North Dakota Law Review

Volume 77 | Number 3 Article 6

2001

Parent and Child - Custody and Control of Child: Parental Alienation: Trash Talking the Non-Custodial Parent Is Not Okay

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PARENT AND CHILD—CUSTODY AND CONTROL OF CHILD: PARENTAL ALIENATION: TRASH TALKING THE NON-CUSTODIAL PARENT IS NOT OKAY

Hendrickson v. Hendrickson, 2000 ND 1, 603 N.W.2d 896

I. FACTS

Diane Nygaard and Mark Hendrickson were married in New Rockford, North Dakota on August 9, 1980.[1] Throughout the marriage, Mark was employed in Dickinson while Diane worked in Jamestown.[2] The Hendricksons purchased a home in Jamestown, but because of Mark's job in Dickinson, he was only able to be at the family home on weekends and holidays.[3] Diane had a daughter, Carissa, who was five years old at the time of the marriage.[4] Mark and Diane had four children together: Carinna born on November 23, 1981, Anthony born on September 2, 1983, Matthew born on March 14, 1986, and Andrew born on July 23, 1988.[5]

Diane raised the children on her own during the week, while Mark was home to help only on weekends and holidays.[6] The long-distance arrangement took its toll.[7] The marriage deteriorated, and the children did not have strong emotional ties with their father.[8] Mark began to come home sporadically on weekends and stopped bringing home his

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1. Brief for Appellee at 4, Hendrickson v. Hendrickson *(Hendrickson I)*, 553 N.W.2d 215 (N.D. 1996) (No. 950331).

2. Hendrickson v. Hendrickson (*Hendrickson I*), 553 N.W.2d 215, 216 (N.D. 1996). The distance between Dickinson and Jamestown is 199.2 miles; this equals a driving time of three hours and forty-two minutes. *Yahoo! Maps, available at* http://maps.yahoo.com. (last visited Nov. 13, 2001).

3. *Hendrickson I*, 553 N.W.2d at 216.

4. *Id.* Mark did not adopt Carissa; however, he and Diane raised her, aided by seventy-five dollars per month child support from the child's biological father. Transcript on Appeal at 674-75, *Hendrickson I* (No. 950331). Mark was abusive toward Carissa over the years. *See* Trial Court Transcript at 807-11, *Hendrickson I* (No. 950331) (recording testimony by Carissa about Mark's abuse toward her). The three older children saw this abuse and identified with it. *Hendrickson I*, 553 N.W.2d at 218. They saw no difference between Carissa's status and their own. *Id.*

5. Brief for Appellant at 5, *Hendrickson I*, 553 N.W.2d 215 (N.D. 1996) (No. 950331).

6. *Id.*

7. *Id.*

8. Appellee's Brief at 7, *Hendrickson I* (No. 950331). Mark testified at trial that he tried several times to persuade Diane to move with the children to Dickinson. Psychological Evaluation of Mark at 2, Appendix to Appellant's Brief at 111, *Hendrickson I* (No. 950331). She refused to move. *Id.* Diane stated that she and Mark planned the family home to be in Jamestown and that he would move back as soon as he could find suitable employment in the Jamestown community. Guardian ad Litem Carla Godfrey's report, Appendix to Appellant's Brief at 131, *Hendrickson I* (No. 950331). Mark found no suitable position for his "bookkeeper/accountant/project manager" skills. *Id.*

paycheck.[9] Diane filed for divorce on November 30, 1993.[10] An interim order specified that Diane was to have custody of the children during the divorce proceedings with reasonable visitation for Mark.[11]

Mark had difficulty with visitation from the start.[12] The court tried facilitating by setting more definite visitation schedules.[13] Mark would drive to Jamestown for his visitation with the children and be told that they had other plans for the weekend.[14] The court then appointed Carla Godfrey as guardian ad litem (GAL) to assist in making the visitations work.[15]

The divorce trial ended with the district court granting custody of the children to Diane.[16] Mark was granted reasonable visitation and Ms. Godfrey was retained as GAL to facilitate that visitation.[17] Mark appealed the divorce judgment to the North Dakota Supreme Court on October 5, 1995.[18] The North Dakota Supreme Court decided *Hendrickson v. Hendrickson (Hendrickson I)*[19] on September 10, 1996.[20] The court did not change the custody of the children, as Mark had requested on appeal.[21] Because it had taken almost one year to decide this case, the

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9. Transcript on Appeal at 346, *Hendrickson I* (No. 950331). Mark stated that he stopped bringing home his paycheck because Diane was not paying the bills. Transcript on Appeal at 186, *Hendrickson I* (No. 950331). He told Diane to send him the bills, and he would pay them. *Id.*

10. Summons and Complaint, Appendix of Appellant's Brief at 9-12, *Hendrickson I* (No. 950331).

11. Appellant's Brief at 2, *Hendrickson I* (No. 950331).

12. *Id.* at 5-6. Mark had only one holiday visitation with the children, which was Christmas of 1993. *Id.* The times he was allowed visitation, it was never with all four children. Appendix to Appellant's Brief at 46, *Hendrickson I* (No. 950331). Diane always had plans for at least two of them. *Id.*

13. Appendix to Appellant's Brief at 32, *Hendrickson I* (No. 950331) (scheduling visitation on Saturday from 9 a.m. to 5 p.m., and on Sunday from 12:00 p.m. to 5 p.m.); Appellant's Brief at 3, *Hendrickson I* (No. 950331) (scheduling visitation every second and fourth weekend starting on Friday at 5:30 p.m. and ending on Sunday at 5 p.m.).

14. Appellant's Brief at 6, *Hendrickson I* (No. 950331).

15. Stipulation Appointing Guardian Ad Litem, Appendix to Appellant's Brief at 56, *Hendrickson I* (No. 950331). The guardian ad litem (GAL) reported that the weekend-long visitations were a big part of the problems between Mark and the children. GAL Report, Appendix to Appellant's Brief at 138, *Hendrickson I* (No. 950331). Mark would rent a motel room in Jamestown when he had visitation with the children. *Id.* The children did not like being cooped up in that room for a whole weekend. *Id.* at 142. The GAL stated that the children would be equally unhappy being cooped up with Diane for all weekend. *Id.* The children also missed being with their friends. *Id.* at 139.

16. Memorandum Opinion, Appendix to Appellant's Brief at 182, *Hendrickson I* (No. 950331). The court stated two factors that were decisive: (1) It was natural for the children to be attached to their home in Jamestown, and (2) Mark's treatment of Carissa had affected the way the three oldest children of the marriage felt about their father. *Id.*

17. *Id.* at 182-83. The divorce was final on August 8, 1995. Appellant's Brief at 4, *Hendrickson I* (No. 950331). The GAL was appointed through June 30, 1996. Memorandum Opinion, Appendix to Appellant's Brief at 183, *Hendrickson I* (No. 950331).

18. Notice of Appeal, Appendix to Appellant's Brief at 224, *Hendrickson I* (No. 950331).

19. 553 N.W.2d 214 (N.D. 1996).

20. *See generally Hendrickson I*, 553 N.W.2d 214 (N.D. 1996).

21. *Hendrickson I*, 553 N.W.2d at 218.

delay and lack of closure created further deterioration of Mark's relationship with his children.[22]

After the termination of GAL Godfrey's appointment, the district court appointed Karen Mueller as the new GAL.[23] Ms. Mueller met with the children and parents and arranged for a visitation between Mark and the children to take place on July 25, 1997.[24] When Diane brought the children to Bismarck for the scheduled visitation, she left them at Ms. Mueller's office and then went to her daughter Carissa's home.[25] The children refused to go with their father, however, when he arrived to pick them up.[26] They ran away, and Mark called the police.[27] Everyone, including Ms. Mueller, ended up at the police station in Bismarck.[28]

Diane was contacted at her daughter's home and went to the police station with both Carissa and Carissa's husband Clinton.[29] At this time, Clinton verbally assaulted Ms. Mueller, telling her she was being paid by Mark and, therefore, would do whatever he wanted.[30] Diane told the children that they needed a lawyer, rather than telling them they needed to go with their dad.[31] In spite of this, Mark did eventually get the children for five days.[32]

The situation ultimately deteriorated to the point where everything was done through the court.[33] Both Mark and Diane tried to prevail by filing motions with the court.[34] District court Judge Hilden notified the

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22. Testimony from Court Trial Before Judge Hilden, Brief for Appellant at 25, Hendrickson v. Hendrickson (*Hendrickson II*), 1999 ND 37, 590 N.W.2d 220 (No. 980124). The GAL scheduled a weekend visitation for the children and Mark. *Id.* at 27-8. He picked up the children, drove about five blocks, and stopped at a stop sign. *Id.* When the car stopped, the children jumped out of the car without saying anything and ran away from the back of the car. *Id.* Mark drove to the nearest phone and called Diane but there was no answer. *Id.* at 28-9. He found out later that Diane was waiting in her car a block behind the stop sign. *Id.* at 29. Diane tells a different version of the story. *Id.* at 106. She was taking Carissa to work at her uncle's car wash business and saw the kids running across the field and crying. *Id.* at 107. In fact, Diane filed child abuse and neglect charges against Mark for throwing the children out of the car and leaving them in the middle of nowhere. Transcript of Proceeding at 29, *Hendrickson II* (No. 980124).

23. Transcript on Appeal at 3, *Hendrickson II* (No. 980124). Diane confronted Ms. Mueller at her office in Bismarck. Transcript of Proceedings at 112, *Hendrickson II* (No. 980124). Ms. Mueller told Diane that she should get rid of her bitterness, and then kicked her out of the office. *Id.* This resulted in the GAL's indication that she would not be able to work on the case. Appellee's Brief at 3-4, *Hendrickson II* (No. 980124). The court issued another order on July 3, 1997, appointing Ms. Mueller as GAL and stating that the parties, including the children, were to cooperate with her. *Id.*

24. Appellee's Brief at 9, *Hendrickson II* (No. 980124).

25. *Id.* Carissa was married to Clinton Wilkinson and living in Bismarck. *Id.* at 9-10.

26. *Id.* at 9.

27. *Id.*

28. *Id.* at 10.

29. *Id.* at 9.

30. *Id.* at 10.

31. *Id.* at 9-10.

32. *Id.* at 10.

33. Transcript of Court Trial at 4, *Hendrickson II* (No. 980124).

34. *Id.* Motions were filed to stay visitation, reconsider guardian ad litem fees, change custody,

parties that a hearing would be held to address the motions.[35] Both Mark and Diane were present with their lawyers, and both parties testified.[36] Former GAL Carla Godfrey also testified.[37] Karen Mueller had submitted her GAL report to the court earlier, and Judge Hilden accepted the report as a court exhibit.[38]

In her report, GAL Mueller recommended that (1) Stutsman County take custody of the children,[39] (2) all six family members see the same therapist, (3) Diane and Mark attend post-divorce counseling together, as well as go to individual counseling, (4) Mark and the children go to bi-weekly counseling with brief visitation either before or after and with no extended family members present, and (5) Mark attend parenting classes.[40]

Judge Hilden adopted Karen Mueller's report and issued his order on December 9, 1997.[41] He stated:

> This is the most outrageous case of deliberate frustration of visitation and child alienation that I have ever seen.

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and request that the hearing be in Stutsman County (the Jamestown area). *Id.*

35. Register of Actions, Notice of Hearing, Action No. 428, Brief for Appellant Appendix at 14, *Hendrickson II* (No. 980124).

36. Table of Contents, Transcript of Court Trial at 2, *Hendrickson II* (No. 980124). Mark testified about the difficulties he had making visitations with the children. Transcript of Court Trial at 8-32, *Hendrickson* (No. 980124). Cross-examination addressed the relationship problems that Mark had with his children and the need for Mark to take affirmative steps to solve the problems. *Id.* at 32-41. When Diane testified, she alluded to Mark sexually abusing Carinna. *Id.* at 142. When Carinna was a baby, Mark would hold her on his lap and call her his little princess. Transcript on Appeal at 475, *Hendrickson I*, 553 N.W.2d 215 (N.D. 1996)(No. 950331). Diane testified that her mother and older daughter Carissa told her they saw Mark "feel [Carinna] up and down. Whether it would be the chest part, [or] the rear part." Transcript of Court Trial at 142, *Hendrickson II* (No. 980124). Diane admitted during cross-examination that she never saw Mark fondle Carinna. *Id.* at 152.

37. Table of Contents, Transcript of Court Trial at 2, *Hendrickson II* (No. 980124). Ms. Godfrey testified that she did not see a campaign of alienation on the part of either parent. *Id.* at 52-53. She saw the problems as mostly situational: Mark's weak relationship with the children because of his living apart from them during the week during the marriage; the children's dislike of being cooped up in a motel room all weekend; and their desire to be with their friends and not miss their activities. *Id.* In addition, the children felt that if they lost their dad it would not change their lives much. *Id.* at 51. They would not have to move out of their house or change schools or activities. *Id.*

38. Transcript of Trial Court at 4, *Hendrickson II*, (No. 980124). Ms. Mueller had been summoned, but was not able to be at court due to scheduling problems. *Id.* She thought both parents were involved in a power struggle and were to blame. Karen Mueller's GAL Report, Brief for Appellee Appendix at 16, *Hendrickson II* (No. 980124). She also thought Diane's family contributed to the alienation and frustration of visitation. *Id.* at 15. Mueller stated, "[a]ll the adults involved in this conflictual situation share the blame for the chronic hostility and the horrendous position these four children have been placed in and have suffered through." *Id.* Mueller addressed Diane's suspicion of Mark's sexual abuse. She stated in her report, "Either Diane's family is lying and Diane knows it and made this up or Diane has a lack of regard for her daughter's well being; to the extent that it is more important for her (Diane) to look good in the divorce proceedings." *Id.* at 54.

39. Karen Mueller's GAL Report, Brief for Appellee Appendix at 25, *Hendrickson II* (No. 980124). It was important to get the children out of the alienating environment. *Id.* at 23. If Mark lived in Jamestown, Mueller would have recommended a change of custody to him. *Id.*

40. *Id.* at 25-27.

41. Order of District Court, County of Stark, Southwest Judicial District, Page 1, *at* Brief for Appellee Appendix at 28, *Hendrickson II* (No. 980124).

> I find that the report of Karen Mueller is entirely credible and, in large part, I adopt her recommendations. . . .
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> Further, I find that Diane has been by far the greatest cause of this fractured and dysfunctional family.[42]

Stutsman County refused to take custody of the children, and a frustrated Judge Hilden was required to issue a final order on February 24, 1998.[43] Judge Hilden stated:

> This is the most outrageous case that I have seen since I began law school twenty-five years ago. Diane's continuing pattern of alienating behavior has pretty much destroyed Mark's hope of a meaningful relationship with his children. Basically, there has been no visitation since this divorce was commenced. Now, six large files, a Supreme Court appeal and tens of thousands of dollars in attorneys fees later, there seems to be no hope of reasonableness.
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> . . . .
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> The report of *guardian ad litem*, Karen Mueller, which I have adopted in full and upon which I continue to rely, tells . . . by deed and innuendo, [how] Diane rewards the children's rejection of their father making this perhaps the worst case of alienation syndrome in the history of the United States. . . . [Diane's] statement on the stand that she has 'tried and tried' to encourage visitation is patently ridiculous.
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> . . . .
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> I would order Diane to report to jail . . . if I could do so without harming the children. But in jail, Diane would probably lose her job, house and car. . . . [W]ith the currently existing relationship between Mark and his children . . . I [cannot] now give Mark custody whether or not Diane goes to jail.[44]

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42. *Id.* Judge Hilden ordered five things. *Id.* at 28-29 First, the custody of the children was to be turned over to Stutsman County Social Services. *Id.* at 28 The children were to be removed from Diane's custody if her alienating behavior continued. *Id.* The County was also to monitor therapy and treatment of all six individuals involved. *Id.* Second, Stutsman County Social Services was to select the therapist to be seen by all six individuals. *Id.* at 29. The therapist was to keep the County informed of therapy progress. *Id.* No extended family members on either side were to interfere with, or be present at Mark's visitation. *Id.* Third, Stutsman County Social Services was ordered to report to Judge Hilden after ninety days. *Id.* The Judge would determine if alienating behavior (from the parties or extended family members) was occurring, and then impose a jail sentence of thirty days on the applicable person. *Id.* Fourth, Stutsman County was to file a report to Judge Hilden every ninety days until the youngest child was eighteen years of age, or until Judge Hilden issued an order changing the requirement. *Id.* Fifth, Judge Hilden denied all other pending motions. *Id.*

43. *Id.* at 30-32.

44. Order of District Court, County of Stark, Southwest Judicial District at 1-2, *Hendrickson II*, 590 N.W.2d 220 (No. 980124).

Judge Hilden then sought to create an economic incentive for Diane to stop the alienating behavior.[45] He ordered that Mark's child support payments be put in escrow for the children's post-secondary educations.[46] Each child was to receive his/her distribution at age twenty-three.[47] Judge Hilden stated that he would reconsider this order if Diane succeeded in persuading the children of the importance of having a relationship with their father.[48] Judge Hilden ordered that Mark continue to have reasonable visitation, and also ordered Diane to pay Mark's attorney's fees of $2,000.[49]

Diane appealed the order,[50] and Mark cross-appealed.[51] For the second time, the Supreme Court of North Dakota looked at *Hendrickson v. Hendrickson* (*Hendrickson II*).[52] It determined that the lower court was in error when it ordered that the child support payments be put in escrow[53] and remanded the case to reverse that order.[54]

Judge Hilden held the remand hearing on April 26, 1999, to deal with the many motions that had accumulated.[55] He granted only one of the many motions: Diane's motion for release of the child support payments in escrow.[56] Judge Hilden stated that Diane "has been in continuous and willful contempt of court for the approximately four years that I've had this file."[57] He found that there was a significant change in circumstances, and it was necessary that custody be changed to Mark.[58] He ordered Diane to pay child support and also ordered that Diane be denied visitation for one year.[59] Finally, he ordered that all of the parties attend counseling.[60]

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45. *Id.* at 31.
46. *Id.*
47. *Id.* at 32.
48. *Id.*
49. *Id.*
50. Appellant's Brief at 16, *Hendrickson II* (No. 980124). Diane raised the issues of whether placing the child support payments in escrow was erroneous and whether awarding Mark attorney's fees was an abuse of discretion. *Id.* at 1.
51. Appellee's Brief at 39, *Hendrickson II* (No. 980124). Mark raised both of Diane's issues in his brief and defended the court's order. *Id.* at 1. He raised a third issue, whether the lower court was in error when it did not change custody of the children to their father. *Id.*
52. Hendrickson v. Hendrickson (*Hendrickson II*), 1999 ND 37, ¶ 2, 590 N.W.2d 220, 221.
53. *Id.* ¶ 8, 590 N.W.2d at 223. The court noted that the guidelines show that child support is supposed to be paid to the custodial parent for the children's current needs. *Id.* ¶ 9.
54. *Id.* ¶ 15.
55. *See* Transcript of hearing in District Court, County of Stark, Southwest Judicial District at 3-7, Hendrickson v. Hendrickson (*Hendrickson III*), 2000 ND 1, 603 N.W.2d 896 (No. 990123) (identifying motions for change of custody, change of venue, attorney's fees, motion to dismiss, motion for continuance, permit for supervisory writ to change judge, and others).
56. *Id.* at 24.
57. *Id.* at 23.
58. *Id.* at 23-24.
59. *Id.* at 24.
60. *Id.* With regard to the counseling, other documents show that the judge ordered Diane to go

Diane appealed the decisions of the remand hearing, and the North Dakota Supreme Court looked at *Hendrickson v. Hendrickson* (*Hendrickson III*)[61] a third time.[62] The primary purpose of this decision was to determine child custody issues.[63] The North Dakota Supreme Court *held* that (1) the trial court did not abuse its discretion when it denied a change of venue, (2) there was enough evidence to warrant changing custody of the children to Mark, (3) Diane as the noncustodial parent was entitled to supervised visitations, and (4) the counselor for Diane was to be chosen from among the names on lists to be supplied to the trial court by both Mark and Diane.[64]

II. LEGAL BACKGROUND

Around the middle of the twentieth century, most states followed the "tender years" doctrine when they made child custody decisions.[65] This doctrine stated that a child needs his or her mother during the early years, with the result that custody of young children always went to the mother unless it could be proven that she was unfit.[66] During the women's movement in the 1960s and 1970s, all of this changed.[67] Women went to work in great numbers and left their children with caregivers.[68] This negated the argument that a child must be with his or her mother during the tender years because the mother would likely be working and not staying at home taking care of the child.[69] In addition, with more women working outside the home, fathers found themselves taking a larger role in raising the children.[70] As more fathers sought

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to counseling with a counselor chosen by Mark. *See* Appellant's Brief at 20, *Hendrickson III*, (No. 990123) (stating the court abused its discretion when it ordered Diane to attend counseling with a counselor of Mark's choosing); *see also* Hendrickson v. Hendrickson (*Hendrickson III*), 2000 ND 1, ¶ 22, 603 N.W.2d 896, 903 (discussing Diane's contention that the trial court abused its discretion when it ordered her to go to counseling with a counselor of Mark's choice).

61. 2000 ND 1, 603 N.W.2d 896.

62. *Hendrickson III*, ¶ 1, 603 N.W.2d at 898.

63. *See generally Hendrickson III*, 2000 ND 1, 603 N.W.2d 896.

64. *Id.* ¶ 25, 603 N.W.2d at 903.

65. Shannon D. Sexton, *A Custody System Free of Gender Preferences and Consistent With the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 KY. L.J. 761, 768-69 (1999-2000).

66. *Id.* at 769-70. Sexton refers to the 1959 edition of *Corpus Juris Secundum* (C.J.S.) showing an unfit mother as unable to assume the responsibilities of motherhood or unable to "provide a suitable home." *Id.* at 768 n.60. Compare this description with the 1978 C.J.S. edition in which the age, health, and sex of the child are considered first, and "when all other considerations . . . are equal, the mother is the proper custodian where a child is of tender age [that] require[s] the care and attention . . . a mother is especially fitted to bestow . . . unless the mother is for some reason unsuitable or unfit ." 67A C.J.S. *Parent & Child* § 21 (1978).

67. Sexton, *supra* note 65, at 770.

68. *Id.*

69. *Id.*

70. *Id.*

custody of their children, more legislatures did away with the tender years doctrine.[71]

Typically, legislatures replaced the tender years law with a "best interests of the child" standard.[72] This standard contained several factors that a court had to weigh and balance when determining the placement or modification of custody of the child.[73] Examples of the factors are: "(1) the wishes of the child and guardians; (2) the relationship of the child and each guardian; (3) the child's 'adjustment' to his/her home, education, and community environment; (4) evidence of domestic violence; (5) the mental and physical health of all involved; and (6) consideration as to who has been the primary care-giver."[74]

With the "tender years" presumption removed, the parent who better met the best interests of the child, as determined by the above-listed factors, would be awarded custody.[75] By the 1980s, this change in law, combined with no-fault divorce, caused the courts to be flooded with custody disputes.[76] Into this setting came the additional problem of parental alienation.[77]

A. PARENTAL ALIENATION

An early definition of parental alienation was formed in 1949 by a California appellate court: "parental alienation occurs when a parent pursues a consistent course of action calculated to prevent any close relationship existing between the child and the other parent, causing the child's mind to become 'poisoned and prejudiced' against the other parent."[78] By 1987, a leading child psychotherapist, Richard Gardner,

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71. *Id.* The courts also backed away from the "tender years" doctrine. *See* Devine v. Devine, 398 So. 2d 686, 696-97 (Ala. App. 1981) (reversing the lower court's affirmation of the "tender years" doctrine and stating it should be considered along with other factors in the case); *see also* Commonwealth *ex rel.* Spriggs v. Carson, 368 A.2d 635, 639 (Pa. 1977) (questioning the validity of the "tender years" doctrine and reversing the lower court's presumption in favor of the mother); Odegard v. Odegard, 259 N.W.2d 484, 486 (N.D. 1977) (rejecting the mother's assertion that placing her son in the custody of his grandparents violated the "tender years" doctrine).

72. Sexton, *supra* note 65, at 771.

73. *Id.* at 771-72.

74. *Id.*

75. Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L.J. 395, 395 (2000).

76. *Id.* at 396.

77. Kathleen Niggemyer, *Parental Alienation is Open Heart Surgery: It Needs More Than a Band-Aid to Fix It*, 34 CAL. W. L. REV. 567, 576 (1998).

78. *See id.* at 574 (paraphrasing the court's definition and noting that the blame for the alienation is on only one parent); *see also* Ludlow v. Ludlow, 201 P.2d 579, 582 (Cal. Dist. Ct. App. 1949).

had developed a theory regarding parental alienation.[79] Gardner distinguished between parental alienation and parental alienation syndrome.[80] Parental alienation focuses on the acts of the alienating parent, whereas parental alienation syndrome focuses on the acts of the child, who has become an active participant in the alienating parent's campaign to vilify the target parent.[81]

Gardner drew a picture of a typical alienating parent as the custodial mother, trying to turn the children against the noncustodial father.[82] He described three stages or types of alienating activity that lead to parental alienation syndrome.[83] These three stages or types are mild, moderate, and severe.[84]

In mild cases, the mothers have a good relationship with their children and realize the importance of the noncustodial father in the children's lives.[85] However, the mother has anger and a desire for vengeance and, as a result, alienates the children with slight prodding.[86] If there is a custody dispute, the children side with their mother because of the strong bond between mother and child.[87]

In a moderate case of parental alienation syndrome, the custodial mother is more disturbed.[88] She is on a campaign to make the noncustodial father unwanted by the children.[89] She acts out of vengeance and anger.[90] She finds all sorts of excuses to frustrate visitation, and is not receptive to court orders.[91] The children in this scenario do not want to go on visitation with their father, but when they do go on visitation with their father and get away from the custodial home, they give up their resistance and enjoy their time with him.[92]

The custodial mother in a severe case is one who has never had a good relationship with her children.[93] She is in a state of paranoia and

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79. *See generally* RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE, (1987). Dr. Gardner is a leader in the field of child psychotherapy. Biography of Richard Gardner, M.D. *available at:* http://www.lima-associates.com/gardnbio.htm (last visited Nov. 13, 2001). He practices as a child psychologist and an adult psychoanalyst. *Id.* He is also a Clinical Professor of Child Psychiatry at Columbia University College of Physicians and Surgeons. *Id.*

80. GARDNER, *supra* note 79, at 67.

81. *Id.* at 68.

82. *Id.* at 69.

83. RICHARD A. GARDNER, PSYCHOTHERAPY WITH CHILDREN OF DIVORCE, 451 (1991).

84. *Id.*

85. *Id.* at 461.

86. *Id.*

87. *Id.*

88. *Id.* at 455.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 452.

does anything she can to turn her children against the noncustodial parent.[94] The children become actors in the campaign against their father and totally resist visitations.[95] They scream and cry, run away, recite descriptions of their father's past bad behavior as if it happened yesterday and, similarly, fear his future bad behavior.[96]

Gardner's work is criticized by modern professionals as being gender biased.[97] Others claim that his work is still valid and "more convincing than his critics' [work]."[98] Douglas Darnall takes Gardner's theory and expands it.[99]

Darnall states that parental alienation can be caused by either parent.[100] Also, the roles of alienator and victim can be switched.[101] A parent can be an alienator, but the victim parent can retaliate and become

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94. *Id.*

95. *Id.*

96. *Id.*

97. Niggemyer, *supra* note 77, at 576. Niggemyer also states that mental health professionals reject Gardner's assertion that custody should be changed only in a case of severe parental alienation. *Id.* at 577 n.74 (citing STANLEY S. CLAWAR & BRYNNE V. RIVLIN, CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN 4 (1991)). Other professionals reject the theory because of lack of statistics. *Id.* at 576 n.68 (citing Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability, 27* LOY. L.A. L. REV. 1367 (1994), and noting that professionals reject Gardner because of no peer review or statistics to back up his theories).

98. Barry Bricklin & Gail Elliot, *Qualifications of and Techniques to be Used by Judges, Attorneys, and Mental Health Professionals Who Deal With Children in High Conflict Divorce Cases*, 22 U. ARK. LITTLE ROCK L.J. 501, 517-18 (2000) (arguing that even without statistics, Gardner's scientific methodology is careful and valued).

99. Douglas Darnall, *Parental Alienation: Not in the Best Interest of the Children*, 75 N.D. L. REV. 323, 326-27 (1999). Douglas Darnall practices as a licensed psychologist, is CEO of a psychiatric clinic in Youngstown, Ohio, and is the author of DIVORCE CASUALTIES: PROTECTING YOUR CHILDREN FROM PARENTAL ALIENATION (1998). *Id.* at 323.

100. *Id.* at 326. Darnall identifies three kinds of alienators. *Id.* at 327. The first group consists of the naive alienator. *Id.* This person is cooperative about the relationship with the children and the other parent. *Id.* Things are said on occasion, however, that damage that other relationship. *Id.* Most well-meaning parents can be naive alienators. *Id.* The child in this setting is able to dismiss most of the negative remarks and is unhurt by them. *Id.* at 353. The victim must have faith in his or her relationship with the child and focus on strengthening that relationship, not retaliating. *Id.* It may even be possible to talk to the alienating parent and make him or her aware of the problem. *Id.* The second group of alienators consists of the active alienator. *Id.* at 327. This parent is dealing with hurt and anger, and it is triggered by actions of the ex-spouse, causing the parent to lose control. *Id.* The statements and actions will be damaging to the relationship of the child and victim parent; however, the alienating parent is able to see that his behavior was wrongful. *Id.* Again, the victim parent must have faith in the relationship with the child and not retaliate. *Id.* at 354. Both parents need to be educated on parental alienation and parental alienation syndrome and go to counseling. *Id.* The third group consists of the obsessed alienator. *Id.* at 327. This parent is on a "crusade to protect the child from the evil of the court and targeted parent." *Id.* This person will gather support for his or her position and have a group of people available to verify what is going on. *Id.* The obsessed alienator justifies actions even when those actions are irrational. *Id.* Court orders will most likely not be obeyed. *Id.* The victim parent faces a difficult situation. *Id.* at 354. He or she may not be able to communicate with the children. *Id.* Visitation may be impossible because of roadblocks put up by the alienator as well as refusal by the children. *Id.* at 354. Retaliation, or any act, will be used against the victim by the alienating parent. *Id.* at 355. The victim parent must seek support and get legal help. *Id.*

101. *Id.* at 326.

the alienator; now the roles are reversed.[102] Darnall stresses the importance of professionals being able to identify this behavior in its early stage because that is when it is best treated, and treatment at an early stage can prevent parental alienation syndrome.[103]

B. PARENTAL ALIENATION LAW IN NORTH DAKOTA

The North Dakota Legislature has responded to the problem of parental alienation and its accompanying parental alienation syndrome.[104] In 1993, Senators Holmberg, Evanson, Maxon, and Representatives Kelsch and Mahoney introduced a bill in the North Dakota Legislature addressing allegations of child abuse or sexual abuse in child custody determinations.[105] A two-part bill was passed.[106] The first part of the law created a new subdivision, subdivision *l*, to North Dakota Century Code section 14-09-06.2.[107] This created a new factor for the court to consider when placing or modifying custody.[108] It stated, "[t]he making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02."[109] The second part of the law created a new section to chapter 14-09 called "Allegation of harm to child–Effect."[110] It stated, "[i]f the court finds that an allegation of harm to a child by one parent against the other is false and not made in good faith, the court shall order the parent making the false allegation to pay court costs and

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102. *Id.*

103. *Id.* at 324 Darnell lists actions of alienating parents that judges, attorneys, and other professionals can identify and treat. *Id.* at 328-29. Examples of these actions are telling the child that it is the child's choice of whether to go on visitation and refusing the target parent access to the child's medical and school records. *Id.* He also lists symptoms of parental alienation syndrome that can be identified in the child and treated. Some of the symptoms include: ongoing hatred of the targeted parent, refusing visitation, and not respecting the court's authority. *Id.*

104. N.D. CENT. CODE § 14-09-06.2(1)(*l*) (1997).

105. S. 2488, 53d Leg. (N.D. 1993).

106. *See* Child Custody Abuse Allegations, ch. 151, 1993 N.D. Laws at 620 (creating Session Law Chapter 151).

107. *Id.*

108. *Id.*

109. *Id.* Section 14-09-06.2(1) factors for placing or modifying custody include: (a) emotional ties between child and parents; (b) capacity of parents to provide affection, guidance, and education; (c) capacity to provide material needs; (d) length of time and stability of child's present environment; (e) permanence of existing or proposed custodial home; (f) moral fitness of parents; (g) mental and physical health of the parents; (h) home, school, and community record of the child; (i) reasonable preference of the child; (j) evidence of domestic violence; (k) evidence of household presence of person who may harm the child; (*l*) the making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02; and (m) any other factors considered by the court to be relevant to a particular child custody dispute. *Id.*

110. N.D. CENT. CODE § 14-09-06.5 (1997).

reasonable attorneys fees incurred by the other parent in responding to the allegation."[111]

The North Dakota Legislature passed a law in 1997 that specifically addressed post-judgment custody modifications.[112] Subsections five and six allow the court to look at both frustration of visitation and other acts of parental alienation before a custody order has been in place for two years and again after the two years have run.[113]

Many North Dakota cases address the problem of a parent turning the child against the other parent in a divorce situation.[114] The first case that seemed to frame the problem as alienation, however, was *McAdams v. McAdams*,[115] in which the court denied custody to the father because he had alienated the son against his mother.[116] In a later case, *Loll v. Loll*,[117] the court clearly addressed parental alienation syndrome and discussed the weight that should be given to the testimony of a licensed psychologist who was treating one of the children in the case.[118] The mother asserted that the psychologist was unaware that the child he was treating had been alienated from the mother by the child's father.[119] The court noted that both parents contributed to conflict in visitations.[120] In *Brown v. Brown*,[121] the mother wanted the court to grant her custody

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111. *Id.*

112. *See* Postjudgment Custody Modification Motions, ch. 149, 1997 N.D. Laws at 762-63 (codified at N.D. CENT. CODE § 14-09-06.6 (1997)).

113. *Id.* Subsections five and six read as follows:

> 5. The court may not modify a prior custody order within the two-year period following the date of entry of an order establishing custody unless the court finds the modification is necessary to serve the best interest of the child and:
> a. The persistent and willful denial or interference with visitation;
> b. The child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
> c. The primary physical care of the child has changed to the other parent for longer than six months.
> 6. The court may modify a prior custody order after the two-year period following the date of entry of an order establishing custody if the court finds:
> a. On the basis of facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and
> b. The modification is necessary to serve the best interest of the child.

N.D. CENT. CODE § 14-09-06.6(5) & (6) (1997).

114. *See* Johnson v. Schlotman, 502 N.W.2d 831, 834 (N.D. 1993) (turning a child away from the other parent by "poisoning the well"); *see also* Leppart v. Leppart 519 N.W.2d 287, 289-90 (N.D. 1994) (turning children against their father because he had left the cult-like faith of the mother).

115. 530 N.W.2d 647 (N.D. 1995).

116. *McAdams*, 530 N.W.2d at 650. The court quoted *Johnson v. Schlotman* when it stated that the custodial parent has a duty to nurture the child's relationship with his noncustodial parent. *Id.* (citing Johnson v. Schlotman, 502 N.W.2d 831, 834 (N.D. 1993)).

117. 1997 ND 51, 561 N.W.2d 625.

118. *Loll*, ¶ 22, 561 N.W.2d at 630.

119. *Id.* ¶ 21.

120. *Id.* ¶ 16, 561 N.W.2d at 629.

121. 1999 ND 199, 600 N.W.2d 869.

of the child because of predicted future alienation if the child stayed with the father.[122] The court denied change of custody on that basis, but stated that "[e]vidence of parental alienation is a significant factor in determining custody."[123]

C. OTHER STATES' APPROACHES TO PARENTAL ALIENATION

North Dakota's neighboring state legislatures have similarly abandoned the tender years doctrine and replaced it with a best interests of the child standard.[124] Minnesota states in its modification of order statute that "[the court] shall not prohibit a motion to modify a custody order or parenting plan if [it] finds that there is persistent and willful denial or interference with parenting time [visitation], or has reason to believe that the child's present environment may endanger the child's physical or emotional health or impair the child's emotional development."[125] In *Crews v. McKenna*,[126] the court found the custodial mother was alienating the children from their noncustodial father.[127] It determined that the need to remove the children from that environment did not outweigh the possible emotional and developmental damage that would be done to the children if custody were changed to the father.[128] The court decided that the better solution was to modify the present custody order to joint physical custody.[129]

Wisconsin's parental alienation statute states in part:

> a court may modify an order of physical placement at any time with respect to periods of physical placement if it finds that a parent has repeatedly and unreasonably failed to exercise periods of physical placement awarded under an order of physical placement that allocates specific times for the exercise of periods of physical placement.[130]

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122. *Brown*, ¶ 21, 600 N.W.2d at 874.

123. *Id.* (citing Loll v. Loll, ¶ 16, 561 N.W.2d 625).

124. *See infra* notes 125-145 and accompanying text.

125. MINN. STAT. ANN. § 518.18(c) (West 1990 & Supp. 2001). In 2001, the State of Minnesota changed its statute, substituting the more inclusive "parenting time" instead of simply "visitation." *Id.*

126. No. C3-98-75, 1998 Minn. App. LEXIS 793 (Minn. Ct. App. July 7, 1998).

127. *Crews*, No. C3-98-75, 1998 Minn. App. LEXIS 793, at *7.

128. *Id.*

129. *Id.* at *8.

130. WIS. STAT. ANN. § 767.325(2m) (West Supp. 2000). Wisconsin uses the words "physical placement" to mean both the child's custodial home and his or her visitations with his or her noncustodial parent. *Id.* In addition, the statute addresses both the situation in which the custodial parent is interfering with visitations of the noncustodial parent, and the situation when the noncustodial parent does not exercise his or her visitation privileges. *Id.*

In *Hughes v. Hughes*,[131] a Wisconsin case, the court changed custody to the noncustodial father based on a number of factors weighing against the custodial mother.[132] Significant in the findings were the facts that the mother had alienated the daughter from her father and that the father was the parent better able to set aside his interests and make decisions in the best interests of the daughter.[133]

Iowa's child custody statute considers "the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement."[134] *In re Marriage of Rosenfeld*[135] was a case in which the court found that both the custodial father and his wife (the step-mother) were alienating the children from their noncustodial mother.[136] The court looked at the testimony as well as the opinions of experts and concluded that the children needed to spend more time with their mother; it found that this was best accomplished by transferring custody to the mother.[137]

South Dakota does not address parental alienation in its child custody statute.[138] One South Dakota academician sees this area of the law as one where the court can have only guidelines and principles when making child custody determinations.[139] The South Dakota courts do, however, recognize parental alienation and, like their neighboring courts, change the custody to the alienated parent when it is in the best interests of the child.[140]

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131. 588 N.W.2d 346 (Wis. Ct. App. 1998).
132. *Hughes*, 588 N.W.2d at 349-51.
133. *Id.* at 349.
134. IOWA CODE ANN. § 598.41(1)(c) (West Supp. 2001).
135. 524 N.W.2d 212 (Iowa Ct. App. 1994).
136. *In re* Marriage of Rosenfeld, 524 N.W.2d at 214.
137. *Id.*
138. S.D. CODIFIED LAWS § 25-4-45 (Michie 1999). The statute reads:

> In an action for divorce, the court may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same. In awarding the custody of a child, the court shall be guided by consideration of what appears to be for the best interests of the child in respect to the child's temporal and mental and moral welfare. If the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question. As between parents adversely claiming the custody, neither parent may be given preference over the other in determining custody.

Id.

139. Roger M. Baron, *Child Custody Determinations in South Dakota: How South Dakota Courts Decide Child Custody Cases*, 40 S.D. L. REV. 411, 411-12 (1995).
140. *See* Jeschke v. Wockenfuss, 534 N.W.2d 602, 604-05 (S.D. 1995) (affirming S.D. CODIFIED LAWS § 25-4-45 as the trial court's authority to change custody).

Montana, like North Dakota, has included a subsection dealing with parental alienation in its best interests of the child factors.[141] It reads, "adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions."[142] In addition, Montana's Amendment of parenting plan—mediation statute addresses frustration of visitation as a symptom of parental alienation.[143] It allows the court to modify a parenting plan when "one parent has willfully and consistently . . . refused to allow the child to have any contact with the other parent; or . . . attempted to frustrate or deny contact with the child by the other parent. . . ."[144] Montana's caselaw shows its readiness and its need to address parental alienation.[145]

D. WAYS TO DEAL WITH PARENTAL ALIENATION

1. *Sue for Alienation of Children's Affection*

An unpopular suggestion in dealing with parental alienation was to create a tort for parental alienation.[146] A victim parent could sue the alienating parent for alienation of the children's affections.[147] A lower Minnesota court created the tort of "intentional interference with custody rights," to deal specifically with cases where the noncustodial parent kidnapped the children.[148] The Minnesota Supreme Court rejected the tort, holding that "[e]xpanding the adversarial process to include this new tort is contrary to the best interests of children and will only intensify intrafamily conflict growing out of marriage dissolution without

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141. MONT. CODE ANN. § 40-4-212(1)(m) (2001).

142. *Id.* Montana's parenting plan encompasses support, custody, and visitation. *Id.*

143. MONT. CODE ANN. § 40-4-219(1)(d)(i) & (ii) (2001).

144. *Id.*

145. *See In re* Marriage of Miller, 825 P.2d 189, 192 (Mont. 1992) (transferring custody to noncustodial father when custodial mother's refusal of visitation was listed among factors that endangered the children); *see also In re* Marriage of Moseman, 830 P.2d 1304, 1307 (Mont. 1992) (transferring custody to noncustodial mother by finding parental alienation in custodial father's acts of denying visitation, refusing to give the mother his telephone number, not telling the mother of one of the children's tonsillectomy, and not telling the mother of the children's school performance); *In re* Marriage of Cook, 725 P.2d 562, 565 (Mont. 1986) (transferring custody to noncustodial father because custodial mother's alienating acts, such as threatening to move to another country and never allowing the father to see the children again, were endangering the children's mental and emotional health).

146. Niggemyer, *supra* note 77, at 575.

147. *Id.*

148. *Id.* at 575-76.

deterring parental abduction."[149] Based upon this negative reception, a future for the tort of parental alienation is unlikely.[150]

2. *Establish Joint Legal Custody*

A second way to deal with parental alienation and the accompanying parental alienation syndrome is to establish joint legal custody.[151] In this arrangement, both parents share in making decisions for raising the child.[152] One parent may still be the custodial parent.[153] In this arrangement, however, the children often reside with one parent on certain days of the week and with the other parent on the remaining days of the week, or the parents alternate living in the custodial home, with the result that the children do not move between homes.[154]

Adherents of joint legal custody see it as a means of doing away with the custody battle in which the winning parent gets physical custody and the primary parenting rights.[155] Both parents remain active in their children's lives and the children see less conflict.[156] Those who do not see joint legal custody as the answer to the parental alienation/parental alienation syndrome problem, focus on two divorcing parents who cannot get along.[157] "[W]hen post-decree squabbles develop, the law is not really equipped with a mechanism to promptly designate the most appropriate custodian . . . leaving the child in limbo pending a judicial resolution."[158]

In most cases, joint custody does not work well, but it is a viable solution when the parents are willing to make it work.[159] Possessing

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149. Larson v. Dunn, 460 N.W.2d 39, 47 (Minn. 1990). The Minnesota Supreme Court reasoned that its adoption of the Uniform Child Custody Jurisdiction Act and the courts' protection of child custody and visitation do a better job of protecting children from being kidnapped by the noncustodial parent, than would a tort law for parental alienation. *Id.*

150. Niggemyer, *supra* note 77, at 576.

151. Sexton, *supra* note 65, at 777-78; *see also* IRA MARK ELLMAN ET AL., FAMILY LAW 666 (3d ed. 1998) (distinguishing between joint physical custody in which both parents share in the physical care of the child, and joint legal custody in which both parents have legal authority to make important decisions that affect the child).

152. Baron, *supra* note 139, at 430.

153. *Id.* at 432.

154. *Id.*

155. *Id.*

156. Sexton, *supra* note 65, at 775-76.

157. *See Baron*, *supra* note 139, at 431 n.127 (quoting a judge who said, "[t]hese people have already had one shot at sharing the responsibilities and decisions of child rearing–it was called marriage. And they are in front of me precisely because they cannot make a success of sharing those responsibilities and decisions." (quoting Catherine N. Carroll, *Ducking the Real Issue of Joint Custody*, 5 FAM. ADVOC. 18, 21 (1982))).

158. *Id.* at 431.

159. *Id.* at 432.

good problem solving skills and also living in the same community are two parental requirements to making it work.[160]

3. *Mediation*

Mediation is a third method to try to avoid parental alienation.[161] In mediation, a neutral third party works with the parents to resolve their differences involving the children.[162] Mediation can occur at any time before, during, or after the divorce proceedings.[163]

A parent can get a court order making mediation mandatory in the event of conflicts.[164] One suggestion is that both the custodial parent and the noncustodial parent give the court a periodic report on the absence or presence of alienating behavior.[165] When the court sees no such behavior, it can simply file the report away.[166] When it does find alienating behavior, the court can require mediation.[167] Only when mediation fails would the parties have to go back into court and litigate their differences.[168]

Many states also include educational programs with mediation.[169] Parents are educated about the process of divorce and how it impacts themselves, as well as how it impacts their children.[170] The goal is to improve parental attitudes and behavior through awareness and knowledge.[171]

III. ANALYSIS

The North Dakota Supreme Court had to consider four issues when it decided *Hendrickson III*: (1) whether the trial court abused its discretion when it denied change of venue,[172] (2) whether it was erroneous to

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160. *Id.*
161. Darnall, *supra* note 99, at 358.
162. *Id.*
163. *Id.*
164. *Id.* California has mandatory mediation when the court sees custody and visitation contests in pleadings. CAL. FAM. CODE § 3170(a) (West Supp. 2001).
165. Niggemyer, *supra* note 77, at 588.
166. *Id.*
167. *Id.*
168. *Id.*
169. Schepard, *supra* note 75, at 411.
170. *Id.*
171. *Id.*
172. Hendrickson v. Hendrickson (*Hendrickson III*), 2000 ND 1, ¶ 10, 603 N.W.2d 896, 900. Diane stated that the parties would be inconvenienced if they had to come to Dickinson for the remand hearing. *Id.* She cited *Whitehead v. Whitehead*, 336 N.W.2d 363, 365-66 (N.D. 1983), in which the court held that a motion for change of venue should not be denied when both parties and all material witnesses lived outside the county. *Id.* This court noted that in *Whitehead*, the request of change of venue was made before the evidentiary hearing. *Id.* In this case, the evidentiary hearing has already

change custody to Mark,[173] (3) whether it was erroneous to deny visitation to Diane for one year,[174] and (4) whether the trial court abused its discretion when it ordered Diane to attend counseling with a counselor of Mark's choice.[175]

Diane asserted that the trial court changed custody to Mark to punish her for contempt of court.[176] This court noted that the trial court's order of April 26, 1999 contained no language finding Diane in contempt.[177] Therefore, there was no reason to conclude the change of custody occurred as a contempt sanction.[178] Diane further asserted that Mark had withdrawn his April 1998 motion to change custody, and therefore, the trial court had no power to change the custody.[179] The supreme court noted, however, that Mark had stated in his cross-appeal in *Hendrickson II* that the court should have granted his motion to change custody of the children.[180] It was therefore proper to include the change of custody issue during the remand hearing.[181]

Diane's next contention was that even if it was proper for the trial court to hear the change of custody issue, it could not order a change of custody without an evidentiary hearing.[182] The court noted that a full evidentiary hearing had been held before *Hendrickson II* was appealed.[183] It was not necessary to hold an evidentiary hearing for a second time at the remand hearing.[184]

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occurred and there are no witnesses to be inconvenienced. *Id.* The court concluded that the trial court did not abuse its discretion when it denied Diane's motion for change of venue. *Id.*

173. *Id.* ¶¶ 11-20, 603 N.W.2d at 900-02.

174. *Id.* ¶ 21, 603 N.W.2d at 902-03.

175. *Id.* ¶¶ 22-23, 603 N.W.2d at 903.

176. *Id.* ¶ 12, 603 N.W.2d at 900. Diane asserted in her Reply Brief to the trial court's order of April 26, 1999 that she was held in contempt because she had come into the disfavor of the court. Appellant's Reply Brief at 2, *Hendrickson III* (No. 990123). That disfavor arose out of her objection when the trial court accepted in full the report of GAL Karen Mueller. *Id.* Diane rejected the judge's findings that there was a significant change in circumstances and that it was in the best interests of the children to change custody to Mark. *Id.*

177. *Hendrickson III*, ¶ 13, 603 N.W.2d at 901.

178. *Id.* This court rejected Diane's assertions that the lower court held her in contempt and changed custody without going through the two-step process discussed in *Mosbrucker v. Mosbrucker*, 1997 ND 72, 562 N.W.2d 390. Appellant's Brief at 7, *Hendrickson III* (No. 990123).

179. *Hendrickson III*, ¶ 12, 603 N.W.2d at 900.

180. *Id.* ¶ 14, 603 N.W.2d at 901.

181. *Id.*

182. *Id.* ¶ 12, 603 N.W.2d at 900.

183. *Id.* ¶ 15, 603 N.W.2d at 901.

184. *Id.* The court looked at N.D. CENT. CODE § 14-09-06.6(4) for further authority. *Id.* This subsection states the requirements for a party seeking modification of a custody order. N.D. CENT. CODE § 14-09-06.6(4) (1997). The movant must file the moving papers and give notice to the other party. *Id.* The court will set a date for an evidentiary hearing if it determines the movant has made a prima facie case to change custody. *Id.* The court noted the evidentiary hearing was held, and the statute did not require additional evidentiary hearings. *Hendrickson III*, 2000 ND 1 ¶ 15, 603 N.W.2d 896, 901.

Diane then argued that the trial court's decision to change custody to Mark was clearly erroneous because there was no evidence to support the decision.[185] The court cited to *Mosbrucker v. Mosbrucker*[186] for the test of whether a finding of fact is clearly erroneous.[187] The rule in *Mosbrucker* states, "[a] finding of fact is clearly erroneous if it is [1] induced by an erroneous view of the law, [2] if there is no evidence to support it, or [3] if it is clear to the reviewing court that a mistake has been made."[188]

Diane's assertion of no evidence relied on the two-step analysis a court must apply when it considers a change of custody: (1) whether there has been a significant change of circumstances since the divorce, and (2) if there has been a significant change of circumstances, whether that change requires a change of custody to protect the best interests of the child.[189] The court listed many of Diane's actions that contributed to alienation of the children toward their father as well as the frustration of Mark's visitations.[190] Diane took the children away from the home at the time of a scheduled visitation.[191] She refused to let Mark take the children at other attempted visitations.[192] She refused to cooperate with Mark when he wanted to schedule visitations.[193] The court noted that many attempts were made to improve the visitation, but none of them succeeded.[194]

The court relied on *Blotske v. Leidholm*,[195] which stated that a court should first try to make a more rigid visitation schedule before it considered a change of custody.[196] There had been many attempts to do this in the present case.[197] The court's ultimate authority was the Allegation of Harm to Child statute.[198] It stated that persistent frustration of visitation could make a change of custody necessary when it creates an environment that "may endanger the child's physical or emotional

185. *Hendrickson III*, ¶ 16, 603 N.W.2d at 901.

186. 1997 ND 72, 562 N.W.2d 390.

187. Mosbrucker v. Mosbrucker, 1997 ND 72, ¶ 6, 562 N.W.2d 390 at 392; *see also* N.D. R. CIV. P. 52(a) (stating that "findings of fact . . . shall not be set aside unless clearly erroneous").

188. *Hendrickson III*, ¶ 16, 603 N.W.2d at 901 (citing the rule from *Mosbrucker*).

189. *Id.* Diane asserted that there was no change of circumstances because there had been no further deterioration of the relationship between the children and Mark. Brief for Appellant at 18, *Hendrickson III* (No. 990123).

190. *Hendrickson III*, ¶ 17, 603 N.W.2d at 901.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. 487 N.W.2d 607 (N.D. 1992).

196. *Blotske*, 487 N.W.2d 607, 610 (N.D. 1992).

197. *Hendrickson III*, 2000 ND 1, ¶ 6, 603 N.W.2d at 899.

198. N.D. CENT. CODE § 14-09-06.5 (1997).

health or impair the child's emotional development."[199] The court stated that it could deduce from the trial court's findings that the lower court made a correct conclusion of law.[200] The record showed that Diane, by making it impossible for Mark to visit the children, was hurting the children.[201] The children had a right to visitation by their noncustodial parent.[202] To withhold that right worked against the best interests of the children.[203] The trial court's decision to change custody of the children to Mark was not clearly erroneous because the other remedy of more specific visitation was first tried.[204]

Diane made a last assertion regarding the change of custody in which she argued that she did not get a chance to cross-examine the guardian ad litem regarding her report.[205] The supreme court noted that this issue was raised for the first time in Diane's reply brief.[206] This goes against the rule that a reply brief must address only the new matters that are raised in appellee's brief.[207] Therefore, the court stated that it would not address the matter of Diane not being able to cross-examine the GAL.[208]

Next the court reviewed the trial court's order to deny visitation for one year.[209] The court reiterated that the child has a right to visitation from the noncustodial parent.[210] It went on to say that the situation is reversed now that Mark has custody, and Diane, as the non-custodial parent, should not be denied visitation.[211] Visitation should not be denied unless it would "endanger the child's physical or emotional health," and there would have to be a demonstration of that kind of harm before visitation should be denied.[212] The court determined that supervised visitation of the children by Diane should be tried before she is denied visitation.[213]

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199. *Id.*
200. *Hendrickson III*, ¶ 19, 603 N.W.2d at 902.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* ¶ 20.
206. *Id.*
207. N.D. R. APP. P. 28(c). The court noted in a footnote that its holding in *Quarne v. Quarne* remained intact. *Hendrickson III*, ¶ 20, 603 N.W.2d at 902 n.1. The court held in that case that "it was reversible error for a trial court, when making a custody decision, to rely on facts in an investigator's report without allowing the party to call and cross-examine the investigator." *Id.* (citing Quarne v. Quarne, 1999 ND 188,¶ 6, 601 N.W.2d 256, 258).
208. *Hendrickson III*, ¶ 20, 603 N.W.2d at 902.
209. *Id.* ¶ 21.
210. *Id.* (citing Blotske v. Leidholm, 487 N.W.2d 607, 610 (N.D. 1992)).
211. *Id.*
212. *Id.* at 902-03.
213. *Id.* at 903.

The court's final issue was whether the court abused its discretion when it ordered that Diane attend counseling with a counselor of Mark's choosing.[214] The court cited *Krizan v. Krizan*[215] where it had laid out a rule to determine when a trial court abused its discretion.[216] The rule states, "[a] trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination."[217] The trial court had concluded that Diane's behavior showed she needed counseling, but letting Mark choose the counselor for Diane was not the best way to serve that need.[218] It was an abuse of discretion for the trial court to allow Mark to choose Diane's counselor.[219]

The court then looked at *Johnson v. Schlotman,*[220] which held that a trial court was correct to order a child to receive counseling if it was in the child's best interests.[221] The court determined that it was reasonable for a trial court to order counseling for a parent as well, if it is in the best interest of the child.[222] The court agreed that the trial court was correct when it ordered counseling for Diane.[223] The court stated that counseling is especially important where there is parental alienation because the child's emotional attachment to the alienated parent may never be strong without treatment of the alienating parent.[224] The court did not agree that the situation would be best served by letting Mark choose the counselor.[225] The court ordered that the trial court should obtain a list of counselors from both Diane and Mark, and then choose the counselor for Diane from the names on the lists.[226]

In *Hendrickson III*, the North Dakota Supreme Court held that (1) the trial court did not abuse its discretion when it denied a change of venue, (2) there was enough evidence to warrant changing custody of the

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214. *Id.* ¶ 22.

215. 1998 ND 186, 585 N.W.2d 576.

216. *Krizan*, ¶ 13, 585 N.W.2d at 580.

217. *Hendrickson III*, 2000 ND 1, ¶ 22, 603 N.W.2d 896, 903 (citing *Krizan*, ¶ 13, 585 N.W.2d at 580).

218. *Id.* ¶ 24.

219. *Id.* ¶ 22.

220. 502 N.W.2d 831 (N.D. 1993).

221. *Johnson*, 502 N.W.2d at 835-36.

222. *Hendrickson III*, ¶ 23, 603 N.W.2d at 903. By approving the trial court's order of counseling for the children in *Johnson*, the North Dakota Supreme Court could determine in *Hendrickson III* that the trial court could order counseling for the parent if that counseling was in the best interests of the child. *Id.* (citing *Johnson*, 502 N.W.2d at 835-36).

223. *Id.*

224. *Id.*

225. *Id.* ¶ 24.

226. *Id.*

children to Mark, (3) Diane as the noncustodial parent was entitled to supervised visitations, and (4) the counselor for Diane was to be chosen from among the list of names supplied to the trial court by both Mark and Diane.[227] The court remanded the case for modification.[228] Subsequently, after remand, custody was changed again because of the behavior of the children.[229]

IV. IMPACT

The problem of parental alienation and its accompanying parental alienation syndrome will not soon go away.[230] The abandonment of the "tender years" doctrine, presuming the mother to be the better parent, and the adoption of the best interests of the child doctrine, awarding custody to the parent who has the best parenting capacity, have both created an in- and out-of-courtroom competition for the best parent award.[231] This competition can take the form of parental alienation, such as turning the children away from one parent in an effort to prove that the other is the better parent.[232] In the extreme cases, the child takes an active part in putting down the victim parent in parental alienation syndrome.[233]

The North Dakota Supreme Court used strong language in *Hendrickson III*.[234] It stated that divorced parents may not use their children as weapons to win battles in their war against each other.[235] It also stated that children need a healthy relationship with both parents.[236] Both parents (custodial and noncustodial) have a duty to nurture the child's relationship with the other parent.[237] The court took the difficult step of awarding custody to the noncustodial parent when the custodial parent prevented visitation between the children and the noncustodial parent.[238]

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227. *Id.* ¶ 25, 603 N.W.2d at 903.

228. *Id.*

229. *In re* C.H., 2001 ND 37, ¶ 19, 622 N.W.2d 720, 725. The custody issue came before the juvenile court because of the children's unruly behavior while in their father's custody. *Id.* ¶ 15, 622 N.W.2d at 724-25. The Supreme Court affirmed the juvenile court's decision to place custody of the children back to Diane. *Id.* ¶ 19, 622 N.W.2d at 725. Justice Sandstrom dissented, arguing that the mother created the toxic situation and this decision only rewarded her behavior. *Id.* ¶ 25, 622 N.W.2d at 725-26.

230. GARDNER, *supra* note 79, at 68.

231. *Id.*

232. *Id.*

233. *Id.* at 69.

234. *Hendrickson III*, 2000 ND 1, ¶ 25, 603 N.W.2d 896, 903.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

Hendrickson III has already been cited by twelve North Dakota Supreme Court cases. In *Kautzman v. Kautzman*[239] the court used *Hendrickson III* as authority to rule that an additional evidentiary hearing was not needed.[240] The court makes it clear that "when we reverse and remand for a trial court to address an issue or to redetermine a matter, unless otherwise specified, the trial court may decide based on the evidence already before it or may take additional evidence."[241]

Olson v. Olson[242] cited and quoted *Hendrickson III* to make the point that children need a healthy relationship with both parents and both parents must facilitate that bond.[243] The court allowed the custodial mother to move with the child to Houston, Texas, and it used the *Hendrickson III* language to point out the need for the child to have visitation with her father who remained in North Dakota.[244]

Schiff v. Schiff[245] cited *Hendrickson III* to make the point that visitation is not merely a privilege of the noncustodial parent; it is a right of the child.[246] Physical or emotional harm must be demonstrated before that visitation is denied.[247]

Anderson v. Resler[248] cited both *Hendrickson II* and *Hendrickson III*.[249] The court cited *Hendrickson II* to show that a change of custody is a drastic measure and should be used only after alternate solutions have been tried.[250] It then cited *Hendrickson III* to further explain the process of change of custody when frustration of visitation is present.[251]

In *Hurt v. Hurt*,[252] the North Dakota Supreme Court reasoned that both parents seemed to be frustrating visitation.[253] *Hendrickson III* was cited when the court stated that visitation by the noncustodial parent is

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239. 2000 ND 116, 611 N.W.2d 883.

240. *Kautzman*, ¶ 8, 611 N.W.2d at 885.

241. *Id.* ¶ 7 (citing Moch v. Moch, 1998 ND 95, ¶ 9, 578 N.W.2d 129 and Kern v. Kelner, 32 N.W.2d 169, 174 (N.D. 1948)).

242. 2000 ND 120, 611 N.W.2d 892.

243. *Olson*, ¶ 8, 611 N.W.2d at 896.

244. *Id.* ¶ 6, 611 N.W.2d at 895.

245. 2000 ND 113, 611 N.W.2d 191.

246. *Schiff*, ¶ 9, 611 N.W.2d at 195; *see also* McDowell v. McDowell, 2001 ND 176, ¶ 28, 635 N.W.2d 139, *available at* 2001 N.D. LEXIS 188, at *22.

247. *Id.*; *see also* Johnson v. Johnson, 2000 ND 170, ¶ 24, 617 N.W.2d 97, 105 (citing *Hendrickson III* to point out that visitation by the noncustodial parent is a right of the child and is presumed to be in the best interests of the child); K.L.G. v. S.L.N., 2001 ND 33, ¶ 11, 622 N.W.2d 230, 235 (2001) (citing *Hendrickson III* and stating the presumption that visitation by the noncustodial parent is in the best interests of the child, and denial of visitation should occur only when physical or emotional harm may result).

248. 2000 ND 183, 618 N.W.2d 480.

249. *Anderson*, ¶ 10, 618 N.W.2d at 485.

250. *Id.*

251. *Id.*

252. 2001 ND 13, 621 N.W. 2d 326.

253. *Hurt*, ¶ 14, 621 N.W.2d at 331.

not only in the best interests of the child; it is a right of the child.[254] When that visitation is frustrated by the custodial parent, the court may be justified in changing custody.[255] *Hendrickson II* was cited when the court reasoned that a custodial mother has a duty to nurture her children's relationship with their noncustodial father, even when she sees imperfections in the father.[256]

The cases citing both *Hendrickson II* and *Hendrickson III* show a willingness of the North Dakota Supreme Court, like its neighboring supreme courts, to work out situations that maximize the child's relationship with both parents.[257] This kind of reasoning goes directly toward solving the problem of parental alienation and its accompanying parental alienation syndrome.[258]

V. CONCLUSION

A goal to improve parental attitudes and parental behavior in a divorce proceeding can be characterized as a lofty goal. Yet, at the end of the day, it is the parents who choose how to interact with their children—whether in a constructive or destructive way. *Hendrickson III* makes it clear that the parent who chooses to destroy the child's relationship with the other parent by withholding visitation will be seen by the court as a parent who is not working for the best interests of the child.[259] The court may change custody in that situation, for the good of the child.[260] It is not about being the better parent. It is about what is in the best interests of the child.

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254. *Id.*
255. *Id.*
256. *Id.*
257. *See* Schiff v. Schiff, 2000 ND 113, ¶ 9, 611 N.W.2d 191, 195 (stating that visitation by the noncustodial parent is a right of the child); *see also Hurt*, ¶ 14, 621 N.W.2d at 331(stating it is the custodial parent's duty to nurture the child's relationship with the noncustodial parent).
258. *See Hurt*, ¶ 14, 621 N.W.2d at 331 (stating that the custodial parent has a duty not to "poison the well" and subsequently turn the children away from their noncustodial parent).
259. *Hendrickson III*, 2000 ND 1 ¶ 18, 603 N.W.2d 896, 901-02.
260. *Id.*