application to the present case, several aspects of the court's proposed definition warrant analysis.

The first and second elements of the proposed definition, taken together, require that the alienating parent act " with the intention of damaging the reputation of the other parent in the children's eyes" (emphasis added) or acting in disregard of a substantial possibility of causing such damage. Further, the parent alleging alienation must prove that there was no other "legitimate justification" for the parent's actions. In other words, as later stated by the court in dismissing the father's alienation claim, "There is no evidence that the mother solely intended that these activities alienate the daughters from their father" (emphasis added).

Thus understood, the constructed definition would seem to make no room for cases of parental misbehavior that can damage the child's relationship with the other parent where there is neither an intent to alienate nor even an awareness of the possibility that the behavior carries such potential. Prominent forensic psychologist David A. Martindale, Ph.D. elucidates this concept as follows:

It is unwise for experts or jurists to attend only to those actions by parents the "sole purpose" of which is alienation of the child from the other parent. Mental health professionals with expertise in family interactions are well-aware of a dysfunctional dynamic in which parents transform children into confidants and sources of emotional support. When emotionally fragile parents undergo divorce, their needs may include the need that their children perceive them as 'right' and 'good'. In their efforts to ensure that their needs will be met, they may-without any thought of alienation-make statements and engage in actions that drive a wedge between their children and the other parent. (Martindale, D.A., private communication, 01-05-19)

The fourth element of the court's definition is also troubling. It requires that the favored parent's conduct in fact "results in the children refusing to spend time with the targeted parent." In other words, the targeted parent must prove that the alienating parent has successfully carried the child into the end-zone of total rejection of the targeted parent. The problem with this, of course, is that it seemingly disempowers the court from shielding the child from the alienating behavior until it is too late to salvage the relationship between the child and the targeted parent. It is unlikely that Justice Dollinger intended such constriction.

In a landmark article on the subject, prominent researchers Joan B. Kelly and Janet R. Johnston made clear that alienation is a process that occurs over time. Among other factors, the child's cognitive and emotional development can affect the point at which the alienation takes hold:

Children's responses to alienating processes and to the behaviors of each parent are influenced by their own psychological, cognitive, and developmental strengths and vulnerabilities and by external arrangements involving the rejected parent ... . Overall, the most common age range of the alienated child is from 9 to 15, although some older adolescents and young adults also can become alienated.

Kelly, J.B., Johnston, J.R., "The Alienated Child: A Reformulation of Parental Alienation Syndrome," Family Court Review, Vol. 39 No. 3, 249-66 (Sage July 2001).

Dr. Martindale elaborates this point as follows:

It is imprudent to conceptualize the complex dynamics of alienation in dichotomous terms (present v. not present). Many parent-child relationship problems develop slowly, and where the forces that create those problems are present, constructive steps must be taken to address patterns of behavior that, if not curtailed, will produce predictable negative consequences. Just as harm is done when, with insufficient evidence, it is concluded that alienation exists, harm is also done when the current absence of specific indicators of harm in a parent-child relationship leads us to conclude that there is no cause for concern.

Martindale, D.A., private communication; Martindale, D.A., "Expert Witnesses: Observing the Limits of Expertise," The Matrimonial Strategist, 35(3), 1ff (2017).

Indeed, Justice Dollinger recognized this dynamic when he wrote:

The mother's conduct could have resulted in alienation and, in other cases, similar conduct could lead to a child's rejection of a parent. But, in this case, even if the mother intended to alienate these children from their father, she failed. This court has no doubt that parental alienation-destroying a parent in the eyes of a child-exists and should not be tolerated. But it does not exist for these children. (emphasis added)

So again, where is the elbow room within the constructed definition for judicial action in the face of alienating behaviors that have not yet completely severed the parent-child relationship? It may be instructive at this juncture to step back from the definitional difficulty-indeed, to step back from the "parental alienation" label itself, and focus instead on parental behavior and its potential impact on the children.

A Broader Perspective

The search for definitional specificity of parental alienation, important though it is, carries with it the risk of losing sight of the larger issue of the parental obligation to foster a meaningful and positive relationship between the child and the other parent. This parental obligation is well ensconced in New York law (Bliss on Behalf of Ach v. Ach, 56 N.Y.2d 995 (1982)) and has become a major factor in custody cases. Significantly, the law speaks not only of a "willingness" to encourage " contact" with the other parent but of willingness and ability to foster the " relationship." Rosenstock v. Rosenstock, 162 A.D.3d 702 (2d Dept. 2018); see also Williams v. Bryson, 2018 N.Y. Slip Op. 08941 (2d Dept. 2018). In effect, a parent must not only express a willingness to nurture that relationship but must act accordingly.

Clearly the parental obligation to foster the child's relationship with the other parent requires more than merely refraining from active efforts to alienate. It is an affirmative duty to behave in ways that actively promote the relationship. Dobies v. Brefka, 83 A.D.3d 1148 (3d Dept. 2011) exemplifies the point. The court called foul against the mother because she "could not identify one instance when she disciplined [the child] for refusing to visit the father or for misbehaving while visiting." Interestingly, perhaps ironically is the better word, when Justice Dollinger ultimately turned to the fostering factor he found that "the mother, despite the claims that she has attempted to alienate the children, has worked harder to foster a relationship between the daughters and their father than the father has worked to foster the relationship between the daughters and their mother."

Given this affirmative duty to promote the relationship, one could argue that, if a tort analogy were to be applied, the negligent infliction of emotional distress fits more snugly than its more stringent sibling employed by the court. In any event, a more direct and productive path would be for the court to bypass the labels and simply measure parental behavior. Apart from questions of motivation or intent, and irrespective of whether the child has yet reached the point of total rejection of the targeted parent, the court can assess whether specific proven parental behaviors are likely to foster the other parent's relationship with the child or to undermine it. In effect, by their deeds you will know them.

Conclusion

Justice Dollinger's prodigious work product in J.F. v. D.F. is an important and evocative contribution to family law jurisprudence. It is a decision not only to be read but to be studied, indeed savored, as it reflects a standard of scholarship to which one would hope all among bench and bar would aspire. Whether one wholly embraces his proposed definition of parental alienation or not, the decision serves as an important reminder that such loaded terminology ought not to be lightly bandied about. It carries practical import as well. The practitioner, when presenting a case on behalf of a "targeted parent," would do well to cast the case in the broader terms of whether the opposing parent's behavior lives up to the affirmative obligation to promote the client's relationship with the child rather than relying solely upon a theory of "parental alienation."

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Appellate Review of Law and Facts in Child Custody Cases: Some Observations

This commentary examines the question of whether the Appellate Division in the Third Judicial Department has been affording litigants the benefit of this two-tiered analysis in child custody cases.

By **Jim Montagnino** | September 13, 2019

Our intermediate appellate courts are empowered to review factual findings as well as legal conclusions in both criminal and civil cases. The authority for this scope of review in criminal cases rests in CPL 470 and in civil cases in CPLR 5501.

This commentary examines the question of whether the Appellate Division in the Third Judicial Department has been affording litigants the benefit of this two-tiered analysis in child custody cases.

More than 30 years ago the Court of Appeals clarified the dual nature of intermediate appellate review in New York. In *People v. Bleakley and Anesi*, 69 N.Y.2d 490 (1987), the defendants had been convicted after a jury trial of first degree rape and other related offenses. On direct appeal, a majority of a split Appellate Division in the Second Judicial Department "articulated the view that their function as an appellate court was not to substitute their judgment for that of the jury on matters of credibility or the weight to be accorded to the evidence presented at trial, but rather to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the defendants' guilt had been proven beyond a reasonable doubt." 69 N.Y.2d at 494. Reversing the Appellate Division, the Court of Appeals, through Judge Bellacosa, held: "To determine whether a verdict is supported by the weight of the evidence ... the appellate court's dispositive analysis is not limited to that legal test." Id. at 495. Rather, the court detailed how the questions of legal sufficiency and weight of the evidence were distinct issues of law and fact that were to be addressed separately.

When reviewing the legal question of sufficiency of evidence, "the court must determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial." Id. Yet when the weight of the evidence is called into question, the intermediate appellate court must perform a different function. "If based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." Id. (internal quotes omitted). On this analysis, "[i]f it appears that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict [under] CPL 470.20(2)." Id.

The *Bleakley* decision caused a sea change in the manner in which our intermediate appellate courts subsequently exercised their dual functions of legal and factual review. As of this writing, a Westlaw search discloses that the case has been cited 8,283 times in published decisions. The bipartite analytical methodology of *Bleakley* has been employed beyond just the criminal sphere in a myriad of intermediate appellate cases including juvenile delinquency proceedings (see, e.g., *Matter of Anthony E.*, 82 A.D.3d 1544 (3d Dept. 2011)); child protective proceedings (see, e.g., *Matter of Zoe L.*, 122 A.D.3d 1445 (4th Dept. 2014)); and even landlord-tenant disputes (see *Solow v. Wellner*, 86 N.Y.2d 582, 587 (1995); *Freeman Street Properties v. Thelian*, 6 Misc.3d 127(A) (App. Term 2004) (dissent), rev'd 34 A.D.3d 475 (2d Dept. 2006)).

While other Departments of our Appellate Division have employed a *Bleakley*-style analysis when called upon to review the weight of evidence in child custody appeals (see, e.g., *Matter of Enrique S. v. Genell M. D.*, 56 A.D.3d 396 (1st Dept. 2008); *Matter of Nathan J.H. v. Gwendolyn D.D.*, 305 A.D.2d 293 (1st Dept. 2003); *Matter of Mandry v. Reyes*, 294 A.D.2d 142 (1st Dept. 2002); *Matter of Bartholomew v. Marano*, 2019 WL 3436666 (2d Dept. July 31, 2019); *Weisberger v. Weisberger*, 154 A.D.3d 41, 51 (2d Dept. 2017); *Trinagle v. Boyar*, 70 A.D.3d 816 (2d Dept. 2010); *Matter of Gilman v. Gilman*, 128 A.D.3d 1387 (4th Dept. 2015); *Matter of Mercado v. Frye*, 104 A.D.3d 1340 (4th Dept. 2013)), the Third Department routinely blurs the distinction between review of legal sufficiency of evidence and weight of evidence in custody cases. Instead of carefully distinguishing between legal and factual review, the Third Department generally employs an amorphous standard. Under the rubric "sound and substantial basis," the court often lumps together a generic review of both facts and law.

The Third Department first embraced the "sound and substantial basis" standard in 1975. In *Matter of Ernest LL. v. Rosemary LL.*, 50 A.D.2d 706, 706, the court held that, in the presence of "numerous errors, mistakes and omissions in the transcript," meaningful review under the standard was impossible. The court therefore reversed

and ordered a new trial. From *Ernest LL.* to the present, the "sound and substantial basis" standard has been routinely invoked by the Third Department in its review of custody determinations.

Though Judge Bellacosa's broad language in *Bleakley* seems clear in its intended applicability to intermediate appeals of both civil and criminal cases, the two-part *Bleakley* analysis has never crossed over into the realm of Third Department custody appeals. For example, in *Matter of Miller v. Miller*, 287 A.D.2d 814, 815 (2001), the Third Department explicitly stated: "Respondent contends that Family Court's custody award was against the weight of the evidence … ." The Appellate Division disagreed with the respondent and stated: "Since Family Court is in the best position to observe the witnesses' demeanor and assess credibility, deference is accorded its factual findings unless they lack a sound and substantial basis in the record." Id. (citations and internal quotation marks omitted). In short, having determined that there was legally sufficient evidence to support Family Court's findings, the Appellate Division denied the appellant any factual review whatsoever. By expressly stating that legal sufficiency of evidence mandated deference to the trial court's factual determinations, the Third Department committed the same error that occasioned the reversal of the Second Department in *Bleakley*. For just as it is improper to defer to a jury's verdict simply because the evidence is legally sufficient to support the conviction, it is improper to defer to a trial court's factual findings when the weight of evidence—a clearly factual issue—is raised on the appeal.

Matter of Arielle LL., 294 A.D.2d 676 (3d Dept. 2002), is another interesting example of this problem, arising here in the context of a child abuse case. A three-justice majority of the Appellate Division noted that the "[r]espondent's sole assertion on appeal is that Family Court's finding of sexual abuse is against the weight of the evidence." Id. at 677. Again, the court sidestepped the factual issue and held: "According great deference, as we must, to those factual findings made by a court which had the advantage of directly observing the demeanor of all witnesses who testified, we can find no basis upon which to disturb the determination rendered *since we find it to be supported by a sound and substantial basis in the record*." Id. at 677-78 (emphasis added).

There are other appeals of custody awards in the Third Department where the court implies that deference to the factual determinations of the trial court in custody cases is mandatory if the evidence in the record is legally sufficient to satisfy the "sound and substantial basis" test. See, e.g., *Matter of Fletcher v. Young*, 281 A.D.2d 765, 767 (2001); *Kaczor v. Kaczor*, 12 A.D.3d 956, 958 (2004). A recent decision by the Third Department, however, seems to suggest that the distinction between a determination that is not legally sufficient and one that is against the weight of the evidence is no longer merely blurry, but is now indiscernible. The case involved a 13-day trial where the factual questions raised included whether allegations of sexual abuse of a five-year-old girl by her father had been fabricated by the child's mother.

In *Matter of Nicole TT v. David UU*, 2019 WL 3226724 (July 18, 2019), the child allegedly told her mother that her father had touched her in a sexual manner on a single occasion in January 2016. The mother brought the child to a local hospital for a SANE exam and the child was later interviewed by Child Protective Service (CPS) case workers, a police detective and experts at a sexual trauma center. The experts found credible the child's report that the father had sexually abused her. Criminal charges were brought against the father, the Department of Social Services commenced a child abuse proceeding, and the mother filed both a family offense petition and a custody petition.

Meanwhile, the father repeatedly protested his innocence. During the pendency of the case, the Family Court judge awarded the mother temporary sole custody but allowed the father some visitation under the supervision of the paternal grandmother. In September 2016 the mother brought another family offense petition against the father, alleging that he had sexually abused the child during one of the supervised visits. The child was subjected to another SANE exam and again interviewed by CPS and the experts at the sexual trauma center. Once more, the experts agreed that the child's story was credible. Shortly afterward, however, the father revealed that he had equipped himself with a body camera prior to the supervised visit. He produced the recording of the entire session and proved that nothing improper had occurred.

In reversing Family Court's award of custody to the father, the Appellate Division held "that Family Court's decision and order misstates and mischaracterizes the record evidence and that the determination lacks a sound and substantial basis in the record." The Appellate Division further stated:

> We are mindful that the record shows that the father did not sexually abuse the child during the supervised visit in September 2016. That conclusion, however, does not validate Family Court's determination that the January 2016 allegation was a 'fabrication' … . To the contrary, the record evidence demonstrates that the police investigator, therapists and evaluators all believed that the child was telling the truth in January 2016 … . Contrary to the court's erroneous finding, no professional involved in the case testified that the child had been coached or that the mother was consciously trying to alienate the child from the father.

The Appellate Division reversed the trial court's order on the law and remitted the matter to a different judge "for updated fact-finding … and a custody determination that reflects the best interests of the child."

The Appellate Division's determination was expressly based on the legal standard of "sound and substantial basis," and the reversal was ordered "on the law." Yet the reasoning employed by the Appellate Division suggests that it felt that many of the Family Court's factual findings were against the weight of the evidence. For example, the Appellate Division disagreed with the trial judge's finding that the child had not been sexually abused in January 2016 because the experts who interviewed the child agreed that her story was credible. This is clearly a factual and not a legal conclusion. Cf. *Matter of Shirreece AA v. Matthew BB*, 166 A.D.3d 1419 (3d Dept. 2018).

The ultimate conclusion to be drawn here is a simple one. New York law gives every appellant the right to challenge both the legal sufficiency and factual weight of an adverse trial determination. In child custody cases, this right can best be protected at the intermediate appellate level by a decision and order that separately addresses both the legal issue of whether a determination was supported by a sound and substantial basis in the record as well as the factual issue of whether that determination was against the weight of the evidence. As a practical matter, the legal

issue should be addressed first, for if the trial court's determination is not supported by a sound and substantial basis in the record it is subject to reversal as a matter of law. If this legal test is satisfied—and if the issue of weight of the evidence has been raised by the appellant—the Appellate Division should then review the trial record and decide whether the quantum or quality of conflicting evidence is such that it calls into question the soundness of the trial court's factual findings. If and only if this is so, the Appellate Division may then decide whether to defer to the trial judge's assessment of the witnesses' credibility or whether to substitute its fact-finding authority and reverse or modify the lower court's order. The adoption of an approach such as this would best ensure that appellants receive the level of review of both the law and the facts to which they are entitled.

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New York Law Journal

Parental Alienation—A Broader Perspective

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

By **Jordan E. Trager** | April 09, 2019

Photo Credit: Bigstock

A recent decision published in the New York Law Journal, *J.F. v. D.F., (https://www.law.com/newyorklawjournal/almID/1545410238NY201201795/)* 61 Misc.3d 1226(A), 2018 N.Y.Slip. Op. 51829(U), by Judge Richard A. Dollinger, provided a thorough analysis of the concept of "parental alienation" in the New York courts. This was followed by an article in the New York Law Journal titled "Parental Alienation: What a Concept! (https://www.law.com/newyorklawjournal/2019/01/11/parental-alienation-what-a-concept/)" by Timothy M. Tippins, who provided his analysis of the concept of "parental alienation" in the New York courts and analyzed Judge Dollinger's decision.

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

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

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

Summary of Parental Alienation in the NY Courts

It has long been held in the New York courts: “Parental alienation of a child from the other parent is an act so inconsistent with the best interests of a child as to, per se, raise a strong probability that the offending party is unfit to act as custodial parent.” *Doroski v. Ashton*, 99 A.D.3d 902 (2d Dept. 2012); *Bennett v. Schultz*, 110 A.D.3d 792 (2d Dept. 2013); *Avdic v. Avdic*, 125 A.D.3d 1534 (4th Dept. 2015); *Halioris v. Halioris*, 126 A.D.3d 973 (2d Dept. 2015).

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

Understanding Parental Alienation as a Concept

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

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

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

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

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

Parental Alienation Definition in Dollinger's Decision

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

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

Several significant questions are raised by Judge Dollinger's definition of parental alienation. What "legitimate justification" could there possibly be for alienating a child from another parent? What intention can there possibly be other than "the intention of damaging the reputation of the other parent"? It should not be necessary to show all of this in order to prove the existence of parental alienation.

Standard of Proof in Dollinger's Decision

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

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

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

Tippins Article

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

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

A Broader Perspective of Parental Alienation in NY Courts

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

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

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

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

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

Proving Parental Alienation in NY Courts Based on This Broader Perspective

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

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

Remedies in Court

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

Both Judge Dollinger's decision and Professor Tippins' analyses are highly important, not only as bodies of legal work to be studied, but also in bringing valuable attention to parental alienation as a concept, and in their efforts to find more effective solutions in these kinds of cases in the New York courts.

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

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New York Law Journal

Does Empowering Children During Divorce Litigation Serve Them Well?

With the expectation that an AFC is to be working with the child client to zealously advocate the child's position, the balancing of the child's desires versus the child's best interest must be the focus.

By **Lisa Zeiderman** | July 26, 2019

For better or worse, an unemancipated child of an intact family has little choice but to reside with and accept those decisions made by his/her parents. In intact families, decisions pertaining to time sharing with the parents, a child's general welfare,

education, religious preferences, medical and health issues, camp, and even extracurricular activities are routinely determined by a child's parents.

Contrast the foregoing with a child of divorcing parents. During a divorce and/or custody proceeding and even thereafter in post-judgment proceedings, a child may voice his/her desires regarding the foregoing issues through his/her attorney, usually appointed by the court.

As recently as June 2019, the Appellate Division Second Dept. held that: "The Family Court erred in failing to give due consideration to the expressed preferences of the child, who was 14 and 15 years old at the time of the proceedings in the Family Court, and who communicated a clear desire to remain in the father's custody." *Newton v McFarlane*, 2019 WL 2363541, *1 (2d Dep't June 5, 2019) No. 2017-13478, V-20779-10/16I, V-33124-10/16I.

Previously children were represented by law guardians who made a recommendation to Judges as to a child's best interest. However, in 2007, the role of Attorney for the Child (AFC) was clarified in §7.2 of the Rules of the Chief Judge. An AFC is now required to zealously advocate the child's position on critical issues such as access with a parent, education, and other major decisions, so that the child's voice through an AFC may be considered by the Judge.

The history of the development of the AFC is as follows: In October 2007, Chief Judge Judith Kaye, in consultation with the Administrative Board of the Courts, and with the approval of the Court of Appeals, promulgated a new §7.2 of the Rules of the Chief Judge. Section 7.2 was passed in response to a report submitted by the Matrimonial Commission in 2006 to Chief Judge Kaye and closely reflected the recommendations outlined therein. The Commission concluded that the attorney for the child is not and should not be regarded as a fiduciary. (Matrimonial Commission of the State of New York, Report to the Chief Judge of the State of New York (February 2006). Nor was an AFC to be an investigator for the court.

Pursuant to §7.2, the law guardian is now referred to as an AFC and an AFC's mandate was to advocate the child's position subject to the limited exceptions set forth below. Like the parents' respective attorneys, an AFC is subject to the ethical

requirements applicable to all lawyers, including but not limited to disclosure of client confidences. 22 NYCRR. As such, when the child client instructs an AFC to keep his/her confidences regarding his/her preferences, an AFC must do so. That means that a parent may not know why, for example, his/her 13-year-old child is voicing a desire not to live with and sometimes even have contact with a parent. 22 NYCRR.

With an AFC advocating a child's desires, the question presented is what is the proper balance to strike between respecting a child's desires and preferences and empowering the child to the point where the child believes that he/she has not just a voice but also a vote in making adult decisions that may have a long-term effect on the child.

Significantly, the child's preference may be based upon misinformation or misplaced views. Additionally, the child may be easily influenced and manipulated. In cases such as the foregoing, an AFC's role is even more critical as it is an AFC who can advise the child client, while providing the child information and assistance about the court proceedings in an honest, realistic and unbiased manner. In that way, an AFC can help the child formulate his/her desires based upon sound information and then articulate the child's desires to the court after consultation with the child client.

The new role of the AFC, while respectful to the child's desires, does pose issues for the parents embroiled in litigation. Parents who want to act like parents are suddenly finding themselves competing for their child's affection, such as: homework versus computer time; pizza versus vegetables; unlimited video games and computer time versus rules regarding video games and computer use. Curfews fly out the window and the list continues. In certain instances, parents who are concerned that their children's voice may become too powerful in the courtroom find their role and authority as parents descending into a popularity contest between the parents to gain the child's approval.

Pursuant to §7.2, an attorney is to fully explain the options available to the child and may recommend to the child a course of action that in the attorney's view would best promote the child's interests. 22 NYCRR. However, after counseling and

advising the client, an AFC must advocate the child's desires so long as the child is capable of voluntary and considered judgment, even if an AFC believes that what the child wants is not in the child's best interests.

The New York State Bar Association (NYSBA) determined that it was appropriate and imperative to deviate from the previous standard regarding the role of an attorney for the child, because the NYSBA felt "the child often has a keen insight concerning his or her needs," and should, therefore, be the driving force in legal proceedings, especially custody matters. New York State Bar Association Committee on Children and the Law, Law Guardian Representation Standards, Vol. II: Custody Cases (3d ed., 2005).

When an AFC believes that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child can then advocate a position that is contrary to the child's wishes. However, an AFC must inform the court of the child's articulated wishes if the child wants the attorney to do so, even if that is contrary to the position that an AFC takes in the courtroom. 22 NYCRR. Thus, for example, even when the AFC is aware that a parent is influencing a child's decision about access or other major decisions that the AFC believes is not in the child's best interest, the AFC still must advocate for the child's desire except in the situations set forth above.

The foregoing is not only a departure from the previous standard, which required the AFC to advocate the best interests of the child, even if those interests were at odds with the child's wishes, but it is also a departure of what children of intact families experience. In some situations, it can result in an empowerment of children that begs the question of why children of divorcing parents are afforded that power and voice that children of intact families often lack.

A significant question to be considered is whether this evolution of an AFC's role is actually helping the child or instead helping the child achieve what the child wants. For example, there are matters in which one parent has successfully lobbied against the other parent to the point where the child has a strong desire to sever contact

with a parent. Are we empowering the child too much when the child's attorney is now advocating the child's desire not to see a parent and in fact to slice that parent out of the child's life? If the child's AFC is a strong advocate and the parent's attorney is not as skilled, what is the result? Are we faced with the child seizing the power in the parent/child relationship? Further, given the costs of litigation, the reality may be that a parent simply must cede to the child's desires before a judge has the opportunity to determine the best interests of the child. For those instances, will the child later resent the parent for not fighting harder? Moreover, while the judge in the matter does determine what he/she believes is in the child's best interest, this may only occur after a trial of the matter. The reality is that the judge's decision may not occur for months if not years after certain decisions have been made and realities set a course too late to realistically change.

With the expectation that an AFC is to be working with the child client to zealously advocate the child's position, the balancing of the child's desires versus the child's best interest must be the focus. If there is consensus that the child should remain a child and not make adult decisions, then there must be timely safeguards put into place by the court to guard against lobbying and manipulation of children and inappropriate empowerment of children. The safety mechanism in place for children to remain children is the court. However, for the court to be an effective safety mechanism, it must utilize the arsenal of tools available, including when appropriate the appointment of forensic psychologists to perform an evaluation, a full development of a case before the court and importantly an in camera interview with the child so that the court can hear the reasoning behind the child's voice and ultimately make a decision based upon the child's best interest. Most of all, while the child should understand that his/her voice will be heard, the child must understand that the court will ultimately make a decision based upon the child's best interest.

Lisa Zeiderman *is a managing partner of the law firm of Miller Zeiderman & Wiederkehr and Certified Divorce Financial Analyst who focuses her law practice solely in matrimonial and family law.*

New York Law Journal

Giving a Greater Voice to the Child Enhances Fact-Finding and Decision-Making

If other lawyers and the judge fail to properly discharge their responsibilities, the solution lies in improving their performance, not in twisting out of shape the role and ethical responsibilities of the AFC.

By **Gary Solomon, Karen J. Freedman and Karen Simmons** | August 05, 2019

In a recent article, “Does Empowering Children During Divorce Litigation Serve Them Well? (https://www.law.com/newyorklawjournal/2019/07/26/does-empowering-our-children-during-divorce-litigation-serve-them-well/),” N.Y.L.J. (July 29, 2019), Lisa Zeiderman appears to offer a resounding “no” in response to that rhetorical question. In doing so, and in recounting the evolution of the role of the attorney for the child (AFC) in New York, she raises issues that no longer bear serious discussion, and gets several things wrong.

Ms. Zeiderman asserts that prior to the promulgation in 2007 of §7.2 of the Rules of the Chief Judge, “children were represented by law guardians who made a recommendation to Judges as to a child’s best interest.” Not so. Pre-Rule 7.2, the AFC (then called a “law guardian”), while always taking into account and communicating

to the court the child's expressed wishes (see Family Court Act §241), did act upon his or her own considered judgment, but only when representing young children who are incapable of articulating their wishes and/or making considered judgments. However, when representing teenagers, and even younger children who *are* capable of considered judgment, the AFC was ethically bound to advocate for the child's preferences unless successful advocacy would expose the child to a risk of imminent serious harm. Rule 7.2 formalized what was already the prevailing practice, at least in New York Family Courts, and also had the salutary effect of deterring renegade AFCs from engaging in unauthorized and inappropriate "best interests" advocacy.

More unsettling are a number of assertions made by Ms. Zeiderman that reflect her discomfort with Rule 7.2. She asserts that "parents who are concerned that their children's voice may become too powerful in the courtroom find their role and authority as parents descending into a popularity contest between the parents to gain the child's approval," which "can result in an empowerment of children that begs the question of why children of divorcing parents are afforded that power and voice that children of intact families often lack." Ms. Zeiderman also observes that "[a] significant question to be considered is whether this evolution of an AFC's role is actually helping the child or instead helping the child achieve what the child wants." Ms. Zeiderman complains that "[i]f the child's AFC is a strong advocate and the parent's attorney is not as skilled, what is the result? Are we faced with the child seizing the power in the parent/child relationship?"

Ms. Zeiderman entirely misses the point. These are valid concerns for a child's parents, for mental health professionals, and for the judge who is making a best interests determination, but they have absolutely nothing to do with the role of the AFC. The purpose of Rule 7.2 is to enhance the likelihood that the court will reach the right result by ensuring that the child, like other litigants in these and other types of proceedings, is represented by loyal counsel and thus has an opportunity to effectively assert his or her position in court. The judge, not the AFC, is charged with making a determination based on the evidence presented, and applicable statutes and case law. Is Ms. Zeiderman really suggesting that AFCs should stray from the dictates of Rule 7.2, and refrain from zealously advocating for what the child wants,

because there is a risk that the AFC's skilled advocacy will seduce the judge into a decision Ms. Zeiderman would say is not in the child's best interest? That seems to be the "between-the-lines" message in her article. Ms. Zeiderman properly recognizes that the AFC should counsel the child with respect to a proper course of action, but laments the fact that the AFC is obliged to advocate for what the child wants should that counseling fail to change the child's mind.

At bottom, Ms. Zeiderman, intentionally or inadvertently, communicates a lack of faith in the ability of AFCs to help children make sound decisions, and in the ability of judges to reach sound judgments even while the attorneys act as zealous advocates and make factual presentations designed only to further their client's interests.

AFCs are inspired by the considerable wisdom of children, whose judgment about their best interests often proves at least as sound as that of the adults who have substituted their own judgment, and, in some cases, are not fully able to distinguish their child's needs from their own. Requiring the AFC to advocate the child's best interests would deny the child an effective voice in the proceedings, and creates a risk that the AFC's advocacy will be based not on what would be best for the child, but rather on the AFC's personal inclinations and biases. The strength of the adversary process lies in the full presentation and consideration of different points of view. Consequently, giving a greater voice to the child enhances rather than impairs both fact-finding and decision-making. If other lawyers and the judge fail to properly discharge their responsibilities, the solution lies in improving their performance, not in twisting out of shape the role and ethical responsibilities of the AFC.

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New York Law Journal

The Voice of the Child: Critical and Often Compelling

I write to provide some historical perspective and add my voice in support of the present law, which provides that Attorneys for Children must represent to the court the child's wishes (unless the child is too young, is incapable of expressing his/her wishes, or if the child's wishes would endanger his/her health or welfare), rather than the attorney's own opinion of the child's best interest.

By **Sondra Miller** | September 12, 2019

Photo: Shutterstock

Thanks to the New York Law Journal for refocusing our attention on the significant issue of the child's voice in contentious custody proceedings, by publishing two recent articles—"Does Empowering Children During Divorce Litigation Serve Them Well? (https://www.law.com/newyorklawjournal/2019/07/26/does-empowering-our-children-during-divorce-litigation-serve-them-well/)" authored by Lisa Zeiderman (July 26, 2019) and "Giving a Greater Voice to the Child Enhances Fact-Finding and Decision-Making (https://www.law.com/newyorklawjournal/2019/08/05/giving-a-greater-voice-to-the-child-enhances-fact-finding-and-decision-making/)," authored by Gary Solomon, Karen J. Freedman and Karen Simmons (Aug. 5, 2019).

I write to provide some historical perspective and add my voice in support of the present law, which provides that Attorneys for Children must represent to the court the child's wishes (unless the child is too young, is incapable of expressing his/her wishes, or if the child's wishes would endanger his/her health or welfare), rather than the attorney's own opinion of the child's best interest.

An Historical Perspective

In 1962, the statutory authority for the appointment of attorneys for children was set forth in §241 of the Family Court Act. The statute declares that an attorney for the child is a necessary advocate for a minor, who often requires the assistance of counsel to protect his/her interests *and* to communicate the child's wishes to the court. Mindful of these dual requirements for the representation of children as set forth in §241, in 2006, the Matrimonial Commission recommended the adoption, by administrative rule, of the Statewide Attorneys for Children (previously Law Guardian) Advisory Committee's uniform protocols for the representation of children. Subsequent to the Matrimonial Commission's recommendation, in October 2007, the Administrative Board promulgated 22 NYCRR 7.2, which incorporated slight modifications to the Statewide Attorneys for Children Advisory Committee's working definition of the role of the attorney for the child. This working definition was previously approved by the Administrative Board in 1997.

The Matrimonial Commission

The Matrimonial Commission, appointed by Judge Judith Kaye in 2004, on which I served as chair, was composed of 31 members—12 judges, 16 attorneys, one mental health professional, one retired law school dean, and one certified public accountant. The Commission was directed to consider all aspects of matrimonial litigation, including custody and visitation; the appointment, qualifications and use of law guardians and guardians ad litem; forensic experts and alternative dispute resolution methods, including collaborative divorce. After its statewide public hearings, interviews and investigations, the Commission was asked to make recommendations for improving the courts' critical role in the regulations and laws affecting matrimonial litigation in Family and Supreme Courts.

The instant issue—the representation of children in court proceedings—was considered at length (Matrimonial Commission Report 2006, pages 39-44). After reviewing relevant literature, considering conflicting points of view, and considerable debate, the Commission unanimously recommended the adoption of the Statewide Law Guardian Advisory Committee's working definition of the role of the attorney for the child and agreed that the ultimate determination of the custody of the child should be determined by the judge, who must be guided by the child's "best interest," having heard the contentions of all parties by their attorneys and the attorney for the child—*representing the child's wishes*, and after an "in camera" with the child, and review of forensic reports and other relevant records.

Significant decisional precedent (trial and appellate) before and after the Matrimonial Commission Report reflected acceptance of this role of the attorney for the child as representing the child's wishes, not the opinion of the child's attorney as to his best interests. *Koppenhoffer v. Koppenhoffer* 159 A.D.2d 113 (2d Dep't 1990), *Eschbach v. Eschbach* 56 N.Y.2d 167 (1982); *Hughes v. Hughes*, 79 A.D.3d 473 (1st Dep't 2010).

I am sympathetic to Ms. Zeiderman's concerns that there may be instances where the child has been manipulated and where the best interest of the child may be more appropriately and convincingly expressed by the child's attorney. However, as her article notes, the court is directed to consider the contentions of all parties and their counsel, as well as "the arsenal of tools available." Those tools include the

appointment of a forensic examiner, and significantly, meetings with the child "in camera" where the judge can hear directly from the child. The judge may have more than one "in camera" meeting with the child and his/her attorney during the course of the proceedings and before their conclusion.

I enthusiastically concur with the sentiments so well expressed in the article authored by Solomon, Freedman and Simmons, and also refer your readers to the recent signicant opinion authored by Presiding Justice Alan Scheinkman, Ā*Newton v. McFarlane*, 174 A.D.3d 67 (2d Dep't 2019), confirming, inter alia, the appropriateness of the present rule regarding the role of attorneys for children:

> Substantively, and more importantly, it cannot be denied that a teenaged child has a real and substantial interest in the outcome of litigation between the parents as to where the child should live and who should be entrusted to make decisions for the child. It seems self-evident that the child is the person most affected by a judicial determination on the fundamental issues of responsibility for, and the environment of, the child's upbringing. To rule otherwise would virtually relegate the child to the status of property, without rights separate and apart from those of the child's parents. As Chief Judge Charles Breitel stated in the landmark case of *Matter of Bennet v. Jeffreys*, 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 356 N.E. 2d 277: "a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of … constitutional magnitude." Among those rights is the child's right to have his or her best interests, and his or her position concerning those interests, given consideration by the court.

Judges who have presided over custody trials commonly agree that the decisions required of them as to the child's best interest are the most trying and difficult of their obligations, often causing sleepless nights and painful doubts. Only one judge, of historic note King Solomon (1 Kings 3:16) had before him a rare and simple custody decision—to award custody to the mother who relinquished her claim to the child in order to save her child's life.

Our public voice as citizens is important. We should not underestimate the obligations we all share in exercising our influence in the selection and appointment of wise, conscientious, sensitive judges, who are responsible, inter alia, for determining the child's best interests.

Sondra Miller *is a retired Justice of the Appellate Division, Second Department, and is chief counsel to McCarthy Fingar in White Plains.*

Unreported Disposition
Slip Copy, 61 Misc.3d 1226(A), 2018 WL 6530810 (Table), 2018 N.Y. Slip Op. 51829(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

***1** J.F., Plaintiff,
v.
D.F., Defendant.

Supreme Court, Monroe County
2012/01795
Decided on December 6, 2018

CITE TITLE AS: J.F. v D.F.

ABSTRACT

Parent, Child and Family
Custody
Parental Alienation

J.F. v D.F., 2018 NY Slip Op 51829(U). Parent, Child and Family—Custody—Parental Alienation. (Sup Ct, Monroe County, Dec. 6, 2018, Dollinger, J.)

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OPINION OF THE COURT

Richard A. Dollinger, J.

Introduction

In this matter, the court must wrestle with a significant, but undefined concept in New York matrimonial law: what is parental alienation, and when does it require a change in primary residence and/or time sharing?

The parties signed a custody and parental access agreement in 2013 ("the agreement") and thereafter a property settlement agreement. The couple--a college professor and an attorney--have three daughters. The judgment of divorce was signed in November 2013. The agreement designated the father as the primary custodial parent and included a shared parenting schedule - the children spending two days each week with one parent, the remaining five with the other, then flipping the arrangement during the second week. It provided for a week-to-week rotation during the summer. The couple anticipated conflict; the agreement contains language providing for an arbitrator to resolve disputes, and the couple referred a series of disputes to one.

The present hearing was not the first conflict for this couple. Less than a month after the divorce was signed, the father sought and obtained a temporary order of protection against the mother, requiring her to stay away from him and his home. He later commenced a town court proceeding seeking to enforce the order and received a one-year order of protection. In August 2014, less than a year after the agreement was signed, the court, in the face of competing show cause orders, issued an order that resolved a series of custody, visitation, and parenting issues. In September 2015, the court, confronted with a second set of competing affidavits, issued an order defining the summer schedule and confirming the scope of authority for the arbitrator.

Within two years, the parties began another litigation war of attrition. The mother filed a family court petition for sole custody, arguing that the father was inhibiting the children's growth and development by refusing to take them to activities. The mother sought to modify the agreement to permit the couple's two older daughters to spend an entire week during the school year with her. The father filed an order to show cause claiming that the mother violated the agreement by scheduling activities on the father's parenting days - and cutting into his parenting time - without his approval. The father also sought sole custody, alleging that the mother had violated the agreement and through a course of conduct, had alienated the children from him.

All the motions were consolidated, and the trial court conducted a multi-day hearing, over the course of a month. After the hearing, the court conducted a *Lincoln* [1] hearing with the three daughters (ages 15, 13, and 7). Thereafter, the

court, prior to the submission of summations by both parties and the attorney for the children, issued a temporary order finding that "there's sufficient parental alienation to deem a sufficient change of circumstances that required modification of the original agreement."

The court made the following "temporary" findings:

(1) there was a prior positive relationship between the daughters and their father;

(2) the mother had "badmouthed" the father to professionals and told the children there was an order of protection and, as consequence, the children could not get out of a car apparently at their father's home;

(3) the mother over-scheduled the children, limiting the father's contact;

(4) the mother's gift of a cell phone to their oldest daughter and telling her to call the mother, if she needed or wanted to, was evidence of the mother suggesting that the father was dangerous;

(5) the mother was engaged in conduct that painted the father as "unloving," even though those words were never spoken by the mother because the mother let the children choose who to live with, and advocated for a change in residency that the children desired, was designed to make "the dad look like he was an ogre;"

(6) the mother was inappropriately confiding in the children when she told them, "if you don't like the schedule, call your attorney instead of trying to mitigate the situation;"

(7) the mother withheld medical information from the father relating to several medical episodes involving the daughters; and,

(8) the mother's suggestion that the father should have rules for viewing television at his home, and commenting that he does not correctly do laundry, were evidence that she was ***2** "undermining his authority."

The court, after making these findings, rejected expert testimony that the proof demonstrated a "moderate or medium situation of parental alienation." She held that the proof established a "mild case of alienation" and added "part of that is because dad is engaged in some of the exact same alienating behavior that mom did," adding that it included "badmouthing" and "scheduling one banquet on mom's time for his house."

She added: "You're both guilty of this." She further noted that only the father had applied for a change in residence/custody based on the alienation allegation and she rejected any result that would deny the mother access to her children for any period of time. However, the court held that the proof justified a modification of the parenting time, granting each parent a week on and week off during the school year with a mid-week meal for the non-residential parent as a method of continuing contact between the parent and children during the week they resided with the other parent. Based on these findings, joint custody continued, but the court created zones of interest for each parent: the mother was given final authority in medical, dental, and religious activities, while the father was given final say on education and extracurricular activities. [2]

Sadly, after signing the temporary order setting forth the new schedule, the assigned judge in this case, and the judge who conducted the hearing, died. The parties stipulated to have this court review the transcript and decide the matter based on the hearing proof, the exhibits, and the contents of the Lincoln hearing. [3] This decision is based on that stipulation. This court read the transcript several times, reviewed all the admitted exhibits, the transcript of the Lincoln hearing, and the prior orders and submissions. This court did not utilize any of the work of the prior judge or her law clerk in reaching this determination.

The parental alienation doctrine has become a basis for contentious parents to undercut parenting agreements; agreements that were based, at their inception, on a parental concurrence of the best interests of their children. Any decision in this matter demands a detailed analysis of the concept of parental alienation, a review of the proof of alleged conduct by both parents, an assessment of the maze of expert testimony, and then an evaluation of the parental conduct as it impacts their children's view of their mother and father. It is undisputed that the father, seeking to curtail his ex-wife's access to the children, holds the burden of proof on the concept of parental alienation and whether each item of conduct, alleged to be alienating conduct, is proven by a preponderance of the record.

Before analyzing the facts in this matter, an exploration of the concept of parental alienation is essential. This concept sidled its way into New York's family law largely as a result ***3**

of aggressive parent reaction to changes in their relationships with their children after a divorce.[4] The landscape of post-divorce family relationships is pitted with emotional intra-family land mines. Children, whose lives can be turned topsy-turvy by the separation of their parents, have uncertain and unpredictable reactions to the separation and their view of the causes of such separation. Combine these understandable and easily foreseen changes in the children's relationship with their parents, with the increasing independence and self-determination of children as they grow into teenagers, and it becomes difficult for any parent, professional, or ultimately the court, to determine the relative causes of a teenager's reaction to their parents. For parents, the calculation is a mix of emotions, developmental psychology, personality development, and intellectual growth. For professionals, viewing these myriad changes from the sidelines, and making evaluations based on interviews with family members, it is a daunting task. The court, seeking to align the various factors into some discernable legal judgment, is cast into a labyrinth of competing facts, trying to discern each parent's culpability in the transformation of their children. Then, if justified, it must devise a "best interests" plan for their future.

There is no dispute that there is evidence of a change of circumstances proven at the hearing of this matter. The evidence clearly establishes that at least in the period within 18 months after their divorce, the parents could not reasonably communicate with each other.[5] Eschbach *v. Eschbach*, 56 NY2nd 167 (1982); *Matter of Murphy v Wells*, 103 AD3rd 1092 (4th Dept 2013) (change in circumstances exists where, as here, the parents' relationship becomes so strained and acrimonious that communication between them is impossible). These facts, largely uncontested by either parent, establish a change of circumstances and allow this court, in accord with the children's best interests, the discretion to fashion a new parenting plan (including a ***4** change of custody, a change of primary residence and a change in the visitation plan). The extent of any changes depends in significant measure on unraveling and analyzing the web of proof presented, claiming that the mother has alienated these children against their father.

The Law of Parental Alienation in New York

Against this broad canvass of conflicting emotions among parents and children, this court acknowledges that the New York courts have accepted the notion of parental alienation as a factor in determining whether a change in circumstances exists. The judicial refrain is unmistakable: a concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child, that it, per se, raises a strong probability that the interfering parent is unfit to act as a custodial parent. *Matter of Avdic v Avdic*, 125 AD3rd 1534 (4th Dept 2015) (the court's determination that the mother had engaged in parental alienation behavior raised a strong probability she is unfit to act as a custodial parent).[6] The acknowledgment of this concept requires a more demanding definition than just the "unjustified frustration of the non-custodial parent's access."[7] *Vargas v. Gutierrez*, 155 AD3rd 751, 753 (2nd Dept 2017). Parental alienation as a basis to alter parenting access is a relatively new concept in family law. The term was first coined in 1985 by a researcher who recorded impressions ***5** involving false allegations of child sexual abuse.[8] These initial observations led to development of the still-controversial Parental Alienation Syndrome, a form of psychological, but non-sexual abuse. *Id.*[9] When first articulated in New York, the concept was linked to a parent "programming" a child to make claims of sexual abuse. *Karen B. v. Clyde M.*, 151 Misc2nd 794 (Fam. Ct. Fulton Cty 1991), *affd sub nom Karen PP v. Clyde QQ*, 197 AD2nd 753 (the trial court concluded that a parent was unfit by casting the false aspersion of child sex abuse and involving the child as an instrument to achieve his or her selfish purpose).[10] Less than a decade later, a New York court found alienation without allegations of sexual abuse, but there was overwhelming evidence that one parent had virtually brainwashed the children:

In the instant case, the children do not want to visit with their father. With the passage of time, these children have become "staunch corroborators" of their mother's ill opinion of the father. They call their father names, they make fun of his personal appearance, they treat him as though he were incompetent, and they speak of and treat his mother similarly . . . The mother's view of the father has been completely adopted by the children and she has done nothing to promote their relationship with him.

J.F. v. L.F., 181 Misc2nd 722 (Fam. Ct. Westchester Cty 1999). As the concept worked into New York law, the courts, without evidence of physical abuse or false reports of sexual abuse, ***6** required proof that a party "intentionally" engaged in conduct for the "sole purpose" of alienating the child. *Smith v. Bombard*, 294 AD2nd 673 (3rd Dept 2002). Trial courts held that occasional adverse statements, even made in the presence of children, and the occasional failure

to communicate about scheduling treatment sessions, while deplorable behavior calculated to antagonize the other parent, did not countenance a finding of change of circumstances sufficient to change custody. *F. D. v. P. D.*, 2003 NYLJ LEXIS 2057 (Sup. .Ct. Nassau Cty 2003) (both parties in this matter agree that there has been no interference with visitation). With respect to statements alleging abuse of the child, the court added:

This court finds that [the therapist] testified credibly and truthfully, and that in fact the Mother's statements [regarding alleged abuse by the father] were made while the child was present. While this court does not countenance the Mother's statements and deplores them, the statements on the several occasions testified to, did not result in any alienation of the child.

Id. at 9.The court concluded:

In this matter, although the Mother's statements to [the therapist], in front of the child, are not to be countenanced and are never to occur again, nevertheless the court does not find that the Father has met his burden of proof with respect to change of circumstances. Regardless of the unfortunate statements by the Mother, the visitation with the Father has been unhampered, and in fact, the Father has had additional visitation in excess of that provided by the current so-ordered stipulation. The child further loves his Father very much, despite the Mother's negative comments and apparent attempts to alienate the child on the several occasions the Mother made certain statements to [the therapist] in the presence of the child.

Id. at 11. While the court rejected a finding of parental alienation, the trend to allege alienation based on a pattern of intentional conduct involving statements and derogatory comments took hold in New York. The Family Court in *Whitley v. Leonard*, 5 AD3rd 825 (3rd Dept 2004) found alienation when a parent encouraged a child to negotiate changes in visitation directly with the father, denied the father an opportunity for visitation while she was away on vacation, failed to communicate with the father concerning the child's problems at school, discussed court proceedings with the child, and promised the child that he would be returned to her custody. In addition, courts began to summarize parental alienation as a form of "brainwashing" of the child. *Jennifer H. v. Paul F.*, 6 Misc3rd 1013 (A) (Fam. Ct. Suffolk Cty 2004). Throughout this process, the courts, as a *sine qua non*, have insisted on a finding of an actionable refusal or failure by the children to visit the targeted parent. *Duzant-Forlenza v. Wade*, 2009 NY Misc. LEXIS 6688 (Fam. Ct. Westchester Cty 2009).

One other precedent attracts interest because it was the basis for the court to admit testimony from the experts during the hearing. In *Mastrangelo v. Mastrangelo*, 2017 Conn. Super. LEXIS 226 (Sup. Ct. 2017), a Connecticut court held that even though the children were not seeing their father, the father's conduct in seeking to establish parental alienation was not proven and what emerged was "a picture of two parents constantly in court over issues involving the children." The court in *Mastrangelo* said that pursuing the alienation claim was part of the father's "efforts to take the mother down." In that case, three of the experts who testified here, also testified on behalf of the father in Connecticut. In addition, the "rejection" alleged by the father in *Mastrangelo* was complete in that the children were not seeing their father; a fact in stark contrast to the more-then-equal access that the father has in this instance. The decision in ***7** *Mastrangelo*, while not controlling, is instructive on several fronts. It demonstrates that alienation can be a two-way street. Excessive litigation based on a flimsy theory can be as alienating as any other strategy. The presence of the same three experts here - at a substantial cost by the father -- suggests to the court that the parental alienation theory is a new tool in the "para-psychology-in-the-courtroom complex," as part of a strategy to upend negotiated parenting agreements by the more aggressive and more moneyed spouse. Finally, in *Mastrangelo* concludes that even if there is proof "rejection" (lack of access by a parent), that fact alone does not lead to the conclusion of alienation. [11] In this case, as noted throughout the opinion, there is no evidence of lack of access for this father to his children.

Other New York courts have expressed equal skepticism over the scientific validity of "parental alienation." *Matter of Montoya v Davis*, 156 AD3rd 132, 136 n.5 (3rd Dept 2017) (the appeal was concerned about the forensic evaluator having been deemed an expert in "parental alienation," which is not a diagnosis included in the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders and further noted that, in the criminal context, "parental alienation syndrome" has been rejected as not being generally accepted in the scientific community, *citing People v Fortin*). [12] Another New York court used a descriptive method to reference parental alienation:

Parental alienation has been described as the programming of the child/children by one parent, into a campaign of denigration against the other. The second component is the child's own contributions that dovetail and complement the contributions of the programming parent. It is this combination of both factors that define the term parental alienation.

P.M. v. S.M., 17 Misc3rd 1122 (A) (Sup. Ct. Nassau Cty 2007); *Zafran v. Zafran*, 191 Misc2nd 60 (Sup. Ct. Nassau Cty 2002). *See also Seetaram R. v. Pushpawattie M.*, 2018 NYLJ LEXIS 2069 (Fam. Ct. Queens Cty 2018) (parental alienation is where a custodial parent actively interferes with, or deliberately and unjustifiably frustrates, the non-custodial parent's right of reasonable access).

Amidst the swirl of these increasingly more frequent cases, the concept of parental ***8** alienation remains controversial, both in psychological studies and the courts. In a widely-quoted study, a California law professor in 2001 commented:

PAS as developed and purveyed by Richard Gardner has neither a logical nor a scientific basis. It is rejected by responsible social scientists and lacks solid grounding in psychological theory or research. PA, although more refined in its understanding of child-parent difficulties, entails intrusive, coercive, unsubstantiated remedies of its own. Lawyers, judges, and mental health professionals who deal with child custody issues should think carefully and respond judiciously when claims based on either theory are advanced. Although the use of expert testimony is often useful, decision-makers need to do their homework rather than rely uncritically on experts' views. This is particularly true in fields such as psychology and psychiatry, where even experts have a wide range of differing views and professionals, whether by accident or design, sometimes offer opinions beyond their expertise. Lawyers and judges are trained to ask the hard questions, and that skill should be employed here.

Burch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 Family Law Quarterly 527, p.33 (2001). Another judge intoned in a Maryland family dispute:

I write separately to state my view that I consider the diagnoses of "parental alienation" or "parental alienation syndrome" (which, quite evidently, are the basis for Father's appeal) to be based on novel scientific theories. Prior to admissibility, testimony on these subjects must be subjected to a *Reed/Frye* hearing to prove that such diagnoses are generally accepted in the relevant scientific community, a conclusion about which I have significant doubt. *See* Smith, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. Mass. L. Rev. 64 (2016) (collecting cases denying admissibility of diagnoses of parental alienation syndrome); Burch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 Fam. L.Q. 527, 539 (2001-2002) (quoting Dr. Paul J. Fink, past president of the American Psychiatric Association: "[Parental Alienation Syndrome] as a scientific theory has been excoriated by legitimate researchers across the nation. Judged solely on [its] merits, [Parental Alienation Syndrome] should be a rather pathetic footnote or an example of poor scientific standards."). Unless and until that happens, however, I would caution courts, lawyers, expert witnesses, and litigants not to use the terms "parental alienation" or "parental alienation syndrome" casually, informally, or as if they have a medically or psychologically diagnostic meaning that has not been established.

Gillespie v. Gillespie, 2016 Md. App. LEXIS 1366, p.36 (Ct. Sp. App. Md. 2016) (Freidman, J., concurring). [13] Despite these judicial misgivings expressed by others, there is no doubt that parental alienation exists. [14] As one commentator noted:

Although PAS has generated much controversy in both the mental health and legal fields, there is little doubt that parental alienation exists, and has existed, for years. *See, e.g.*, Fidler & Bala, *Article: Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 Fam. Ct. Rev. 10, n. 12 (2010) (noting that parental alienation "is not a new phenomenon") . . . Young, *Parent Trap, Parental Alienation Cases divide Scholars,* Boise Weekly, January 2007 ("Whether or not a psychological 'syndrome' exists, parental alienation clearly does."). As a news reporter glibly claimed, "Anybody old enough to drink coffee knows that embittered parties to divorce can and do manipulate their children."

Vernado, *Article: Inappropriate Parental Influence: A New App: A New For Tort Law and Upgraded Relief For Alienated Parents,* 61 DePaul L. Rev. 113, n. 6 (2011).

In this somewhat uncertain landscape, this court seeks a more demanding definition of parental alienation to more explicitly describe the concept of what constitutes "unjustified behavior." To achieve this, the court borrows

from a comparable tort-law cousin: the tort of intentional infliction of emotional distress, a concept in which an individual, as a consequence of certain directed behavior, caused harm to the emotional status of a second party. *Howell v. New York Post Co.*, 81 N.Y.2nd 115 (1993). The tort of intentional infliction of emotional distress consists of four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Id*. Simple word substitution -- "parental alienation" for "emotional distress" - creates an equivalence between this tort designed to protect an individual's emotional status and the family law concept to protect and preserve a parent's relationship with their children. [15] If the substitution works, then parental alienation consists of four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe alienation of any parent from a child; (iii) a causal connection between the alienating conduct and the child's rejection of a parent; and (iv) severe parental alienation." The resulting equivalence allows a more refined analysis of what "unjustified . . . frustration of access" means in the parental alienation context.

In reaching this equivalence, the court examines the nature of the conduct that is the first prong of this test. In intentional infliction of emotional harm, the standard of "extreme and outrageous conduct" is "strict," "rigorous" and "difficult to satisfy" unless there is evidence of a prolonged "deliberate and malicious campaign of harassment or intimidation." *Nader v General Motors Corp*., 25 NY2nd 560, 569 (1970).Importantly, New York courts have recognized that alienating conduct by a parent must meet the family law equivalent of "extreme and outrageous" ***9** conduct that supports the tort of intentional infliction of emotional harm. In defining the conduct that constitutes parental alienation, the courts have broadly stated that the underlying conduct must be "so inconsistent with the best interests of the children." [16] *Matter of Sanders v Jaco*, 148 AD3rd 812, 813 (2nd Dept 2017); *Rosenstock v Rosenstock*, 162 AD3rd 702 (2nd Dept 2018) (absconding with the child as "inconsistent conduct"); *Altieri v Altieri*, 156 AD3rd 667 (2nd Dept 2018) (false accusation of sexual abuse as "inconsistent conduct'). In short, the alleged alienating conduct must be more than minor parental mishaps - an isolated vulgarity, a missed communication or unreturned phone call on a child's welfare, a disparaging comment about the other spouse's significant other, a statement about "who loves you more," questioning the ex-spouse's judgment, an occasional complaint about inadequate support or the other parent's reliability. [17] While downplaying these incidents, this court concedes that a chorus of suspect behaviors - perhaps all of the above repeated over a prolonged period of time - might reach the "extreme and outrageous" threshold to justify a finding of alienation. In short, the alleged conduct to support a finding of parental alienation must "so" violate norms of proper parenting, age appropriate conversations with children and/or parenting conduct. This aspect of the analysis -- determining the standards of parenting and when parent conduct sharply violates those valued intra-family standards -- represents a serious challenge to the court, but one that this case demands be resolved.

When analyzed in this light, parental alienation, as a legal concept, requires (1) that the alleged alienating conduct, without any other legitimate justification, be directed by the favored parent, (2) with the intention of damaging the reputation of the other parent in the children's eyes or which disregards a substantial possibility of causing such, (3) which proximately causes a diminished interest of the children in spending time with the non-favored parent and, (4) in fact, results in the children refusing to spend time with the targeted parent either in person, or via other forms of communication. [18]

The Alleged Alienating Conduct by the Mother

Within this framework, the court reviews the conduct by the mother that the father alleges is evidence of alienation, with an understanding that the father must prove that the conduct occurred and that it meets the "extreme and outrageous" test.

(a) The October 2013 Removal of Items from the Marital Residence

In October 2013, during the divorce action, the father contends that the mother removed several items of personal property from the marital residence without his consent. The father testified that he was out of town with the children when the removal occurred, and he and the children returned to an almost empty house. The mother returned, a few days later, this time with a police officer, and took additional items, all while the father was present. The next day the mother appeared again at the house, again with a police officer, and a confrontation ensued. According to the father, he gave the mother a note instructing her not to return again, which she promptly destroyed. Thereafter, the mother visited again and removed additional personal property. All of these incidents

occurred after the signing of the couple's property settlement agreement and before the execution of the judgment of divorce.

There is little dispute that these actions occurred, but the context is extremely pertinent. First, at the time the mother removed items from the house, the couple had agreed on a distribution of personal property in their separation agreement. There is no requirement in that agreement governing *when* the mother could retrieve the property from the marital residence. Second, at the time the mother entered the marital residence to remove items, she still was an owner of the house, and as the agreement specified that she did not need to vacate the house until December 1, 2013 (approximately six weeks after her entries to retrieve personal property). There is nothing in the agreement that barred the mother from entering the house, needing the father's permission to enter the house, or barring her from removing agreed personal property. Third, there is no evidence in this record that the mother took anything from the house other than what they had agreed she could take as her share of personal property. The only exception was a guitar of minimal value, which they eventually resolved. Fourth, the father, despite the obvious opportunity to do so, never sought to amend the agreement to change the access provisions or enforce it before the judgment roll was signed in December 2013.

In this court's view, this episode, while perhaps raising questions over the conduct of the mother, does not equate as alienating conduct. The conflict between the parents was obvious - they had signed the agreement only a few days before. The mother's injudicious calling of the police was unnecessary. Her involvement with the children during the removal was also a misjudgment, even though it appears that the children were present, in part, because they were living in the house at the time. The tension was aggravated by the father's attempt to foreclose the mother from returning to the house, when the agreement gave her that undisputed right to enter and stay there. In short, both parties exacerbated the tension in this confrontation and this court declines to apportion the culpability to either side. Poor obstinate behavior was exhibited by both, but the mother's behavior in returning to the house she owned and retrieving property does not constitute alienating behavior as she was within her rights under the couple's agreement.

(b) The Driveway Exchanges and Order of Protection

Frustrated by the mother's conduct, the father filed for an order of protection, which was ***10** granted in October 2013.[19] The order of protection contained provisions for the mother to stay away from the father and changed the site of mandated pick-ups and drop-offs of the children. The agreement had permitted these at the top of the father's driveway, but the order mandated that exchanges occur away from the top of the driveway, curbside outside his residence. The father feared the mother would violate the terms of the order, so he sent the order to the mother on every email he sent to her during this period of time.[20] The mother violated the order on November 6, 2013 - prior to the grant of the judgment of divorce - when she appeared at the top of the driveway for exchanges. In response to the mother's conduct, the father filed a criminal complaint, which was eventually resolved through an adjournment in contemplation of dismissal. Importantly, the mother acknowledged that she somewhat frequently discussed the order of protection with her daughters, discussed the order with others and told her children that as a result of the order, she had to keep away from them when they were with the father. The mother also claimed that the order prevented her from calling the children on their father's phone and claimed that she had no means to contact the children, a claim rebutted by phone records that show that she had long calls with her children during the period from October 2013 through February 2014.[21] The temporary order of protection was eventually resolved by a one-year order in which the exchange distance was changed back to the top of the driveway and the father agreed to stay 30-feet away from the mother while both attended the children's activities.

Based on the credibility of the father and mother on this aspect of this matter, the court finds that the mother did violate the order of protection by driving to the top of the driveway. Her comments, in the verbal exchange with the father, at the top of the driveway were intemperate, but hardly ”outrageous and extreme.“ She lacks credibility on her claims that somehow the order did not apply when she drove to the top of the driveway. She used poor judgment in discussing the order of protection with her daughters, but it was inevitable that she would discuss the order with her daughters in some context. She would need to explain to them that she could not deliver them to the top of their father's driveway and she had to keep away from him when they jointly attend events. However, the court declines to extrapolate this finding into evidence of parental alienation because the conduct fails to meet the ”per se“ or ” extreme and outrageous conduct“ that the test requires. In addition, there is no evidence that any of the daughter's considered the mother's violation of

this aspect of the order as a factor in ***11** their relationship with the father. There is no evidence in this record that the daughter's complained to the father about the pending order, the mother's violation of the order or, for that matter, that the father complained to the daughters about their mother's violation of the order.

(c) The Medical/Mental Health Care Controversies

In October 2013, before the judgment was signed, the mother took the children to a physician for flu shots. According to the father, the mother argued that she had sole authority to permit administration of the shots, a notion rebutted by the text of the agreement which requires joint decision-making on healthcare issues involving the daughters. The father appeared at the appointment, with his computer in hand, brandishing his joint decision-making agreement. A verbal confrontation ensued. The pediatric group later terminated services to the family. The father asks this court to infer that the confrontation, triggered by the mother's behavior, caused the termination of the physician services. This court declines to draw that speculative inference, as there is no testimony from any personnel at the pediatric office explaining the basis for the termination.

In February 2014, after the divorce was signed, the mother took the couple's oldest daughter to a psychologist because she was, according to the mother, engaging in self-mutilation. This incident is diagnosed in greater detail in another portion of this opinion. Importantly, despite a furor of what the mother said or wrote during this appointment, the psychologist determined that the daughter did not need further treatment and there was no finding of any harm to the child.

In a second episode, shortly thereafter, the mother took all three daughters to a pediatric practice and again the father appeared, and, in his version of the incident, the mother ran from the room. In sum, these doctor visits show a troubled and virulent antagonism between father and mother. The mother failed to notify the father of the appointments, even routine ones. The father appeared at the doctor's office and confrontations ensued. It is difficult for this court to assign culpability in these episodes. The mother initiated the dispute by failing to communicate and the father aggravated the situation when appearing. The mother's failure to communicate has greater credence as the cause of these unnecessary incidents.

The failure to communicate by the mother colors other incidents. The couple's youngest daughter needed medical attention when she fell. The mother did not consult with the father and did not promptly inform the father that the treating physician recommended that the child be monitored for neurological symptoms while the child spent a weekend with her father. The child suffered no further complications. The father asked for further information and the mother refused to accept a certified letter from him on the incident.

The couples' middle daughter also became a focal point for parent controversy involving an ankle injury sustained during volleyball. The father alleges that the mother let the child go to a concert the night of the injury (hardly the first child to choose a concert over minor pain) and then the mother claimed the injury justified the child declining to travel with her father a week later, even though the child actually went on the trip with her father and enjoyed it. The father also claims that he never found out that one daughter had pneumonia until a month after it was manifest, [22] but, the father's comment seems a bit out of the ordinary. The child was present in ***12** the father's home repeatedly during that month-long period and there is no evidence that he discussed the medical condition with his daughter.

The court finds that these health-related decisions by the mother - apparently without consulting the father beforehand - violated the joint custody provisions of their agreement. In particular, these allegations - combined with the mother's notes and comments when her daughter visited a psychologist - requires this court to pause in considering the mother's ability to serve the best interests of the children. The incidents - the trip to pediatric office, the disputed ”bronchial infection“ and the failure to notify the father of the youngest child's fall - are also failures by the mother in her joint custody obligations. However, as noted earlier, these mistaken judgments and unilateral actions must be viewed against the backdrop of complex active lives of these young girls. These violations, taken in total, do not equate to ”extreme or outrageous“ conduct and are not alone sufficient on which to sustain a case for parental alienation.

(d) Miscellaneous Squabbles

The father also alleges that the mother created unneeded conflict when the oldest daughter wanted to retrieve her bike from her father's house and the father did not permit his daughter to do so. The father alleges that the mother brought the child to father's house and allowed the daughter to take

the bike, despite his objection. He alleges that this incident created "unnecessary conflict in the presence of the children," a fact that he attributes to the mother even though his own conduct (declining to allow his teenaged daughter to use her bike) may have contributed to the incident. Regardless, there is no evidence that this incident impacted the daughter's relationship with her father.

(e) The Activities of the Daughters

The major source of conflict in this family stems from these very active children. Each child has abundant activities. The agreement provided that each child was entitled to three activities. The mother admits that she signed up at least one daughter for a fourth activity, but she contends that the father " rejected all" activities. In particular, the mother signed one daughter up for tennis lessons and another for swimming lessons and a field trip, and the father alleges that he never consented to these activities. The parents also quibble over whether these activities impact the children's performance in school and/or their homework. There is no evidence in this long hearing that activities of any sort have adversely impacted these children in their education. The father argues that the activities crimped his time with his daughters, but he can produce no evidence of any particular time that he lost as a consequence of the activities and there is ample undisputed evidence that he attends his daughters' activities and games. Furthermore, and most importantly, there is no evidence that the father's refusing to agree to his daughters' activities caused any change in the relationship between him and his daughters. [23]

In short, while the signing up for activities caused consternation between the parents, there is no evidence that ill-will spilled over to the children or caused ill-feelings between the children and their father. This court credits the father's version of the enrollment of the children in activities. The court finds that the mother did enroll her daughters in at least two activities that the father did not know about or approve. In that respect, the father has proven by the ***13** preponderance of the evidence that the mother violated the joint custody provisions of the agreement.

However, the court finds that the father has failed to prove by the preponderance of the evidence that the activities of the children lessened his parenting time with them or impacted his relationship with them. Because the father shared time with his daughters - he had half of the parenting time each week - he had ample time to interact and nurture them. There is no evidence that the father was routinely foreclosed from any of his selected pursuits as a result of his daughters' activities. On the contrary, the proof amply demonstrates that he encouraged his daughter's activities, attended them, and applauded their success. Based on these conclusions, the father has failed to prove that the children's activities, even if dictated by the mother without input from him, alienated his daughters from him.

(f) Other Conduct by the Mother

In his litany of the mother's alleged alienating conduct, the father also alleges that the mother interferes with his access to the children via cell phone. He contends that the mother gives the youngest daughter advice on what to say to her father during phone calls. He also alleges, and the mother acknowledges, that she examined texts between the children and their father. The father also claims that the alienating conduct includes the mother's comment to the children about the lack of a rule in the father's home regarding his daughter's watching television, that she encouraged the daughters to report details of the father's girlfriend to her and that she laughed when the daughters mocked the girlfriend. [24]

The father also objects because he claims that the mother over-empowered the daughters when she admitted that she believed that her daughters should be able to visit their father whenever they want, which the father claims is evidence that the "decision rests squarely in their hands." The father states that the mother used "poor judgment" when she suggested to them that "going to court " was the only avenue to make changes in the parenting scheme unless their father agreed. The father claims that when the daughters asked their mother whether they "could force dad" to change the schedule, she told them that "we " can "ask the court to reduce it." The father also alleges that the mother was told by her daughters that they did not want to live with their father or, in one daughter's case, go away on vacation with him. [25] The daughters offered the lack of shampoo and conditioner in the shower and the lack of " toilet paper on a roll" at their father's house as justifications to live with their mother rather than their father. These flimsy reasons, the father agues, are evidence that the mother has poisoned the children against spending time with him.

In this court's view, these comments by the daughters are evidence that they would prefer to reside with their mother during school weeks; they are not evidence that the daughters have ***14** "rejected" their father. In fact, by all accounts, they have continued to visit with their father as their parents agreed

to nearly five years ago, and there is no evidence that the daughters ever intended to stop visiting with their father.

(g) The Father's Description of his Relationship with his Daughters

To meet his burden of proof, the father must establish, as a threshold, that prior to the allegedly alienating conduct, the daughters had a positive relationship with him and now they do not; and that the father did not abuse or engage in activities that alienated his daughters. The proof establishes that the daughters had a positive prior relationship with their father prior to the divorce. He described the relationship as ”free of strife, free of difficulties.“ The children have a similar view of their father. They have an assortment of minor complaints about his ”strictness,“ but they do not impact the relationship. The premise that the relationship has changed for the worse has only the father's impressions to support it. He claims that his daughters are ”cooler“ to him than when they were younger, that they are often sullen when they come to his home, and that they do not immediately warm up to him when they arrive for visitation; although they eventually overcome their cooler disposition and then warmly embrace him after time with him. Like many teenagers, they are not always in accord with the father's direction. He claims that the once close relationship between the nanny and the daughters has been altered since she became his girlfriend. Unsurprisingly, in the father's testimony he never suggests that the change might have something to do with his own conduct and the change of the nanny's role (from nanny to his girlfriend). [26]

The mother, in a defensive posture, argues that the father's conduct contributed to family tensions and may be responsible for the daughters' moods in dealing with their father. She cites his calling the police on allegedly six different occasions to serve an order of protection and accuse her of theft (including one time when the children were with her); delivering the order of protection to parents of the children's friends and a church minister; preventing the children from visiting the mother's California relatives when they were with him; confiscating one of the daughter's phones to prevent her from calling her mother; blocking the mother's emails to him; suggesting that the mother may suffer from munchausen by proxy; [27] recording conversations with the children and having his girlfriend record conversations as well. There is evidence in this record to support these allegations, but little evidence to suggest that the father's conduct, while aggressive, boorish, insensitive to his family's desires, and inappropriate, has caused alienation from his children. [28] This post-separation conduct -- without question -- irritated the mother and realistically exacerbated her anger and fueled her behavior against the father. This evidence further obscures the post-divorce family dynamic in this case. The father portrays a clear landscape, with the mother's alienating conduct as the dominant feature. The mother paints a murkier picture of competing parents, engaged in a tug of water, pushing and pulling against ***15** each other with the children trapped in the middle. She contends culpability for the deterioration of the relationship between father and daughters, if it exists, can be apportioned to both parents.

Even crediting all the complaints and allegations, there is no evidence of any drastic change in the relationship between the father and his children, and no evidence of confrontations between the father and his daughters when they reside with him. He argues that he can best provide for the children, reduce conflict, and support the mother-and-daughter relationship. He admits that he could be a better parent and asks this court for additional time with his daughters to allow him that opportunity. However, in considering the conduct of the mother and the father in their interactions with each other, the Court acknowledges the lack of any drastic change in the daughters' inter-personal relationship with their father. [29]

Expert Testimony on The Couple's Conduct in this Case

The previous court permitted four experts to testify on whether the conduct, as described at hearing, in documents, or deposition testimony constituted parental alienation by the mother. In each case, the expert testified on their accepted definition of parental alienation as the ”unjustified rejection of a parent by a child.“ While this definition was accepted and advocated by these experts, this court, as noted above, has articulated a more exacting legal definition of parental alienation. Nonetheless, a review of the expert testimony is justified in determining whether there is proof of parental alienation through a preponderance of the evidence.

One critical fact hovers over all the expert opinions in this case: even under the definition advanced by these experts, the ”rejection“ that is the subject of their analysis *originates in the children* (the child rejects one parent because of the alienating conduct of the favored parent), but in this case, none of the proffered experts ever interviewed or talked to any of the three daughters. [30] The father's experts, weighing facts relayed through sources, other than the daughters themselves, including transcripts and prior pleadings, concluded that

the mother had alienated the children.[31] The lack of evidence from the daughters casts the expert opinions into a ***16** nearly hypothetical context, devoid of any practical significance. While these experts described certain activities by the mother as "alienating strategies," none of the experts ever opined that the strategy actually worked. The absence of this critical conclusion certainly influences the court's analysis of all the expert opinions in this case.[32] In addition, another critical factor belays the conclusion that alienation, through any means exists: the father is, by dint of the judgment of divorce, the residential parent, has equal sharing time, and there is no significant evidence that he has ever been denied or thwarted by the mother from any of his access time pursuant to the agreement and divorce decree.[33]

Despite these seemingly missing links, a review of the expert testimony is required. The first expert was Dr. Amy Baker and she advanced 17 forms of conduct which she described as suggestive of an alienation strategy by the mother.[34] The strategies were:

1. Bad mouthing or saying untrue and inappropriate comments about the father in the presence of the children. These included comments about his mental health status, that he was crazy, and suffered from personality disorders and the like. The most objectionable comments made by the mother were found in a patient intake form when the oldest daughter visited a therapist. The court discusses those allegations in another portion of this opinion. Apart from these allegations, which deserve a detailed analysis, the expert included as a form of bad mouthing that the mother gossiped to her daughters about the father's girlfriend, the daughters' friend and former nanny. This court declines to credit this testimony, as it has an almost sophomoric quality and there is no evidence that this "gossip" about the girlfriend/former nanny caused any rejection of the father.[35]

2. Dr. Baker contended that the mother was limiting contact, by over scheduling activities that allowed the mother to dictate the father's time with the children.Dr. Baker suggested that the mother was solely motivated to limit the children's time with their father. In contrast, the proof shows that the daughters all enjoyed their activities and the parents, prior to their separation, had encouraged numerous activities. The mother may have violated the agreement by scheduling an activity without the father's express consent or approval, but her motivation was the same after the divorce as the parents had employed during the marriage; *i.e.*, to keep their daughters active. Furthermore, there is also no evidence that the father lost any time with his children as a result of their crowded activity schedules. There is no evidence that he even discussed the scheduling with his daughters or suggested to them that they not participate. The court declines to find this conduct (even if the failure to obtain the father's consent to activities violates the parties' agreement), as proof of "extreme and outrageous" behavior that leads to alienation.

3. The expert explained that the mother was interfering with communication by the mother when the father called.[36] The expert claimed that the mother was limiting the father's telephone contact with his daughters. While the mother did oversee calls, and in some cases - accepting the father's version of the facts - told their youngest daughter what to say, recorded calls, and intercepted others on occasion, there is no evidence that the daughters could not freely communicate with their father - by phone or otherwise - when they wished.[37] They had access to phones when they were with their mother. In addition, making this bald statement that the mother interfered with communication between[38] the father and his daughters, ignores the fact that the children spent half their time each week with their father. The father never testified that his daughters complained about a lack of access to him. Even crediting all of his testimony and the expert's comments, the interference by the mother on texts and telephone calls was occasional and does not represent any systemic or prolonged interference with the father's communication with his daughters, whom he had overnight half of each week.

4. The expert described the "metaphorical removal" of the father from the daughter's life which the expert described as removing pictures or mementoes of the family's married life from the mother's residence. The expert conceded there was no evidence of that conduct by the mother in this instance.

5. The expert described the "withholding of love" by the mother of the daughters as part of an alienation strategy, but there is not a shred of evidence of that here.

6. The expert then described, through what can only be described as psychological ***17** circumlocution, that if the mother signed up the daughters for activities and then tells the daughters that their father does not approve the activities, that is evidence that the mother wants the daughters to think that their father does not love or care for them. The father, in his summation, claims that the mother's conduct

in over-scheduling activities was a boundary violation.[39] In considering this suggestion, the court notes that there is no evidence that the mother ever told the children that the father did not support their activities or denied them access to activities. There is ample evidence that the mother and father quarreled over the activities and the father, having negotiated for limitations in the separation agreement, insisted on enforcing the limitation. At one point in his description of enforcing the limitation on activities, the father testified that "they [the children] shouldn't just be going to school and doing activities. I don't think that's life." He added: "they should have free time, down time, free play time . . . time to do homework, talk to their friends, socialize, be with their extended family."[40] While these disagreements infuriated the parents, it had little to no effect on the children. Based on the transcript of the Lincoln hearing, this court is confident that if the father denied one of the older daughter's time to participate in an activity, they would have taken that issue up with her father. There is no evidence that any conversation occurred between the older daughters and their father over the extent of their activities. In view of that conclusion, this court declines to find any evidence of alienation in the mother's signing up the daughters for activities.

Parenthetically, the expert's claim that over-scheduling can be interpreted as an alienating strategy is a demonstration of the need for a more exacting definition of parental alienation. Signing up a child for an activity that the child enjoys and may have previously participated in hardly seems "outrageous or egregious." This court is not naive: a mother may over-schedule a child with activities to slice into the father's time with his children. But, if there is a dual motivation -- please the child and diminish the father's time with the child and a past history in which the parents scheduled numerous activities prior to the divorce that limited both parents ***18** active contact with their children -- how does this court decipher which predominates? The refined definition of parental alienation helps resolve the dilemma. If the underlying conduct is outrageous, then even a beneficial motivation does not preclude the court from considering it as having an "alienating consequence." In this instance, the conduct - aggressive scheduling of the children to consume large amounts of free time -- is not "outrageous" and there is no evidence that it substantially reduced the father's interactions and time with his children. It is undisputed that the two older daughters, carrying complicated scheduling demands, are excellent students and there is no evidence that their activities had any negative collateral consequence to them or their relationship with their father. For that reason, this court declines to consider the scheduling of activities as evidence of alienation, even if the decision to sign them up violated the terms of the couple's agreement.

7. The expert testified that there was evidence that mother portrayed the father as "dangerous" to the children which was further proof that she intended to alienate the children from the father. The expert claims that giving the oldest daughter a cell phone to use when staying with her father is evidence that the mother wanted her daughter to not trust her father and to consider her time with him to be unsafe. The mother does not deny that she told the oldest child to call her from her father's residence if she felt uncomfortable. There is evidence of repeated calls between mother and daughter when the daughter was at her father's residence. There is also evidence that the mother came and picked up the child from the father's residence -- at least once in nearly four years. This court declines to infer that giving a teenaged daughter a cell phone or picking her up once when the daughter asked her to was planting a suspicion in her daughter's mind that her father was a "danger" to her. The child custody agreement allowed the daughter to have a cell phone. There is no evidence that the father repeatedly disciplined the daughters for talking on a cell phone with their mother or that the calls prevented the father from engaging in any interaction or activity with his daughters.

The allegation that the mother sought to portray the father as "dangerous" is buttressed by evidence that the mother, when presenting her oldest daughter to a psychologist and filling out an intake form, accused the father of abuse that harmed the daughter. This allegation is troubling, but needs to be examined closely. First, the mother's concern about self-harm by the daughter was an understandable motivation to seek healthcare. This court will not criticize a mother who takes a teenaged daughter to seek attention if there is any evidence or even suspicion of self-harm. Even though the seeking of treatment was justified, the fact that the mother never notified the father of either the suspected self-harm or the appointment with the psychologist is troubling. It suggests that the mother was clandestinely attempting to build a case of abuse against the father.[41]

Second, the allegations of abuse are contained in the "Patient and Family Information Form" completed by the mother in February 2014, three months after the divorce was final. Initially, the form asked for reasons why the parent was seeking help for the child. The mother wrote: "She is burning and scratching herself. When she is with her father."

Strangely, the mother put a period after the word ”herself,“ suggesting that the words connecting the alleged harm to time ”with her father“ was a strategic add-on, intending to point the psychologist to the father as the cause. The mother also admitted, under cross-examination, that the alleged ”burning“ described on the form occurred while the couple were still living together. This intentional and fabricated smearing of the father as the cause, at the outset of the responses by the mother, strongly suggests a motivation to have the treating professional link any adverse findings to the father. [42]

The form asked the mother whether the child had ”experienced a violent or otherwise traumatic event“ and the mother checked the box ”no.“ In the very next section of the form, in response to the inquiry of whether the daughter had been a victim of abuse, the mother circled the words ”verbal“ and ” emotional“ and apparently wrote the words ”by father“ next to it. The next inquiry asked whether the child had ”witnessed domestic violence“ and the mother checked the response ”yes“ and added ”by father -- witnessed as a child two years old -- father strangled pregnant mother.“

This court is cognizant that a false allegation of abuse - sexual or emotional - can be a telltale sign of alienation. However, several facts undercut that conclusion in this case. First, based on the testimony credited by the court, there is no evidence that the mother made that allegation in the presence of the child or that the child read the intake form. [43] There is no evidence that either the mother or the treating psychologist reviewed the form and its contents with the daughter during the appointment. Second, there is no evidence that the daughter ever heard the mother make this allegation to her or her sisters and no evidence that the treating psychologist repeated the comment to the daughter or ever asked the child whether she had observed her father abusing her mother. Third, there is no evidence that the mother ever discussed the alleged ”abusive incident“ with her daughter in another context. Fourth, the father testified that he had no evidence that the mother ever made that allegation to anyone else. Fifth, there is no evidence in this record that the underlying emotionally-charged incident -- the father strangling his pregnant mother -- ever occurred. Finally, there is no evidence that the mother ever suggested to her daughters that their father was dangerous or someone to be feared.

The intake form is also the site of further comments by the mother that raise issues regarding her temperament and intentions regarding the relationship between the father and his children. When asked whether there was anything that might be ”important“ to the treating psychologist, the mother wrote: ”Father is an extremely belligerent and controlling person . . . extremely angry and bitter about the divorce . . believed to have OCD (obsessive compulsive disorder), narcissistic personality disorder and asbergers (sic) . . . “ [44] The first two comments are the obvious opinions of a frustrated and angered former spouse. While the comments seem wholly unnecessary in this context, this court does not view them as portraying the father as ”dangerous. “ They are intemperate and ill-advised, but cannot be construed as suggesting the father is dangerous. In addition, there is no evidence that the mother made these comments to her daughters and even if the court were to draw a conclusion that these remarks were repeated to the daughters in other contexts, there is no evidence that the daughters agreed with their mother's assessment. [45]

The more troubling comments, which the father argues are a window to the mother's true motivation in all these contexts, relate to the allegations regarding the father's mental status. These comments were clearly designed by the mother as an attempt to influence the treating psychologist and lead her to the conclusion that the father was responsible for the daughter's condition upon consultation. There is no evidence in this record that the father had ever been diagnosed with any of the alleged conditions. In a damaging admission, the mother admitted in cross-examination that she had no evidence that the father had ever been diagnosed with any of the disorders. Even the form of her admission casts doubt on her motivation. When asked whether it was ” responsible “ to list these unfounded diagnoses, the mother seemed to parse out the question and eventually answered ”I don't believe they are patently false. “ She focused on the words ”believed to have“ which precede the listed disorders and argued that she had been ”told by others“ that the father suffered from these personality disorders. The court rejects her explanation. She hedged her comments and blamed the origin of the ”disorder“ comment on someone else. This evasion fails here; the mother knew or certainly should have known that the psychologist would focus on the disorders and not the words ” believed to have. “The mother, a skilled lawyer, knew that these seemingly-authoritative but unfounded and untruthful comments about the father's mental status were red flags to the psychologist. The comments are striking evidence of her animosity and disregard for the father's relationship with his daughter.

These comments, in writing by the mother, tempt the court to conclude that the mother engaged in a widespread and lengthy

campaign of unfounded and intensely personal commentary to the daughters about their father's personality and character, with the ultimate goal of estranging or alienating them from him. The father's suspicion that such a campaign existed ***19** is understandable. But, while tempting to accept the father's suspicions, the court's fealty to the credible proof at hearing and the requirement for a preponderance of the evidence to establish the necessary facts dictates otherwise. In the absence of any evidence that these comments were communicated to the daughters or for that matter were repeated to anyone else, it is impossible for this court to conclude that the mother's commentary on the treating psychologist's intake form made the children consider their father as ”dangerous.“ [46] This conclusion does not excuse the mother's incendiary, irresponsible, and potentially destructive lies, her complete lack of judgment and her equivocations on the witness stand, but this court concludes that there is insufficient proof to justify the conclusion that the mother's comments on the intake form, standing alone and never repeated, made the father seem dangerous in the eyes of his children. [47]

8. The expert also testified that conveying the notion that a child's time with a parent is ”discretionary“ is also evidence of alienation. The mother does not deny that she told the children that they could see their father ” whenever they wanted.“ But, from her perspective, the comment was not designed to restrict the children's choice; it was intended to make it clear that if they wished to visit with their father, the mother would accord with their wishes.The undisputed proof in this case is that the daughters almost always - with a few minor exceptions - went with their father as the agreement and subsequent orders instructed. There is no evidence that the mother in this case ever told her daughters that they did not need to or should not participate in visitation with their father. There is no evidence that the mother ”permitted' the children to decide. In fact, the children followed their parents' wishes, as set forth in the separation agreement, almost exactly.

9. The expert testified that alienation occurs when the mother incites the children to reject the father. In describing the norms of parental alienation, the expert states that the father, faced with rejection by a child, gets angry with the children, a reaction that worsens their alienation from him. In this case, there is a paucity of evidence of conflict between the father and his daughters. This court can find no evidence of disciplining the children by the father, except his occasional demand that the daughters go to sleep on time. There is no evidence of any other significant conflict with the daughters when they are with their father.

10. Dr. Baker testified that the mother keeping secrets with her daughters would be evidence of alienation, except there is no evidence of any such secrets here.

11. Dr. Baker also suggested that the mother's use of the daughters to spy on the father was evidence of an alienation against him. In that regard, the father alleges that the mother got “ongoing reporting” from the daughters about the father's relationship with his girlfriend. The proof establishes that the daughters did talk to their mother about the father and his girlfriend. But, it is inconceivable to this court that three young girls, who spend substantial time with their father and knew that their father's girlfriend was their former nanny, would not talk to their mother about this relationship. It would negate any common sense understanding of young nearly-teenage children that they would spend substantial time with their father and his girlfriend and not discuss it with their mother. [48] But, in this case, while there is an acknowledgment that such conversations occurred, there is no evidence that they were routinely initiated by the mother or so pervasive as to influence the daughters. The father, in his summation, suggests that the mother should have instructed her daughters that gossip on this issue was “inappropriate” and a “modeling of bad behavior.” This stance ignores the interaction of a mother - former wife - and curious children who are exposed to their father's amorous relationship with their former nanny. The question of whose conduct regarding the girlfriend is “inappropriate” is left to the children, but this court declines to draw an inference that the mother's occasional discussion with their maturing daughters about their father's post-separation personal life is a form of alienation.

12. Dr. Baker testified that the mother's confiding facts of the court process or other facts ***20** of the mother and father's personal or financial relationship with the children was evidence of alienation. The proof establishes that the mother discussed the order of protection with her daughters, apparently because it impacted where the mother could sit in relation to the father at sporting and other events. The mother also told the children that they could contact their attorney to change the visitation schedule and used the word “we” to describe the legal effort to change the schedule. The mother also used the word “defendant” to describe the father. The evidence does suggest that the mother had a loose tongue and talked frequently with her children about the couple's legal issues, a fact that seems inescapable given

that the mother is an attorney. There is evidence that the older daughters occasionally voiced objection to visiting or spending time with their father in the mother's presence. But there is also evidence that the father complained to his daughters about the payment of child support, and the mother's use of "his money," and on several occasions called the police to intervene in family squabbles. Both parents injected legal issues into discussions with their daughters.

From the children's perspective, the legal fight between their parents occupied a large part of the family's interaction. There were repeated calls to the police, proceedings in court, and repeated conferences between the children and their attorney. Combine these facts with their mother's career as an attorney and this court can easily understand that the mother made legal-tinged comments to the children. Furthermore, the children asked a raft of legal questions that needed answers and, at times, made unsolicited comments to their mother about spending time with their father. The fact that the mother responded does not constitute alienating conduct. An attorney mother, confronted by curious children about legal topics and their implications in their lives, faces Hobson's Choice. Saying nothing suggests indifference to the daughters' inquiry, while responding decisively - and honestly, but in emotional manner as might befit a former spouse - sounds rude and alienating, and responding with bromides such as "your father needs you and needs your love and affection," as one expert suggested, is unrealistic and, pollyanna-ish. However, even if this court credits the testimony that the mother heard the children make comments about their father and their desire to spend less time with them, there is simply insufficient evidence of a regular and consistent course of these comments to draw the conclusion that the mother was encouraging the daughters' discontent with their father.

Other conduct by the mother - including copying the older daughter on certain emails between the parents and both parents recording phone calls with the children - was foolish and immature. But there is no evidence that the sum of all of these actions by the mother created "contempt, fear or disgust at the targeted parent" as the experts suggested.

13. There is no evidence that the children called their father any name other than "dad." The mother used the phrase "defendant" to describe the father, but there is no evidence the daughters repeated it.

14. The mother did not replace the father in the children's lives.

15. The children's names were never changed. [49]

16. A major factor, highlighted by Dr. Baker, involves the mother's withholding information from the father. As noted earlier, the mother failed to tell the father about several ***21** doctor appointments, when the youngest daughter fell, the middle daughter hurt her ankle and had a "bronchial infection" or "pneumonia" (depending on who you believe), and about the oldest daughter's "self-harm." These facts are established and violate the couple's joint custody agreement. There is no dispute that the mother's conduct in this sphere kept the father "in the dark" and, her conduct subjected the children to possibly more difficult medical conditions. But this court declines to make the quantum leap to the conclusion that this conduct made it appear to the daughters that their father was "uncaring or incompetent." There is no evidence that any one of the daughters complained about their health when visiting their father and no evidence of any adverse consequences of the mother's neglect in notifying the father. There is no evidence that the daughters were even aware of their mother's neglect in that regard - their father never discussed it with them and he never complained to them about their mother's conduct. The daughters, in their discussion with the court, never gave any hint that they considered their father "uncaring or incompetent."

17. As a final ingredient in parental alienation, the expert stated that the mother suggesting that the father's television viewing rules mimic her own "undermines his authority." The proof establishes that the mother did inform her daughters and the father that they should not be watching television at certain times. The mother also sent electronic messages regarding the daughters' personal hygiene. If this conduct is evidence of alienation, and evidence that the father's authority has been undermined, it will be news to his daughters, who acknowledge that their father had his own rules in his house and, like a many a teenager before them, they have, at times, reluctantly and with objection, followed them. Even so, the father cannot point to any rule or requirement of his household that his daughter have failed to follow. There is no evidence that he has lost his authority or been diminished in his daughters' eyes. [50]

When all is said and done, a scorecard for these touchstones of alleged "parental alienation" reveals a mishmash of contested facts. There is no overwhelming evidence of any of the 17

alleged signs of alienation that the experts presented. While there is evidence of unacceptable conduct by the mother, the only unequivocal conduct involves a few violations of the agreement and orders, withholding medical information, and discussing the girlfriend and the court proceedings. On the other 13 allegations, there is either no evidence of the conduct or there is no correlation between the conduct and the daughters' views about their father. [51]

Importantly, the father's view of his alienation from his daughters does not comport with ***22** the model of "rejection" advanced by Dr. Baker.He described how he has experienced "alienation" from his children:

There has been a change in their behavior that I've observed. I've seen them hugging me less, kissing me less, talking to me less, opening up to me less, spending time less time with me, and this has gradually increased since the time of the divorce and has accelerated dramatically in the past six months, and I'm referring primarily to Chiara and Gemma, and it's not every day and even on an individual day. It's not all day. There's a period of time when they come to me after an exchange where it seems like they're frozen or icy. They don't show affection to me. I do not see affection shown to me. There's a thawing-out period, and after this period, things are different. They're more affectionate. They hug me, they come up to me, they kiss me, they do things with me. They don't just hide in their rooms, and then when it comes time for - comes time an exchange again, there's a recertification. Something changes in them. All of a sudden, it goes back to the way it was before the exchange.

When they're in the presence of [the mother], they don't come to me. I've witness them locking eyes with me. They turn away. They won't come to me. They won't kiss me. They do not say hello, good-bye, anything like that when [the mother] is present. Those are some of my observations.

The father in this case sees "rejection" in the emotional reaction of the children to him and acknowledges that the children, based on the time they spend with him, eventually show no signs of rejection. He admitted that time with his children is not the crux of his complaint. "That's not the problem," he testified. Instead, he complains that his older daughter is "rude" when he tells her to put her phone away until she is done with her homework. His middle daughter is "disrespectful" when she is told to do chores. In this court's view, there is no equivalence between teenagers being "rude" or "disrespectful" to a parent - an irritating, but maturing ritual for teenagers - and "alienation" of a child from that parent. The father also seems acutely overly sensitive and jealous that when his daughters are with their parents in public, the children tend to favor and gravitate to their mother. In this court's view, these behaviors by the daughters are not evidence of rejection of their father. Maturing teenaged daughters can easily have a greater affinity for their mother without rejecting their father. Less-tender behaviors of hugging and kissing, cited by the father as evidence of alienation, can be just as credibly equated with normal growth and development of teenage daughters. In addition, there is no evidence in this record that the mother ever violated the visitation agreement and no evidence -- with the minor exception of the sprained ankle incident - that she ever advised her daughters not to visit their father.

The other experts offered by the father reiterated many of the observations of Dr. Baker, but not surprisingly, most of their observations related to the dangers of alienation in the future. A licensed social worker, Linda Gottlieb, described her conclusions as "counterintuitive," which she described as "no matter how convinced you are that your correct using your intuition, it's going to get it wrong." [52] Based on this counterintuitive process, she detailed what to this court ***23** can only be described as a "half-empty-glass-view-from-35,000-feet-up" form of analysis. [53] She introduced her testimony by describing a book she wrote about classic symptoms of alienation that "were so classic that I began to know what the children were gonna say before they said it." She testified that she had reviewed medical records and pleadings and deposition testimony that "described the children very thoroughly." She testified she made credibility findings regarding the observations and testimony of the parents and assessed the parents' behaviors to determine "normal parenting." She testified that a strong bond between parent and child may not be healthy, but can be an "indication of psychological enmeshment." A child with good grades can still be ensnared in the web of an alienating parent she theorized and added that alienated children are poor reporters of "their true desires." [54] When asked about the seemingly well-adjusted and academically proficient children in this case "does that mean they are doing well psychologically?" Ms. Gottlieb answered unequivocally, "No. Absolutely not." She then went into a psychological dissertation over maladjusted children without any reference to the daughters in this case. Her hyperbole in response to this question alone casts doubt about her entire testimony. She described the mother's actions, in some contexts, as "bizarre," and that her "brainwashing actions" meant the children were

"moderate or severe" alienated. Ms. Gottlieb described the mother's conduct as "brainwashing by the severely alienating parent." Despite these conclusions, she admitted under cross-examination that the daughters communicate with their father, spend time with him, go out to dinner with him, were planning on going to dinner with him to celebrate his birthday on the day Ms. Gottlieb testified, go on vacation with him, and do not refuse to talk with him. In response to these questions, the expert said the children "somewhat" have contact with their father even though the proof shows that they spent more than half their time with the father. Ms. Gottlieb's characterization that the children's undisputed consistent access to their father was nonetheless evidence of being "somewhat alienated" strongly suggests that this expert had no actual proof that the children are alienated from their father. [55]

For this court, the expert's comment, at times, reached almost the apex of foolishness: she testified that a mother who tells her children that she misses them when they are gone is guilty of alienating conduct and manipulation. If so, every mother in the world needs reprogramming. [56] She adds:

So, now, we need to think of parenting as proactive; not reactive. It's - Parenting is - Quality parenting is what you don't do and what you do do. So what non-alienating parent would run out and file a petition for sole custody because the children dictated it, teenagers dictating 'Let's force Dad to give up his parenting time' A non-alienating parent is going to say to the children, 'Number one, you are not in power to make such a decision. This is a parental decision. I don't know how you got the idea that you can decide to dictate the family relationships, but whatever is happening with your father happens to be a surprise to me 'cause it came of a sudden. If you have legitimate issues with your dad, I'm calling him up, and we will talk about it and we will get it resolved. You need two loving parents in your life and there is nothing that your father has done to warrant you not to want to have your ongoing equal relationship with him.' That's what a normative parent would do, a parent who truly respects the relationship that the - and the important of having the other parent meaningfully in their lives. But, what did [the mother] do? She tells the children 'Well, legally, you could ask the court to do something.' Who tells a thirteen - and fifteen- year - old to go to the court and file a petition? I mean, this, to me, is kind of bizarre. But, in any case, then she instructs the children to call her attorney. Then the children, presumably, go information, they asked 'How old do you have to be before I can make my own decision'? She tells them 'Thirteen or fourteen.' I'm not sure where she got that from, but the answer is 'You don't make this decision.' You don't give the child the authority to make a decision about ***24** family relationships. So she was doing everything in her power to sabotage and minimize the relationship between the children and their father.

The expert went a step further, when asked to react to how a mother should talk to the daughters about their interaction with the father's girlfriend:

A non-alienating parent would say 'Listen, this is ridiculous. This is - Your father has a right to move on. She's always had a loving relationship with you girls. I don't accept this. Now, cut this out. This is nonsense. You will go there, and you will show her respect, and you will continue to get along with her, and just as she treated you before, you're gonna respond that way.'

When the daughters told the mother that their father broached with them the subject of the father and his new girlfriend - the former nanny - might have a child, the expert said that a non-alienating mother would respond as follows to the inquiring child:

. . . the child said, according to [the mother's deposition] testimony, that she said 'How could Daddy have another baby? He doesn't know how to take care of us. Why should he have another baby? And if they have another baby, I'm never gonna live with him again.' Now, again, a non-alienating mother will say 'That's ridiculous. We don't do that in this family. We're - You know, that is not a reason not to have a relationship with your father.' That's if he truly supported that relationship and recognized how important [the nanny] was to the children for three years.

She added the mother should also say to her daughters, in that situation: "You will respect that parent, and you will get along, and all I care about is that the parent treats you nicely." This suggestion that this expert's rendition of what a parent should say in these instances would be "normative" and that the inference that anything less hospitable is evidence of alienation further undercuts the entire testimony of this witness. [57] In this Court's 10-year experience on the bench, a normative parent - having struggled through a difficult and expensive divorce, with the knowledge that the former spouse was living with the couple's former nanny, and facing curious intelligent, perceptive teenage children - would never react with the halo-inspired comments articulated by this expert as "normative." The comments described above, if made by a

spurned spouse to her nearly-teenaged daughter, are worthy of mythical ex-spousal sainthood, not evidence of normal parenthood. These suggested comments by this expert - alone - strongly suggest that this expert, perhaps well-versed in the clinical textbooks of "normative parenting," has no idea what occurs in the real world of post-divorce parenting in high-conflict cases. To suggest that any deviation from the expert's instructions - instructing mythical children on how they should behave and what they should do - constitutes alienation shows a detachment from reality that leads this court to conclude that these comments - and much of this expert's analysis - ***25** while perhaps advancing an ideal to which parents should aspire, is unworthy of credit. [58]

This conclusion is further bolstered because this expert (and all the other experts who testified) is missing a critical link: she never interviewed the daughters and her entire description of the horrors of parental alienation is speculative as a result. [59] This court refuses to accept this therapist interpretation of the evidence - that decision rests with this court and no one else. This court alone must review the hearing evidence and determine - not through intuition or counterintuitive thinking - whether alienation has occurred and impacts the daughters' lives. [60]

A third expert, Robert Evans, was qualified. This witness, when asked about alienation, first focused on the fact that the children's friends visited them at their mother's house, but he suggested their friends were not permitted to go to their father's. He conceded almost immediately that there was no evidence the friends were not permitted to go the father's house. He found evidence of "character assassination" in the fact the mother had friends in the courtroom at the start of the trial this matter but there was no evidence that the daughters knew about this fact and equating a divorced mother bringing friends to a court hearing as a form of "character assassination" is an unwarranted exaggeration, at the least. He found that the mother's comments, made on the daughter's intake form described at length earlier, were "bizarre" behavior and "spread to others." Later, he testified that the mother was "on multiple occasions . . . telling everyone" about the father's mental health, an obvious exaggeration because there is no evidence in this record that the mother told anyone - other than the therapist - about the father's mental health, and there is no evidence that it was communicated to the children. He interpreted the mother's failure to inform the father about flu shots as being interpreted - presumably by the children - as the father "not caring about them" even though there is no evidence the children knew about the mother's failure to inform the father or that they held that belief regarding their father. He also acknowledged that children in difficult divorces can experience transition problems as they move between the homes of divorced parents without any evidence of alienation. (He said, "in many cases, yes.") At another point, he suggested that if this court listens to the opinions of the children on their preference on spending time with a ***26** parent, "the court is inadvertently empowering the children, just like the mother's been empowering the children." This suggestion, that the court might have a role in causing alienation of a parent if it concluded that changing the residency schedule as the daughters had requested was in their best interests, is far-fetched and directly contrary to New York law. Much of this expert's testimony had a hypothetical quality to it; he seemed to take broad brush concepts and try to adapt them to this case.He repeatedly makes reference to what the children believe, comments that the children "ultimately will have no respect for their father." When asked whether the children's reaction to their father might have anything to do with the father's behavior toward them, the expert acknowledged "it's certainly possible," but he admitted that he had never reviewed any evidence of the father's behavior toward the daughters. As to whether the daughters could express a preference in the absence of any alienation by this mother in this case, the expert testified, "In most cases I would say that's a possibility. I don't know if that's accurate in this case." In short, he admitted that these children could have a preference for their mother over their father - even though they spend more time with their father - and he was unsure whether that justiciable preference existed in this matter. Finally, he admitted that anxiety, anger, sadness, oppositional behavior, and loyalty conflict - many of the children's behaviors as described by their parents in this case - occur in high conflict divorces. [61]

Dr. Evans ultimately concluded that the mother was imposing a "moderate level" of alienation. Importantly, this expert, as those who testified before him, acknowledged that he did not interview the children. He testified that reviewing and assessing documentation enabled him to offer "a forensic opinion with a reasonable degree of clinical certainty for parental alienation." Nonetheless, this expert sought to undercut this court's consideration of any testimony from the children. He testified that "no one can determine if a child is not telling the truth or expressing a genuine opinion." In short, never having met or interviewed the children in this case, this expert suggested this court should not credit their testimony. This slim rationalization for his failure to

interview the children and consider whether their mother's alienating strategies have succeeded before reaching his conclusions is rejected by this court. The court also rejects this expert's suggestion that because child reporting of abuse has a low reliability, an expert can use information - other than interviewing the children - to determine that alienation has occurred. This court can read the transcript of an interview with the children and, using its own judgment, determine whether the alienation factors described by Dr. Evans are present in any of the three children.

The mother, in her defense, produced a rebuttal expert, Dr. Peter Favaro,[62] who ***27** questioned the scientific reliability of the father's experts, suggesting that the failure to conduct an evaluation of the entire family - including interviews with the mother and the children - was open to "confirmation bias"[63] and of "limited utility." He cited the American Psychological Association ("APA") guidelines that an evaluator "should not testify about someone you have not met." He was sharply critical of the analysis performed by the father's experts. He suggested that Dr. Baker's analysis was "pre-scientific" without interviewing either the mother or the children. He said that the opinions of Ms. Gottlieb and Dr. Evans suffered from the same deficiency - they failed to interview either the mother or the daughters in this case.[64] He added:

Because without having access to both parties and without having the ability to perform multiple methods of analysis on data, it becomes very, very difficult to fact check what one person says about the other. The testimony becomes very, very open to something called confirmation bias. The testimony is speculative at that point and would be nonscientific.

When asked whether he was biased in favor of the mother, he replied, "I'm biased with respect to finding methodological flaws and issues that the previous experts have testified to." During an extensive cross-examination, the mother's expert, when asked whether certain circumstances could result in alienation of a child repeatedly said, "it depends" and then he recited a series of factors that any therapist would need to evaluate and review before reaching that conclusion. For example, when asked whether alienation could occur even though a child still visited with the non-favored parent, Dr. Favaro replied: "I suppose it's a possibility, but I would have to have a lot of facts in front of me." Much of the cross-examination was consumed in asking hypothetical questions of whether certain behaviors could cause alienation. Dr. Favaro's answers were peppered with confirmations that certain behaviors could cause alienation, but he added that he would need additional facts before he could confirm the onset of alienation. He also responded during cross-examination to a question seeking to differentiate the attitude of teenagers toward parents in any circumstance:

Q: What about if that child continued to have contact with the parent, but was defiant, uncooperative, disruptive, would you consider that to be a healthy and bonded relationship between the parent and child?

A: It could very well be a healthy and bonded relationship if you're talking about, say, a teenager who is asserting themselves. I mean, there are plenty of intact families where kids who are transitioning from preteen to teens fulfill all those criteria. They are disrespectful, they have a smart mouth, you know, they are defiant. So the fact that a ***28** child may be disrespectful or defiant to a parent, you can't draw a straight line between that and parental interference because it occurs under so many other circumstances.

This court substantially credits Dr. Favaro's insights regarding the methodology of the father's experts. He concluded that the father's experts -- without a chance to interview the daughters or the mother -- could only advance speculative conclusions regarding whether alienation existed in this case. The father's experts, in essence, argue that based on the acknowledged conduct by the mother, and the daughters changed interactions with their father, alienation must exist. Dr. Favaro, in challenging the father's experts lack of a face-to-face discussion with the children or their mother, suggested that those experts can only presume that it exists. In this court's view, the father's experts' testimony, missing this critical link, fails to prove by the preponderance of the credible evidence that alienation exists or that it has damaged, in any reasonable way, the relationship between father and his children. In addition, Dr. Favaro, in his answer to cross-examination questions, painted the complex picture of teenaged and pre-teenaged children reacting to their parents. These would-be adults are often hostile or inappropriate with parents, but such behaviors have nothing to do with alienation.

4. The Lincoln Hearing

At the conclusion of the hearing, the trial court held a Lincoln hearing and met individually with all three children. The daughters were, at that time, ages, 15, 13 and 7. (As previously

noted, this court did not interview the daughters -- the prior Supreme Court judge who heard the case conducted the interviews.) From this court's point of view, the goal of a Lincoln hearing, whether confirming a child's preference, or corroborating the accounts of the various disputed incidents, remains elusive. This court cannot violate the confidences of these three mature and intelligent young ladies. In addition, by referring to the various incidents, this court is mindful not to draw these girls into the vortex of the brass-knuckles contest between their parents. The children are smart, dedicated, and industrious and this court fails to comprehend why it must make disclosures, even in as oblique a fashion as possible, of their observations of their parents conduct and their attitude toward them, based on a nearly half-century old judicial opinion decided without an iota of psychological or therapeutic proof. [65]

The children agree that they spent most of their early years with their mother. While reluctant to offer any account of the discussion, the hearing affirms that the advocacy from the attorney for these children equates with their preferences. Simply put, the children, in a majority sentiment, would prefer to minimize disruptions and stay with their mother for a full week during the school year. They believe that attending school from one location during the week would be less disruptive and reduce complications in their busy lives. They all downplay or have only faint recollection of the alleged "alienating" incidents discussed at length in the trial: the furniture removal ("it wasn't as rough as it sounds"), the order of protection ("I think my dad ***29** told me -- or both of them said something about it"), calling the police, the driveway incident ("that was a long time ago"), and the episodes in the doctor's offices (faint recollection of the father being present, but with no recollection of any of the alleged particulars - which are the casus belli for much of this application.) They each have a critique of their parent's parenting styles - flexibility in scheduling, handling homework, occasional "strictness," occasional comments about money, or stubbornness of the other parent - and this court finds that they are sincere and credible in those accounts of their parents. They offered only mild complaints about living with their father ("sometimes it is harder to focus when nobody is in the house"), but while they would prefer to stay at their mother's during the week in school, they each "really like" their dad and have "a good relationship" with him, watching movies and even asking for flexibility to stay with him more than their allotted time. They describe both parents as "stubborn" and "controlling." They have some complaints that both parents say "negative" things about the other. They sense that their mother has greater flexibility in varying the visitation schedule (it would be easier for the mother to give extra time with their father than vice versa). They exchange nightly telephone calls to each parent. In many ways, the daughters' observations are age-appropriate insights about parents with widely divergent personalities and child-rearing skills, but at their heart, they love both parents and enjoy being with them. One described her life "as pretty perfect." [66]

There is not an iota of evidence that anyone of three daughters are alienated from their father. [67] None of the three children expressed any adverse reactions to the incidents that the ***30** father alleges are evidence of alienation: the driveway incident, the pediatrician office escapade, the repeated court proceedings, the police involvement, the over-scheduling, the bad-mouthing, the limiting of contact, or any of the other supposed "alienation criteria" outlined in the expert testimony in this case. The children have some complaints against isolated parts of their parents' personalities involving flexibility and strictness, ability to confide in them on all subjects, and there is ample proof in the record to support these conclusions regarding the parent's behavior and child-rearing in this matter. The clear and indisputable picture that emerges from the Lincoln hearing is that all three children want to spend time with their father and mother and enjoy spending time with each of them. [68] From this court's perspective, an amazing occurrence - undiagnosed by all the experts - overwhelms all the other evidence in this case: despite the war-like, win-at-all-cost animosity between these parents, and their intent on convincing the court of their righteousness in child rearing, they have (together during their marriage and as separated parents after it) raised three remarkable daughters who love them.

Based on the court's review of all of these facts, this court concludes that the father has failed to prove by a preponderance of the evidence that the mother has engaged in alienation of their children against him. The mother's conduct, while in some instances, violating their agreement or the order of protection or otherwise intemperate or boorish, is not "outrageous and egregious" or "so inconsistent" to justify a finding required by the court's accepted test. The mother's intention, in many of the alleged alienating strategies, has an underlying legitimacy, such as the scheduling of activities for highly-active and industrious daughters or providing a cell phone to keep in touch with the older daughters. There is no evidence that the mother solely intended that these activities alienate the daughters from their father. There is also no causal connection between the mother's conduct and the daughter's

rejection of their father. For example, if the comments on the intake form - the mothers' suggestion regarding the father's mental health status or his "harm to the child" - were intended to make the father "dangerous" in his older daughter's eyes, it would seem that the daughter would contemporaneously react and seek to be immediately sheltered from interactions with her father. Similarly, if the mother was continuously badmouthing the father over the period from the divorce to the hearing - nearly three years - there would be some evidence of the daughters increasingly and more persistently declining to see their father. There is no proof that either occurred and thus no evidence to support any causal connection between the mother's conduct and the children's changed relationship with their father. Finally, there is no proof of rejection. The father has noticed that his relationship with his daughters is different from when he was married to their mother. The mere difference in evolving relationships in this case does not equate with alienation. The father's complaints about his daughters' adjustments when visiting him are insignificant when weighed against his daughters' professed love and fondness for him. The mother's conduct -- ***31** violating the agreement and the order of protection, comments made to the daughters, her conduct at the psychologist's office -- could have resulted in alienation and, in other cases, similar conduct could lead to a child's rejection of a parent. But, in this case, even if the mother intended to alienate these children from their father, she failed. This court has no doubt that parental alienation - destroying a parent in the eyes of a child - exists and should not be tolerated. But it does not exist for these children.

Before concluding, a final aspect of this claim requires comment. The father's experts stated that the mother's conduct resulted in a form of "moderate alienation," which they seemed to suggest was a lesser included offense of "severe alienation." Under the latter, a child completely refuses to visit with the father, but under the former, the child just has a chilly reaction to contact with the targeted parent and a changed, less-loving relationship. "Moderate alienation," according to father's experts, was predicted to be the tip of an iceberg, leading to more pronounced rejection by the child in the future if the alienating conduct continues. This court declines to apply a "moderate alienation" standard in this case. There is no support for a finding of "moderate alienation" or "partial rejection" of a parent in New York cases. In addition, this court cannot fine tune the concept to apply it with any accuracy. If the child visits with a parent, but has a cool or sullen attitude when in the parent's presence, how can this court determine what portion of that attitude is caused by conduct of the favored parent? The determination would unnecessarily plunge the court into the vagaries of child psychology, nuances of child and adolescent growth and development, and parent-child interaction. Finally, despite the suggestion of "moderate alienation" in this case, there is no evidence that the children have "moderately" rejected their father in any sense. As noted above, the father admits that the children, despite some "distant" feelings when they arrive at his house, warm up to him and he establishes a good relationship during his time with them. There is also no current evidence upon which to speculate that these children will engage in a more pronounced rejection of their father in the future even if the current parenting time plan continues to exist.

The father's claim for a change in circumstances, based on alienation conduct by the mother, is dismissed.

5. The Consequence of the Alleged Change in Circumstances

This conclusion does not end the Court's work. The parties have both acknowledged that the breakdown in the parent's communication constitutes a change in circumstances sufficient to require a re-examination of the couple's custody and parenting time. At this stage, the court must resolve the best interests of the daughters under the test of Eschbach *v. Eschbach*, 56 NY2nd 167 (1982). Both parents have provided a stable home environment. The daughters have remarkable grades in school, excel at sports, and have well-rounded activities, including some involving a church group. The parent's past performance can only be considered exceptional - the children have thrived, despite the contentious nature of the parent's relationship. In considering parental fitness, this court, as noted above, declines to find sufficient proof of alienation to disqualify the mother as a "fit parent." Both parents have an ability to guide the children's well-being. This court can easily conclude, after the *Lincoln* hearing, that the daughters have acquired qualities from both highly-skilled and accomplished parents - a rigor in their studies, serious attention to sports and extracurriculars, and a sensitivity to their relationship with both parents. The only apparent deficient factor is whether each parent can "foster a relationship with the other parent." The evidence reveals that despite hiccups after the divorce, the parents here have worked to permit each other to develop relationships with their ***32** children. Both parents have ample access to the children. Both parents can communicate with their daughters. The daughters have strong relationships with both parents, although it is apparent that their bond with their mother -

perhaps related to the mother's at-home status when they were young, and her working at home during the last few years - is stronger than the bond with their father. In addition, the mother has taken steps to nurture the bonds between the children and the father - inviting the father to events at her home (including the youngest daughter's birthday) and allowing the father to have time with the children even during her parenting time. The father has not always reciprocated; for example, not allowing the children to visit their mother's California relatives on his parenting time. A final factor - the mother works from home and is available when the children come home from school - weighs in the mother's favor. In short, on this issue, the facts suggest the mother, despite the claims that she has attempted to alienate the children, has worked harder to foster a relationship between the daughters and their father than the father has worked to foster the relationship between the daughters and their mother. The only other factor in the Eschbach test is the daughter's preference or wishes. There is no dispute that the older children, both directly and through their attorney, want to reside during school weeks with their mother. Their rationale is one of convenience and consistency. While seemingly minor factors - the mother makes their lunches, location of shampoo - may be articulated, these factors have a real life day-to-day significance for the daughters. The daughters oppose the mid-week transitions and, even the father admits that it causes some dispirited reactions by his daughters.

Having found a change that triggers the Court's ability to alter aspects of their custody and parenting agreement, this court, faced with seemingly minor complaints against each parent, proceeds cautiously. The court is reluctant to change the joint custody to which the parents agreed to four year ago. Each parent has a role to play in their child's development, and despite their differences, the parents have largely succeeded in being joint custodial parents. The children are mature, intelligent and responsible. Both parents negotiated for and still deserve a say in their children's activities, schooling, and their medical care. The parents fashioned an elaborate plan for joint decision-making. The evidence establishes that while there have been violations of parts of that agreement, the requirement that the parents make joint decisions has kept both parents in close contact with their children. In that regard, the father admitted in the hearing that he and the mother "agree on so many things. We're very compatible, actually, in the foundational basis of what we believe for the children, what we want for the children." The father suggested that the "conflict" between him and the mother was "manufactured." This court agrees with the father. The conflict is "manufactured" as a result of the inappropriate - if not petulant - behavior of both adults. [69] The behavior that needs to change in this matter is not the ***33** children's, it is the adults. Both parents have contributed to this "manufactured" tension, even though there is no evidence that it has impacted the lives of their daughters. The best interests of the children would be served if the adults acted like parents rather than psychological gladiators. This court declines to change the couple's joint custody plan. Both parents, seemingly hoping to "win" that issue, must retreat to their neutral corners and accept that both of them will have a substantial role in their children's future sharing joint custody.

This court also declines to impose any "zone of interest" analysis, as suggested by the temporary order from the court. These parents wanted to have a detailed involvement with their children and structured their agreement to handle almost every potential aspect of their children's lives. The court is unwilling to change that aspect of the detailed plan, carefully sculpted only a few years ago, especially when it appears that the children are thriving and whatever disputes the parents allege, there is no evidence that the children have been adversely impacted. This court has held that the mother violated the joint decision-making requirements in taking the children to certain doctor's visits, but the court declines to remove her from future medical decisions as a consequence.

The final issue is the residency plan, which is a close question for this court. The older daughters' wishes have real potency. The court concedes their desire for the convenience and consistency that they envision in their mother's residence, but their objections to residing with their father are minimal. There is no suggestion that travel to school from the father's is more difficult or time-consuming or that their academic and extracurricular accomplishments are impinged by spending half of one week with their father. In this court's view, these parents made a conscious and prudent choice to keep their children close to each parent by dividing their time during each week, with an understanding that these children would encounter transition difficulties and inconveniences because of the split-week format. Both parents believed then that the children needed access to them each week in order to benefit from their style of parenting, even if it conflicted with the style of the other parent. The parents made the calculation that shared time -- splitting every week -- was in their daughters' best interest less than four years ago. In that respect, even though there is acrimony between the parents, it has not deteriorated to the point where the "cooperation for the good of the children is impossible." Matter of Deyo v.

Bagnato, 107 AD3rd 1317 (3rd Dept 2013). If, as one child remarked, their life is "pretty perfect," then this court finds that joint custody, with shared visitation as provided in the agreement, has worked. This court is loath to change it simply because their parents have a "win-at-all-cost" attitude. While the temporary order changed the schedule, this court, based on its findings, directs that the parents revert to their agreed plan in the separation agreement. The court notes that the parents could have implemented changes - dividing it as the daughters suggested, but have not agreed on any changes and this court declines to upend the parent's determination that split-weeks were in the children's and their best interests. The request for a change in the visitation schedule, sought by the mother on behalf of the children, is denied.

In reaching this conclusion, the Court does not strip the parents of their right to jointly decide the residency schedule for their children. Since the date of the temporary order, more than a year ago, the children have had a week on/week off schedule, which may have proved to be beneficial to the children. If the parents agree that the temporary schedule has worked and is ***34** in the best interests of their children, the parents, as the ultimate authority for determining their children's best interests, can change it by agreement.

6. Violations of the Agreement/Judgment and a Finding of Contempt

While almost all of this Court's analysis has focused on the claims of parental alienation, there is ample evidence that the mother violated the custody agreement. She committed the daughters to extra activities on at least two occasions without the father's approval, as the agreement required. She also failed to communicate with the father regarding injuries and illnesses that the daughters encountered, in violation of the agreement's joint custody provisions and put her daughters unnecessarily at risk of further complications. The father has sustained his burden of proof on these claims. The father also alleges that the mother violated the agreement's non-disparagement clause, but despite the court finding evidence that the mother made misrepresentations about the father to healthcare professionals, there is no evidence of disparagement of the father by the mother in the children's presence as the agreement requires. The court finds that there is clear and convincing evidence that the mother willfully violated the consultation and activities provisions of the agreement and the judgment of divorce. A finding of contempt with an appropriate penalty is required. In considering available penalties, this court concludes that the mother forfeits her right to the Spring/March break in 2019 and pays a fine in the amount of the father's costs and expenses up to $2,500. NY JUD. §773. Rech v Rech, 162 AD3rd 1731 (4th Dept 2018). As discussed below, the mother is also subject to an award of attorney's fees in favor of the husband as a result of the contempt finding. Matis v. Matis, 17 AD3rd 547 (2nd Dept 2005); Ahmad v. Naviwala, 14 AD3rd 819 (3rd Dept 2005).7. Attorney's Fees

After the financial carnage of a lengthy hearing, both parents seek an award of attorney fees. In considering the request for fees, this court notes that the court that conducted the hearing, when issuing its temporary decision, noted that the mother had substantial retirement assets (including pre-marital accounts and accounts derived from her marital share of the husband's retirement accounts). The court properly noted that the "lesser-moneyed spouse" under the Domestic Relations Law was not synonymous with the "lesser-income spouse" when considering a presumptive award of fees. DRL § 237(a) (a presumptive entitlement to fees to the lesser-moneyed spouse). The legislature did not direct whether either income or assets -- or a combination of the two -- would be the basis for an award. In addition, the legislature did not provide any guidance on how much the "lesser-moneyed spouse" would have in income or assets to be presumed entitled to an award of fees. Presumably, the legislature intended that if the disparity in incomes was substantial, then the lesser-moneyed spouse should be granted substantial fees. Conversely, if both parties have significant assets, then the imperative to award substantial fees to the lesser-moneyed spouse would be diminished (unless other factors -- dilatory tactics, obstreperous courtroom conduct -- intervened). *Kimberly C. v Christopher C.*, 155 A.D.3rd 1329 (3rd Dept 2017); *Valitutto v Valitutto*, 137 A.D.3rd 1526 (3rd Dept 2016) (no fees awarded to the lesser-moneyed spouse because the litigant maintained unreasonable stances, veering into personal and irrelevant attacks aimed at the husband and his counsel at times, that unnecessarily prolonged the litigation). The goal is to "level the playing field" when couples litigate matrimonial related matters. *R.S. v L.F.S.*, 2018 NY Misc. LEXIS 3848 (Sup.Ct. Westchester Cty 2018); *L.G. v C.G.*, 2018 NY Misc. LEXIS 1134 (Sup.Ct. Kings Cty 2018). And while the "playing field" should be "level," both parties need "skin in the game." *Sykes v. Sykes*, 41 Misc 3rd 3061 (Sup.Ct. New York Cty 2013)

The game metaphor applied to this case produces an uneven conclusion. The father has the burden of proof to impute additional income or prove the mother has more assets

available to finance the litigation. *Davis v Davis*, 117 AD3rd 672 (2nd Dept 2014) (the party seeking to have income imputed must prove by a preponderance of the evidence that the party, against whom imputation is sought, is underemployed, has spurned employment, or is otherwise responsible for reporting less income than his or her earned income potential). The mere suggestion that some imputation is justified does not meet the burden. *Rossiter v Rossiter*, 56 AD3rd 1011 (3rd Dept 2008) (competent evidence must be submitted to support such a finding). There is no dispute that the mother has less income than the father. The disparity is substantial - the father makes in excess of $250,000, and the mother makes less than $100,000. The father alleges that the mother, an Ivy-league trained attorney, could earn more and did earn more when she worked in Washington, and that she turned down a higher paying job and instead went to work at home doing legal work for an out-of-state law firm. He also argues that the mother has trust funds available and substantial equity in her home. Based on these allegations, the father disputes the mother's status as the "lesser-asset" spouse, asserts that she is "underemployed," and claims that fees are unwarranted.

This court finds that the father failed to meet his burden of proof on the issue of imputed income.[70] There is no independent evidence of the mother's income potential, and no expert testimony on her skills or her potential income in the legal job market in Rochester or elsewhere. The mere fact that she was paid a higher salary in another job market does not justify imputing income to her. This court declines to consider the mother's access to other assets including trust accounts. There is no evidence that she has drawn funds from trust accounts, or the exact nature of those accounts, or her access to them. And, there is no evidence of any on-going or routine support of the mother from her family. Finally, the fact that she has assets -- albeit less than the father -- does not disqualify her from an award of fees. *Grassi v. Grassi*, 35 A.D.3rd 357 (2nd Dept 2006); *Gallousis v. Gallousis*, 303 A.D.2nd 363 (2nd Dept 2003) (fact that the plaintiff has sufficient assets to pay her counsel does not disqualify her from an award of counsel fees); *Matter of Talty v Talty*, 75 A.D.3rd 648 (2nd Dept 2010) (the fact that the mother has some assets does not disqualify her from an award of counsel fees). The mother here should not be expected to exhaust all, or a large portion, of the finite resources available to her. *Brody v Brody*, 137 AD3rd 832 (2nd Dept 2016). For all these reasons, an imputation of a higher income to the mother for purposes of calculating her entitlement to attorney fees is unwarranted and the fact that she has assets, even significant assets, does not preclude an award.

However, the court rejects the mother's allegations that the father should pay more fees because he abused process in this matter. The court that conducted the hearing considered the mother's argument to dismiss the claim of parental alienation before the hearing, and denied her request. That denial of summary judgment was never appealed, and it remains the law of the ***35** case. In essence, the court concluded that the allegations in the pleadings established a *prima facie* case for parental alienation, which required a hearing to determine the truth of the allegations. *See Wells Fargo Bank N.A. v Grover*, 2018 NY APP. Div. LEXIS 7169 (3rd Dept 2018). In addition, as an ingredient in any claim for abuse of process, the mother would have to prove by the preponderance of the evidence that the father's litigation conduct -- subpoenaing numerous documents, including the mother's employment records, the children's medical and mental health treatment records, police reports, and hiring three experts (all of whom were permitted by the trial judge to testify as experts over the mother's counsel's objections) -- was without any excuse or justification. *Perry v McMahan*, 2018 NY App. Div. LEXIS 6219 (2nd Dept 2018) (even frivolous litigation requiring a party to expend legal fees is not a sufficient basis for a cause of action sounding in abuse of process). The proof in this matter falls far short of meeting that burden. While this court holds that the father did not meet his burden of proof on the parental alienation claim, it holds that he did meet it on the contempt claims. The fact that the father did not meet his burden of proof on parental alienation does not now allow the court to hold that the entire proceeding was without justification.

The fee awards -- to both sides -- in this matter do not level the playing field but they re-balance the costs of litigation, giving each party "skin in the game," and holding them financially accountable.[71] The mother, as the lesser-moneyed spouse, is presumed to be awarded attorney's fees. DRL § 237 (a); *Belilos v Rivera*, 2018 NY App. Div. LEXIS 6192 (2nd Dept 2018).[72] The father has a claim for fees as well. His application to find the mother in contempt for violation of the agreement and the judgment of divorce is granted and he is entitled to fees for his efforts on that application. The fees for progressing the contempt application through a hearing in this hotly contested matter would require substantial time and effort, but no expert testimony. This court awards the father $10,000 as the reasonable attorneys' fees for that effort as part of the finding of contempt.

The court declines to award the husband any fees for his alienation claims, which consumed most of the hearing time and attorney effort. In this court's view, these claims were an unwarranted attempt to make an alienation mountain out of a series of irritating molehills. The father, in progressing those claims, admitted that his children had never missed any significant time with him in the interval between the divorce and the hearing. He never had any proof that his children rejected him as the experts predicted they would. While this court has repeatedly ***36** noted that his experts never interviewed the children to determine if they were victims of alienation, the father had an almost daily opportunity to assess whether this daughter's reactions to visiting with him were evidence of alienation and he failed to do so. His latent animosity to his former wife colored his perception of his relationship with his daughters, and he misread their cooler teenaged reactions to him and his girlfriend, the former nanny. In short, the father's expenses in prosecuting the alienation claim do not merit any further award of fees to him.

The final issue is the amount of attorney's fees that the mother, as the lesser-moneyed spouse, is granted for defending against the alienation claims. A review of the transcript reveals that most of the hearing testimony focused on the father's alienation claims. The mother hired an expert to critique the father's experts and this court found him to be credible and convincing. The court awards her the entirety of the expert fee of $20,000, to be paid by the father. On the question of the amount of attorney fees, this court notes that many of the behaviors which violated the judgment of divorce and the agreement were also described -- and defended -- at length in the hearing. [73] The mother's irresponsible conduct triggered the father's alienation claims and gave him the legal grounds to survive an earlier motion to dismiss the claims prior to the hearing. Under these circumstances, this court, in the exercise of its discretion, awards the mother only a portion of her fees - $50,000. She is also awarded the transcript costs of $4,315. The court considered re-apportioning or requiring reimbursement by a parent for the other parent's payment for the attorney for the children. This court declines to take that step - both parents share some responsibility for this lengthy proceeding and the need for an attorney to intervene on behalf of their children.

Therefore, this court concludes:

(1) the father has proven that the mother violated the terms of the parties' agreement and judgment of divorce by her conduct and as a result, this court fines her the sum of $2,500, which is payable to the father and reduces her time with the children through forfeiture of certain vacation time with the daughters as described above;

(2) the father has failed to prove by the preponderance of evidence that the mother engaged in outrageous and egregious conduct of such a pervasive nature as to result in the alienation of his children from him;

(3) while the parties concede that the breakdown in communication between the parents is a substantial change in circumstances to modify the couple's original agreement, this court, in exercise of discretion, declines to modify the terms of the agreement and henceforth, the terms of the agreement will apply and the children will revert to the parenting times prescribed by the agreement unless the parent's agree otherwise or as otherwise modified by this decision;

(4) the father's request for attorney fees based on a finding of contempt or a violation of the judgment of divorce or custody agreement is granted and he is awarded $10,000 in fees to be ***37** paid within 30 days of the final order;

(5) the mother's claim that the father's legal response and application are frivolous as a matter of law is denied for the reasons set forth above;

(6) as the lesser moneyed spouse, the mother is entitled to an award of legal fees and expert's fees in the amount of $70,000 plus $4,315 in transcript costs to be paid within 30 days of the final order;

(7) all other claims are denied with prejudice.

SUBMIT ORDER ON NOTICE 22 NYCRR 202.48.

Dated: December 6, 2018

Richard A. Dollinger, A.J.S.C.

FOOTNOTES

Footnotes

1 *See Lincoln v. Lincoln*, 24 NY2nd 270 (1969). This court has written about the function of a Lincoln hearing. *T. E. G. v. G. T. G.*, 44 Misc3rd 449 (Sup. Ct. Monroe Cty 2014).

2 This "zone of interest" or "sphere of interest" analysis has been embraced by a number of New York courts as an alternative to granting sole custody. *Wideman v. Wideman*, 38 AD3rd 1318 (4th 2007). Sole custody vests a single parent with the entire power to make decisions for their children, a move that can marginalize a parent and the resulting "complete power imbalance will remove any incentive for the parties to be more inclusive in the decision-making process." *J.R. v. M.S.*, 2017 NYLJ LEXIS 1405 (Sup. Ct. New York Cty 2017)

3 Section 21 of the Judiciary Law says either the case has to be retried or the parties can stipulate to have another judge decide the case. Judiciary Law § 21.

4 In one respect, parental alienation is the flipside of a concept long used by the New York courts to decide disputed custody matters; i.e., the "willingness to foster a relationship between the child and [the opposite] parent." *Matter of Sweeney v Daub-Stearns*, 2018 NY App. Div. LEXIS 7923 (3d Dept 2018); *Matter of Gottfried v Gottfried*, 163 AD3d 966 (2d Dept 2018); *Matter of Buckley v Kleinahans*, 162 AD3d 1561 (4th Dept 2018). These holdings focus on "interference" by one parent in the other's parent relationship with the children in a manner inconsistent with their best interests. *Musachio v Musachio*, 137 AD3d 881 (2d Dept 2016). *See Matter of Matthew W. v Meagan R.*, 68 AD3d 468 (1st Dept 2009) (evidence of the father's hostility toward the mother and intentional undermining of her role in the child's life is ample, including his maligning the mother in the child's presence, his failure to abide by the court's directive that there be telephone contact between the child and mother while the child was staying with the father, and his enrolling the child in a school in Westchester County without consulting the mother and without providing the school with the mother's contact information). In these parental alienation cases, conduct by a parent is transformed, by expert testimony, from "interference" to "alienation" and portrayed as intentional, egregious conduct, solely directed to damaging the parent-child relationship.

5 The evidence demonstrates "blocked emails," mail that was not picked up at the Post Office and similar failures to communicate; including the failure to inform the other parent of healthcare appointments and events. While the parties dispute the culpability of this breakdown, they both agree that it existed.

6 this simple definition were the sole standard for analyzing the facts in this case, the result would be simple. The linchpin of this definition is that the father's access to his children has been frustrated, which the court interprets as evidence that the children have not had "access" to their father. However, there is no evidence that the father has been denied "access" to his children. The record unequivocally establishes that his daughters have followed the agreed visitation plan, with only one or perhaps two minor exceptions during the last few years. In short, the father cannot point to any lost "access" - he has had the time allotted to him under the agreement.

7 In *Avdic v. Avdic*, there are few facts regarding the extent of the alienating conduct by the culpable parent. However, in that case, the Fourth Department cited *Amanda B. v. Anthony B.*, 13 AD3rd 1126 (4th Dept 2004) to support this proposition. In the latter case, the alienating conduct included seven false reports of sexual abuse against the other parent, and refusing to allow visitation at times. The father, in his summation to the court, cites a number of cases to support the extent of culpable conduct that justifies a finding of alienation. *Cramer v. Cramer*, 143 AD3rd 1264 (4th Dept 2016), cited by the father in his summation, involved a mother who made it clear she did not want the child to have a relationship with the father, routinely denied or obstructed visitation and would not cooperate with visitation supervisors. Similarly, in *Matter of Ladd v Krupp*, 136 AD3rd 1391 (4th Dept 2016), the court found alienation because the father interfered with the mother's relationship with the child by, *inter alia*, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, repeatedly telling the child that the mother was irresponsible and unintelligent, and limiting the mother's access to the child or placing absurd restrictions on such access. In *Werner v. Kenney*, 142 AD3rd 1351 (4th Dept 2016), the court found the mother interfered with the father's relationship with the child and that she made unfounded allegations of domestic violence against the father, some of which were made in the presence of the child. Importantly, the alleged conduct that links these findings is the denial of access, a factor not present here, or outrageous conduct of falsely reporting sexual abuse or domestic violence, which are also not present here.

8 Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, Academy Forum, vol 29, no 2, at 3 -7 (American Academy of Psychoanalysis, 1985).

9 During the hearing, the court did not permit the testifying experts to describe the analysis in this case as parental alienation syndrome, as the syndrome has not been recognized in New York. *People v. Fortin*, 706 N.Y.S.2nd 611 (Cty Ct. Nassau Cty 2000), *aff'd* 289 AD2nd 590 (2nd Dept 2001) (County Court was correct in determining that the defendant failed in his burden of demonstrating that "Parental Alienation Syndrome" was generally accepted in the relevant scientific communities). However, the trial court here did permit expert proof on parental alienation. New York's Third Department

Appellate Division has recognized that a court can consider issues of parental alienation even without expert testimony. *Matter of Suzanne QQ. v Ben RR.*, 161 AD3rd 1223, 1225 (3td Dept 2018) (no error in the court's determination that it could consider whether the mother's actions amounted to parental alienation without expert testimony from an individual who had not met any members of this family, because the court was familiar with the topic of the intended expert testimony and there was ample testimony from multiple witnesses who had interacted with the parties and the child). The difference between "parental alienation" and "parental alienation syndrome," while important to psychologists, is not critical to this court. New York courts recognize "parental alienation" in custody/residency disputes and the court's focus is on the parent's behavior and its impact on the children, regardless of its name or classification in the Diagnostic and Statistical Manual 5 ("DSM-V").

10 The Fourth Department has recognized that false allegations of sexual abuse have a potent impact in resolving alienation disputes. *Matter of Nwawka v Yamutuale*, 107 AD3rd 1456 (4th Dept 2013); *see also Matter of East v Giles*, 134 AD3rd 1409 (4th Dept 2015). Even more recent cases in other departments have included, as part of the findings of alienation, a finding of physical abuse. *Matter of Wagner v Villegas*, 162 AD3rd 677 (2nd Dept 2018); *Matter of Suzanne QQ. v Ben RR.*, 161 AD3rd 1223 (3rd Dept 2018) (corporal punishment as a factor in alienation). There is no evidence of any physical abuse by either parent in this matter.

11 In *Mastrangelo*, there was ample evidence of rejection. The children's counselor described it as follows:

"It's currently a pretty strained relationship, an estranged relationship. From the time I first met the kids, they have felt that their father doesn't listen to them, has been prone to angry outbursts, sarcasm, at times belittling them, making fun of them, has been prone to exposing them to his feelings about the divorce, the losses he experienced, the sacrifices he made throughout the marriage. So, it's been a -- they felt that he's not listened to them and not paid sufficient attention to their feelings and concerns."

Mastrangelo v. Mastrangelo, 2017 Conn. Super. LEXIS 226 at 8. There is no evidence of even a remotely similar attitude among the children in this case.

12 In its decision, the *Fortin* court was guided in part by a concurring opinion of Chief Judge Kaye of the New York Court of Appeals, in which the chief judge noted: "It is not for a court to take pioneering risks on promising new scientific techniques, because premature admission both prejudices litigants and short-circuits debate necessary to determination of the accuracy of a technique." *People v. Wesley*, 633 N.E.2nd 451, 462 n.4 (NY 1994)

13 While this court shares many of the concerns aired by my Maryland colleague on the scientific validity of "parental alienation," this court will not revisit that issue. The court here allowed the experts to opine on the doctrine and its application to this family and hence, that issue is moot.

14 This court, in evaluating this concept, acknowledges that there is a running debate whether invocation of parental alienation is the latest chapter in the gender war over children. *See* Drew, *Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)*, 32 Ohio St. J. On Disp. Resol. 373n (2017) (while the term parental alienation sounds neutral on its face, the application has a disparate impact on women); *See also* Glenn, Current Legislation, 2017-2018, Father's Rights Movement, April 18, 2018) ("it's absolutely devastating, and sickening that mothers can turn so manipulative and mean, and cause so much pain, using children as a manipulation tactic"). This court rejects any such simplistic analysis. This matter rises and falls n the facts alone.

15 The concept of a tort like framework for analyzing parental alienation has been articulated elsewhere.*Article: Inappropriate Parental Influence: A New App: A New For Tort Law and Upgraded Relief For Alienated Parents*, 61 DePaul L. Rev. 113 (Fall, 2011).

16 The continual use of the word "so" in this formulation suggests that other courts have used the word with the meaning "to a great extent or degree," an accepted meaning of the word, but a meaning that implies "extreme and outrageous conduct," of the type that would justify a holding under the tort of intentional infliction of emotional harm. Intentional inflection involves conduct in the general public or as one court intoned, "conduct which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." *Freihofer v Hearst Corp.*, 65 NY2nd 135, 143 (1985).

17 What strikes this court is that all of this "conduct" could easily occur in a stable and healthy marriage: what spouse hasn't, on occasion, engaged in these minor slights or shown a lack of consideration for their married partner? Certainly, what is often tolerated inside a marriage as a minor character flaw, lack of concentration or poor judgment doesn't become "extreme and outrageous" conduct after the marriage ends.

18 *In Matter of C.S. v A.L.*, 2017 NY Misc. LEXIS 1450 (Fam Ct. Bronx Cty 2017), the court summarized the consequences of alienation on the children: a near or complete rejection of one parent in favor of the other; superficial and trumped-up or exaggerated complaints about the rejected parent with little or no substance; and inconsistent and contradictory

statements and behaviors. *See* Stahl, *Understanding and Evaluating Alienation in High-Conflict Custody Cases*, 24 Wisc. J. Fam. L. 1 (2003).

19 As with much of these facts, there is a dispute over when and how the order of protection was served. The mother contends it was served on Halloween when the children were present in her residence. The father disputes the date and time of service. This court declines to offer any comment on this factual dispute except to note that there is no evidence that the daughters were aware of the service, complained about its occurrence or considered the time and circumstances of service in forming their evaluation of either their mother or father.

20 The father imprudently ”published“ the order, forwarding it to family friends and the minister at the mother's church.

21 This court, reading the transcript, concludes that the mother demonstrated, on a number of issues, a somewhat casual regard for the truth. While the court could, on the basis of its determination that she has not testified truthfully on certain subjects, reject the entirety of her testimony in this matter, the court declines to do so and, instead, makes an evaluation of her credibility on an issue-by-issue basis.

22 The father claims the he and the mother had agreed to provide 48 hours notice of an ”medical event.“ However, the agreement contains no such provision.

23 There are allegations that the father failed to take his daughters to activities, but there is no evidence that this alleged failure caused friction between the father and his children.

24 A fact that is understated by all sides in this case, but nonetheless significant in analyzing the conduct of both the mother and the daughters is that the father's girlfriend is the children's former nanny. While this fact does not, in itself, justify alienating or offensive conduct by anyone, it does color the reaction of the mother and the daughters that someone who worked in the family household is now the father's girlfriend. Human nature, as it animates the life of a divorced mother and her three teenaged daughters, cannot be ignored by this court.

25 The evidence establishes in this case that the children traveled with their father to Cleveland to visit his family and traveled to Niagara Falls, Iceland, Ireland and Aruba with their father.

26 Importantly, this court will not consider the relationship between the father's girlfriend and the daughters as a factor in alienation. The only critical fact is whether the daughters are alienated from their father. The relationship between the daughters and his girlfriend is not relevant to that determination.

27 See Note 43 infra.

28 There is no evidence that the children cared about the extensive litigation between their parents or that the father's aggressive litigation strategy altered their view of him.

29 In considering the issues involving the parents communicating over their joint custody rights, both sides submitted a raft of emails which suggest that communications were occurring, albeit sometimes after the fact, and sometimes failing to give information that an inquiring parent would want to know. This court examined the emails but declines to draw any conclusions other than the war between the parents - expressed in emails involving hair styles, brushing teeth, applying ointments, watching television and other points of dispute - flooded their respective email accounts. There is no evidence that the exchanges were ever seen by their children.

30 During the proceedings, there was a debate over whether the father had requested an interview between his experts and the daughters prior to the hearing. The father's attorney, in cross-examining the mother's rebuttal expert, asked whether he was aware that the father had previously asked to have the daughters interviewed. The expert answered ” no.“ The mother's attorney objected, arguing that the question assumed a fact not in evidence. The court at the hearing held that the previous request, made by motion before the hearing, to have the father's experts interview the children was not timely, and denied it. The court disregarded the question at the hearing and this court follows that decision.

31 There was a dispute between the experts on whether the failure to interview the children violated norms of psychological analysis and the rules of American Psychological Association (”APA“), a nationwide association. Whether the rules or accepted industry standards permit expert opinions about parental alienation based on documentary evidence alone without interviewing the children is of no moment to this court. The question before this court is whether parental alienation occurred. Any expert conclusion that it did occur without interviewing the children is laden with a level of speculation that undercuts the experts' opinions.

32 During cross-examination, counsel for the mother probed the experts on the reliability of their observations and conclusions regarding the alienation in this case despite not talking to the daughters. The experts defended their analysis and argued that they had professional peer support for their analysis and conclusions despite never talking to the daughters. This court will not wade into that controversy, but simply concludes that while the expert opinions may accurately summarize how the mother's conduct may have been part of an intended strategy, they provide no expert evidence that the daughters were actually alienated.

33 The mother argues that this case would be the first in New York to find parental alienation by a non-residential parent against the residential parent; *i.e.*, the parent with a larger portion of the actual time with the children. The court declines to comment except to note, as it has repeatedly, that the father has no evidence that the mother's conduct cut short his time with the children.

34 Dr. Baker differentiated the concept of parental alienation from "realistic estrangement." The former is a "pathological or unjustified rejection of a parent" and the latter is "a reality-based reason to reject a parent."

35 There was also a suggestion that the mother badmouthed the father during drop-offs at the father's house and that the conversation involved discussion of the order of protection with the children. There is no evidence that the children even remembered these comments and no evidence that they were repeated thereafter.

36 Neither parent exemplified proper intra-family communication. The father mailed information to the mother and mother declined to pick up her mail at the post office. The father sent automatic responses to the mother's blizzard of emails. The father confiscated one daughter's cell phone. The father complained about his daughters incessant texting while in his residence, and many were texts between the mother and the children.

37 The father also acknowledged that he recorded phone calls.

38 In what can only be characterized as a clear demonstration of the divergent perspectives of the parents, the mother testified - without contradiction -- that when the school asked the parents to submit "family pictures," the mother sent a picture of the children with their father and mother, while the father sent in a picture of the children with him and his girlfriend.

39 In several instances, the father's attorney uses the phrase " boundary violations" to describe the mother's conduct, suggesting that the mother had stepped over some figurative line in the sand of human relationships and suggesting the court should infer that the mother's conduct was inappropriate. This court can find no description of this apparent pop-psychology reference in New York's reported cases on custody or family matters. It is only mentioned once. *L.R. v. A.Z.*, 2009 NY Misc LEXIS 2641 (Sup. Ct. New York Cty 2009).It apparently has been used elsewhere to describe inappropriate behavior in the mental health context or health-related matters. *In re Care & Treatment of Clark*, 2017 Kan. App. Unpub. LEXIS 1039 (Ct. App. Kansas 2017); *Kirchmeyer v. Phillips*, 245 Cal. App. 4th 1394 (Ct. App. 4th App. Dit. 2016) (in describing " boundary violations," the trial court said it should not be expected, however, to understand and apply complicated psychoanalytic terminology and procedures without guidance and argument from the litigants). This court declines to subscribe to a relation between "boundary violations" and the " extreme or outrageous" conduct necessary to support a finding of parental alienation. The two are not the same.

40 In the *Lincoln* hearing, there was no evidence that the daughters lacked time to socialize, be with their friends, down time or free time. The daughters had some complaints about getting their homework done when living with their father, but these complaints - from students with uniformly high grades - are minor and of no significance to the court.

41 The father argues that the failure to notify him of the appointment violates the agreement. The agreement states that the mother had a duty to notify the father when the child consulted with a healthcare professional. Agreement p. 14. It also requires the parents to consult regarding treatment. *Id*. at 16. The agreement creates an "affirmative duty" on the mother to "forthwith" notify the father of the treatment. *Id*. at 17. None of these sections specify *exactly when* the notice or consultation must occur. However, applying a reasonable requirement to this obligation suggests that the mother violated the agreement by failing to notify the father of the appointment before its occurrence. The mother, in what can only be considered as a foolish and incredible justification for her violation of the agreement, testified that "she had been told that she did not have to tell him" about the appointment. This comment, alone, dampens the court's confidence in the mother's credibility on this issue.

42 The mother's ascribing blame to the father is even more troubling because the therapist concluded there was no evidence of any self-infliction harm and no evidence of any disposition by the daughter to engage in such conduct. The mother admitted there was no evidence of any self-mutilation by the daughter after February 2014.

43 The Third Department, in weighing a claim of alienation, noted that while a parent may have said something derogatory about the other parent, "there was no evidence that the revelation was made in the presence of the daughter." *Herrera v. Pena-Herrera*, 146 AD3rd 1034 (finding no merit in alienation claim).

44 The mother's note also contains comments about the order of protection and the father's goal to "seek full custody." These comments are unobjectionable: they are accurate and legal in nature, do not cast any aspersions against the father, and are not evidence suggesting the father was "dangerous."

45 The mother's intemperate conduct was paralleled by the father, who, in the same psychologist notes, allegedly accused the mother of munchausen by proxy (a psychological disorder marked by attention-seeking behavior by a care giver through those who are in their care), even though there is no evidence that she had such a disorder.

46 Significantly, there is no evidence that the comments on the intake form, even if read or overheard by the oldest daughter, were ever repeated in front of the two younger daughters. Seen in this light, the alleged alienation caused by the children's receipt of this information, as predicted by the expert and feared by the father, never occurred in the two younger daughters.

47 The father cites a series of additional individuals to whom he claims the mother told that he had a personality disorders or other mental health maladies. However, the proof is somewhat obscure on these points. The second individual was another therapist, who had seen the daughter at an earlier time. The testimony at trial does not establish when the mother allegedly made these comments to this family therapist. There is no evidence on whether these comments, which the mother suggested were made initially by the therapist were made before the divorce action or subsequent thereto and no evidence that the daughter ever heard them. The second therapist did not testify at trial and there is no evidence that the second therapist ever repeated the content of these conversations with the mother. The father also points to the mother's admissions in her deposition that she spoke with two others about his mental health. The deposition transcript was admitted in the trial, but it is unclear, based on the transcript, what the admitted deposition would be used for in the trial. *See* CPLR 3117. The mother's statements in the depositions could be admitted as evidence in chief, if read into the transcript of the hearing, but as best this court can tell, no such proffer was made. Neither of the two witnesses - to whom these adverse comments were made -- testified at the hearing.

These comments in the deposition transcript suffer from a similar proof problem as described above. While the mother admitted talking to these witnesses about the husband's mental health issues, there is no evidence in the proceeding on when these conversations occurred. Neither witness testified at the hearing and there is no evidence that either witness repeated these comments. This court notes that the mother, when confronted with questions about these conversations with at least one of the witnesses, equivocated, seeking to cast doubt about whether she originated the comments. Her tergiversation casts doubt on her testimony and the court can easily infer, from this evasive response, that she originated these comments.

However, even conceding that these comments were made and originated with the mother does not compel the conclusion that they had an alienating consequence in this case. The father cannot pinpoint when they occurred. This court cannot determine whether they were recent - near the time of the separation - or remote. The expert witness did not opine about the impact of pre-divorce comments in evaluating whether alienation had occurred. In the absence of any evidence that these comments were made to these two other parties after the separation of the parties and the fact that this evidence, found in the deposition, was not presented at trial, this court declines to credit the claim that the mother talked to two additional individuals.

48 On this issue, one of the father's experts admitted that if teenaged girls found out that their former nanny was their father's new girlfriend the result could be a “negative response” from the daughters.

49 For examples of these forms of bald alienation, *see Matter of Khan-Soiel v. Rashad*, 111 AD3rd 728, 730 (2nd Dept 2013) (having the children call another “daddy” and changing names on birth certificates)

50 The expert claimed that the children resisted contact with their father by not returning his cell phone calls. A teenager not returning a phone call from a parent may be evidence of age-appropriate indifference or sloth but, is not evidence of parental alienation.

51 The remainder of the expert evidence does little to widen the scope of these matters. The expert claimed that the children would manifest what they called “lack of ambivalence” and would like one parent and hate the other. There is no evidence that the daughters hate their father. The expert said the alienated children lack remorse in dealing with their father and treat him worse than they treat a stranger, but there is no evidence that the children regard their father in that fashion. Finally, there is no evidence that daughters have engaged in “borrowed scenarios,” by mimicking the mother's language or comments and no evidence that the children have rejected anyone close to the father, including maintaining a relationship - albeit an altered one - with their former nanny, now the father's girlfriend.

52 At one point, the expert said: “I believe that the children's feelings and love for their father have been undermined and destroyed. I don't see any evidence . . . I have to be able to reason backwards.” The first sentence is an unfounded prediction made without ever talking to the children. The second sentence is exactly the opposite of what this court does: the court examines evidence and “reasons forward.” These statements undercut the Court's confidence in this expert's opinion.

53 The previous court made it clear that while she would permit the expert to offer an opinion regarding whether the children were alienated, the “question about whether those were sufficient documents for her to render that opinion; that's up to me.” This court concurs. The credibility and adequacy of the basis of the expert opinion rests with this court.

54 At one point in her testimony, the witness suggested the children were “delusional” or beginning to “believe these delusional thoughts” about their father. This court, having read the transcript of the *Lincoln* hearing, cannot find any evidence that the children - from oldest to youngest - have any hint of “delusion” in their relationship with either parent.

55 In cross-examination by the attorney for the children, the expert further equivocated on a number of responses. She was asked whether seemingly innocent conduct - giving the daughter a cell phone - was evidence of alienation. She was asked whether giving a child a cell phone and telling her to “call me” and “use it for emergencies at your father's” may *not* be an indication of alienation. The expert said it was “remotely possible” and only after repeated questioning conceded that giving the child a cell phone may not be evidence of alienation. When questioned about whether a child might want to spend more time with one parent - without any alienation existing - the expert again evaded an answer, testifying “it's remotely possible” and adding “I have not seen it.” The expert also admitted that while she testified that excessive texting between the children and their mother was evidence of alienation, she had no idea regarding the content of messages passed between the mother and her children. When asked whether the daughters might have reacted negatively to their father's affair with their former nanny, the expert conceded “sure, it's possible” and said further “they might have appreciated it.” This court finds this expert's failure to give straightforward answers to the attorney for the children's questions renders her testimony incredible and - and counterintuitive or not - inconsistent with any rational view of the family circumstances in this case.

56 In what this court can only describe as counterintuitive hyperbole, the expert testified that saying “I miss you” is evidence of alienation:

[The mother] testified that she told the children she misses them when they're with their father. This is not the message you send to your children. The message is 'I'm perfectly fine. Have a good time. I'm gonna have a good time. I'm gonna do - I'm gonna do my things. I'm gonna meet with my friends, You know, when you are back, I'll be happy to see you.'

Never has the phase “I will miss you” - a tender loving expression between any parent and a child - been accorded such negative psychological weight and this expert's lending it that weight in this case seems singularly misplaced.

57 The expert also critiqued the mother's handling when one of the daughter's called her father a liar as relayed in the mother's deposition. The expert's explanation of what a normative parent should have said to the daughter in response - “call him up, discuss it with him respectfully, you [the child] cannot call him a liar, I would be glad to help out if you need that” - reflects, in this Court's judgment, a detachment from the reality of struggling parents involved in a difficult and tension-filled divorce.

58 This witness also diagnosed the “moving out” issues which are analyzed by the court in an earlier portion of this opinion. This court assesses the expert's opinion on the conduct of the mother in those incidents independently, but, the court draws the same conclusion: the expert's analysis ignores the reality of this complex and emotionally-laden divorce and the reality “on the ground.” The court declines to credit this expert's impressions of that incident as well. The mere failure of the mother in this case to engage in ideal conduct does not mean her conduct is alienating.

59 The expert conceded that she reviewed information prior to testifying and that in her original analysis, she analyzed the conduct of the mother and not the condition of the children. “My focus was on the mother,” she said, even though she never interviewed the mother.

60 This expert also testified that the daughter's objections that the shampoo in the house was not in the right place and toilet paper not properly hung on the roller were examples of “frivolous rationalizations because no child would resist going to a parent for that.” The evidence shows that these children, while perhaps complaining about these minor items, did visit their father without interruption, a fact that the expert obviously missed or concluded was not relevant in claiming that the children were alienated from their father.

61 Dr. Evans described parental alienation as part of adverse childhood experiences or ACEs. This court has written about this topic in both decisions and articles. *See L.M.L. v H.T.N.*, 2017 NY Misc. LEXIS 3804 (Sup. Ct. Monroe Cty 2017) (Dollinger, J.); Dollinger, *Exclusive Use and Domestic Violence: The Pendente Lite Dilemma for Matrimonial Trial Judges,* 48 Family Law Review 6 (2016), New York State Bar Association, Family Law Section, Spring/Summer, 2016. This court cannot find any significant evidence in this case comparable to the level of abuse and neglect which underlines most ACE research and the court holds that there is insufficient proof to equate the evolving ACE research, referenced by Dr. Evans, to the facts in this case.

62 The expert in this case -- Dr. Peter Favaro -- has testified in other cases. In *D.D. v. A.D.*, 2017 NY Misc LEXIS 2354 (Sup. Ct. Richmond Cty 2017), he testified that children who see abusive, demeaning or vulgar behavior are likely to imitate it. These is no allegation that any of these children have exhibited abusive, demeaning or vulgar behavior toward their father.

63 Dr. Favaro defined confirmation bias as occurring when “someone has a predetermined notion of an outcome and then selectively utilizes only information that supports that prejudgment and eliminates any of the data that refutes it.”

64 Dr. Favaro did backtrack slightly under cross-examination when he acknowledged that the APA guidelines permitted psychologists to form conclusions on an individual's behavior "even after they have only conducted the examination of one individual or none of the individuals." However, in responding, he added: "under special circumstances and when caveats and limitations are described."

65 The Court of Appeals nearly half century-old decision in *Lincoln v. Lincoln* permits the court to interview children in contested custody matters. The decision to draw children into custody and visitation matters by having them participate in a court interview runs the risk of placing children in direct conflict with parents and impacts the parent-child relationship potentially before the hearing and certainly after it. In this Court's view, the entire concept deserves a re-examination in view of advances in research in child psychology and research in family dynamics over the last 49 years.

66 As further evidence of the daughters' condition, there is no proof that any of the daughters have attended counseling or any form of therapy. There is no evidence that the father has ever sought therapy for his daughters or counseling to help them adjust to spending time with their father. *See In re Marriage of DeBates*, 212 Ill 2nd 489, 520 (Ill. 2004) (as a result of alienation, a child suffered emotional distress requiring therapy).

67 The testimony of these children's is light years away from testimony of other children who were alienated by a parent. In *J.F. v. L.F.*, 181 Misc 722 (Fam. Ct. Westchester Cty 1999), the court described the children as follows:

[P]articularly when discussing their father and his family, they present themselves at times in a surreal way with a pseudo-maturity which is unnatural and, even, strange. They seem like "little adults." This court finds that they live a somewhat sheltered, cloistered existence with their mother, emotionally and socially. They do not have friends to their home on a regular basis, and they do not go to other children's homes with any frequency. They do not have friends in their mother's neighborhood.

The loving way in which the children perceive their mother, and the way in which they uncritically describe her as being perfect, stands in stark contrast to their descriptions of their father. Their opinions about their father are unrealistic, misshapen and cruel. They speak about and to him in a way which seems, at times, to be malicious in its quality. Nothing in the father's behavior warranted that treatment. The psychiatrists testified that the children are aligned in an unhealthy manner with the mother and her family. This is evidenced not only in the testimony of the father, but also in the in camera interview. They repeatedly refer to the mother's family as "my family," but they do not refer to the father or his family that way. Both children used identical language in dismissing the happy times they spent with their father as evidenced in the videotape and picture album as "Kodak moments." They deny anything positive in their relationship with their father to an unnatural extreme.

Id. at 725.

68 As noted earlier, these facts are in direct contrast to New York cases which have found parental alienation. *See e.g.,* N.L.G*. T.N.C.G.*, 2017 NYLJ LEXIS 1399, Fam. Ct. Queens Cty 2017) (unexplained, increasing and apparently permanent hostility towards their father who had voluntarily engaged in every service plan and who made every effort to reunite with them).

69 At one point in the hearing, the father testified about filing for an order of protection just after testifying that he would be "more likely to foster a relationship with the mother than the mother [would foster a relationship between the children and their father]." The trial court asked: "How did you think filing a family offense petition was going to foster a relationship with mom?" The father responded: "I thought it would reduce conflict that I felt with the violence . . . that's where I thought it was going" But, there is no evidence of any physical violence in this entire hearing and filing a family offense petition, even if the father believed it had some validity, is almost never, in this court's experience, likely to foster a better relationship with the party against whom it is filed.

70 This court has been involved in imputing income in other contexts and in another case, an appeals court overturned this court because imputation of income, in the context of determining eligibility for appointed counsel, was not authorized by statute. *Carney v. Carney*, 2018 NY App. Div. LEXIS 1999 (4th Dept 2018). This court can find no statutory authority to impute income to a spouse when considering her status as a lesser-moneyed spouse for purposes of an award of legal fees.

71 This court also declines to consider the mother's retirement funds or any family assistance in considering an award of fees. There is no evidence that the mother is anything but the lesser-moneyed spouse from all perspectives.

72 An award of counsel fees lies in the sound discretion of the trial court, and the issue "is controlled by the equities and circumstances of each particular case" after the court has taken into account the equities and circumstances of the particular case including the respective financial circumstances of each party, the relative merit of the parties' positions and whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation. *Papakonstantis v Papakonstantis*, 163 AD3rd 839 (2nd Dept 2018). In considering fees in favor of the mother,

this court considers her status as the lesser-moneyed spouse as the prime factor, but the husband's failure to prove his claim of alienation also supports an award of fees her.

73 The mother also sought fees arguing that the father's alienation claim was frivolous. 22 NYCRR § 130-1.1 (b). In April 2017, the court denied a motion for summary judgment to dismiss the father's alienation claims, which signals to this court that the claims were never considered frivolous by the previous court and this court accepts that ruling as the law of the case. In her summation, the wife's counsel argues that the husband should be penalized for abuse of process. *Curiano v. Suozzi*, 63 NY2nd 113 (1984). There is no evidence that such a cause of action was ever pled in this matter and the court declines to consider it.