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INAPPROPRIATE PARENTAL INFLUENCE: A NEW APP FOR TORT LAW AND UPGRADED RELIEF FOR ALIENATED PARENTS

*Sandi S. Varnado**

INTRODUCTION

A. A Hypothetical¹

Abe and Betty married in 1996. Abe was still in college while Betty was a successful pharmaceutical representative, bringing home a very good salary on which the young couple lived. Not long into the marriage, Abe and Betty had two children, Cara (born in 1998) and David (born in 2000). Abe began to schedule classes at night so that he could be a stay-at-home dad to his little ones. Betty continued her role as the primary breadwinner for the family but had a close relationship with the children.

As their marriage continued, Abe and Betty began to feel the pressures of life and parenting. The two began to disagree and argue with increasing frequency. Finally, in April 2010, Betty moved out and filed for divorce. Abe was devastated by her decision and begged Betty to give their marriage another shot. Betty refused. Little did Abe know that Betty was in love with a co-worker with whom she had begun an extramarital affair.

In Betty's divorce petition, she requested that she and Abe be awarded joint custody of the children. However, she also asked that the court name her as the children's domiciliary parent and allow Abe liberal visitation. Abe balked at Betty's second request and responded with a request that the court name him domiciliary parent.

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1. This hypothetical is fictional. However, its facts have been collected from various cases and news stories.

The court granted the couple's divorce and, after a hearing on the issue of custody, named Abe the children's domiciliary parent.

On January 1, 2011, Abe and the children moved into a nearby apartment complex. Not long thereafter, Abe got wind of Betty's new relationship and found out that it had begun while he and Betty were still married. Although Abe had been committed to fostering the children's relationship with Betty, he began to make comments about Betty in front of the children, calling her "selfish." Soon after, he told the children about Betty's "new boyfriend," although Betty had not yet introduced her new boyfriend to her children. Before long, Abe began to make disparaging comments about Betty on a daily basis. The children began to resist visiting their mother. Betty, who always had a close and loving relationship with the children, was horrified at this turn of events and began to drink to cope with the pain.

Abe was happy that the children could see their mother for what she was, and he continued to criticize her lifestyle choices, telling the children that their mother enjoyed partying during her spare time. He also told the children that he could not afford to purchase certain things for them because their mother did not pay enough child support, instead using her money to buy things for her new boyfriend and to support her drinking habit.

Upon their return from visits with Betty, Abe began to question the children about Betty's parenting. For example, when the children were ill at Betty's, Abe questioned them on whether Betty had bothered to take their temperature or give them any medicine. On the eve of each visit with Betty, Abe began to require the children to pray for their safety "while we are at Mom's."

One day, when Betty arrived to pick up the children, Abe refused to answer the door, yelling through the mail slot that the children wanted nothing to do with her. Abe changed his telephone number and terminated all contact and communication between Betty and their children, blocking her emails and forbidding the children from emailing or otherwise contacting her. He told officials at the children's school not to send any paperwork or information about the children to Betty. He did allow Betty to see the children from time to time, but the children were uncooperative and sullen. Betty completely changed her parenting style, choosing to passively defer to the children's wishes so as to not anger them. Meanwhile, Abe continued to tell the children false, spiteful things about Betty, and Betty began to see a psychiatrist to deal with her emotional distress.

Betty filed for relief in family court, specifically asking for a change of custody, but the court denied the request, noting that the children

seemed happy and were succeeding both academically and in their extracurricular activities. The judge noted that although Abe was alienating the children from Betty, the best interest of the children dictated that they remain in Abe's care. Betty was horrified and filed a civil suit detailing all of Abe's alienating conduct. Abe responded with a motion to dismiss, which the court granted, ruling that the jurisdiction did not recognize claims for alienation of affections (of children or otherwise) and that Abe's conduct, as described by Betty, was not extreme or outrageous. Abe's conduct therefore did not meet the criteria for a claim of intentional infliction of emotional distress.

B. *Overview of Parental Alienation*

It is almost universally recognized that a child benefits from a close relationship with both of his² parents.³ However, when parents divorce or physically separate, they publicly declare that they are unwill-

2. The author realizes that parental alienation has generated a battle between the sexes. See, e.g., Kirk Makin, *Parental Alienation Cases Draining Court Resources*, *GLOBE & MAIL*, May 13, 2009, at A8 (“[T]he term ‘parental alienation’ and the debate itself have been hijacked by two hopelessly polarized groups, fathers’ rights activists and feminists, who each produce a simplistic narrative.”). On the one hand, some men’s rights activist groups claim that mothers, motivated by revenge, alienate the child from the father by falsely alleging abuse on the part of the father. Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 *FAM. CT. REV.* 10, 10 (2010). On the other hand, some feminists claim that parental alienation does not even exist. *Id.* Others believe that “Parental Alienation is a power dynamic, not a gender-based dynamic.” *200,000 Children Suffer from Parental Alienation*, *PARENTAL RTS.* (Aug. 13, 2010, 1:57 AM), <http://mkg4583.wordpress.com/2010/08/13/200000-children-suffer-from-parental-alienation-the-american-psychiatric-association-considers-parental-alienation-disorder-for-the-dsm-%E2%80%935> (quoting Brian Ludmer, a family law lawyer from Toronto, Canada). These commentators also assert that alienation strategies are universal ones, employed by either sex. Amy J. L. Baker & Douglas Darnall, *Behaviors and Strategies Employed in Parental Alienation: A Survey of Parental Experiences*, 45 *J. DIVORCE & REMARRIAGE* 97, 121 (2006).

3. See, e.g., *Coursey v. Superior Court of Sutter Cnty.*, 239 Cal. Rptr. 365, 368 (Ct. App. 1987); Chaim Steinberger, *Father? What Father? Parental Alienation and Its Effect on Children* (pt. 2), *N.Y. ST. B.A. FAM. L. REV.*, Fall 2006, at 9, 13 (“[T]he best interests of [each] child [is] furthered by being nurtured and guided by both of [its] natural parents.” (second and third alterations in original) (quoting *Young v. Young*, 628 N.Y.S.2d 957, 963 (App. Div. 1995))); Michael R. Walsh & J. Michael Bone, *Parental Alienation Syndrome: An Age-Old Custody Problem*, *FLA. B.J.*, June 1997, at 93, 95 (“Of all of the research on the effects of separation and divorce, the one conclusion that is never debated is that children fare better when they maintain a close relationship with both parents.”).

The exception lies “in the case of physical, sexual, or clear emotional abuse.” Walsh & Bone, *supra*, at 95; see also Ira Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 *J. AM. ACAD. MATRIMONIAL LAW.* 131, 132 (2002) (“[A] parent deserving alienation would be one with a repeated history of physically abusing his or her children in an unpredictable manner that has failed to respond appropriately to numerous professional attempts to control the destructive behaviors.”).

ing or unable to get along with each other.⁴ Nevertheless, they share a child who hopefully wants, and certainly needs, both parents. To respect and foster those wants and needs in the wake of the family rupture and to satisfy the public interest in rearing well-adjusted children of divorce, parents must “attempt to cooperate on a regular basis (sometimes for many years) after their joint life is terminated,”⁵ and each should encourage the children’s relationships with the other parent. Unfortunately, not all parents do.

Approximately ten percent of divorcing parents actually litigate for custody of their shared child,⁶ but even in the absence of a custody battle,⁷ some divorcing parents engage in an intraparent competition in which the prize to be won is their child.⁸ Divorce can bring out the worst in adults.⁹ After all, the adversarial nature of divorce, like any litigation, clearly delineates a winner and a loser; it does not encourage cooperation during or after the lawsuit.¹⁰ This competition sometimes leads to guerilla warfare between the parents, where one or both parents attempt to destroy the parent–child relationship be-

4. See Kathleen Niggemyer, Comment, *Parental Alienation Is Open Heart Surgery: It Needs More than a Band-Aid to Fix It*, 34 CAL. W. L. REV. 567, 568 (1998).

5. *Id.*

6. Andrew Schepard & Stephen W. Schlissel, *Planning for P.E.A.C.E.: The Development of Court-Connected Education Programs for Divorcing and Separating Families*, 23 HOFSTRA L. REV. 845, 859 n.33 (1995). These cases have been referred to as “some of the bloodiest battlefields in the gender wars.” Cathy Young, *Parent Trap*, BOISE WKLY. (Jan. 3, 2007), <http://www.boiseweekly.com/boise/parent-trap/Content?oid=930620>. Additionally, many nonmarried couples are involved in child-custody cases. Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 659 (2007); 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. REV. 395, 399 (2000). By way of example, as of 2004, thirty-five percent of parents participating in mediation for custody disputes in California had never been married. Edwards, *supra*, at 659.

7. See Douglas Darnall, *Parental Alienation: Not in the Best Interest of the Children*, 75 N.D. L. REV. 323, 323 (1999) (“[Parental] alienation can occur in even the friendliest of divorces.”).

8. Louann C. McGlynn, Recent Case, *Parental Alienation: Trash Talking the Non-Custodial Parent Is Not Okay*, *Hendrickson v. Hendrickson*, 2000 ND 1, 603 N.W.2d 896, 77 N.D. L. REV. 525, 540 (2001); Niggemyer, *supra* note 4, at 570; see also Anita Vestal, *Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model*, 37 FAM. & CONCILIATION CTS. REV. 487, 487 (1999) (“Many experts in family law . . . have observed an increase in deceptive and manipulative tactics used by divorcing couples.”).

9. *Saturday Today* (NBC television broadcast Apr. 28, 2007).

10. See Donna J. Martinson, *One Case—One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High-Conflict Cases*, 48 FAM. CT. REV. 180, 182–83 (2010); see also Kenneth H. Waldron & David E. Joanis, *Understanding and Collaboratively Treating Parental Alienation Syndrome*, 10 AM. J. FAM. L. 121, 130 (1996) (“The American court system is inherently adversarial, which does not serve the family in conflict well. The adversarial process further alienates and polarizes. Unfortunately, the charges and countercharges inherent in a PAS-involved family fit tongue-and-groove into the adversarial system.”).

tween the other parent and the child.¹¹ Referred to in this Article as “parental alienation,”¹² this type of behavior illustrates a parent’s ultimate disregard and disrespect for that relationship.¹³

11. See *Larson v. Dunn*, 460 N.W.2d 39, 48 (Minn. 1990) (Popovich, C.J., dissenting) (“[T]he parent-child relationship is increasingly threatened by family members.”); see also Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 441 (2008) (“A divorced parent’s anger toward the other parent can lead to excessive conflict for years after the legal relationship has ended, harming both parents and their children.”).

12. The focus of this Article is parental alienation, not the similar-sounding parental alienation syndrome (PAS) with which it is often confused. RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME*, at xxviii (2d ed. 1998); see also Darnall, *supra* note 7, at 325–27 (discussing the distinction between parental alienation and PAS). PAS, a term coined by Dr. Richard Gardner in the 1980s, is defined as

a disorder that arises in the context of child-custody disputes. Its primary manifestation is the child’s campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent’s indoctrinations and the child’s own contributions to the vilification of the target parent. When true parental abuse and/or neglect is present the child’s animosity may be justified, and so the parental alienation syndrome explanation for the child’s hostility is not applicable.

GARDNER, *supra*, at xx.

PAS and parental alienation differ in that parental alienation refers to a wide scope of behavior and concerns only the alienator parent, whereas PAS focuses on a more narrow scope of behavior and concerns the behavior of both the alienator parent and the child. See Darnall, *supra* note 7, at 325–26; accord McGlynn, *supra* note 8, at 533. In comparing the two, some have posited that PAS is a subcategory of parental alienation. E.g., Richard A. Gardner, *Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?*, 30 AM. J. FAM. THERAPY 93, 98–99 (2002); Turkat, *supra* note 3, at 143. 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, *supra* note 2, at 12 (noting that parental alienation “is not a new phenomenon”); Maldonado, *supra* note 11, at 450; Turkat, *supra* note 3, at 131 (“Attorneys who litigate child custody cases are accustomed to hearing clients charge that their children are being turned against them by the other parent.”); Young, *supra* note 6 (“Whether or not a psychological ‘syndrome’ exists, parental alienation clearly does.”). As a news reporter glibly claimed, “[A]nybody old enough to drink coffee knows that embittered parties to divorce can and do manipulate their children.” Kathleen Parker, Editorial, *Syndrome or No, Alienation a Bad Result*, SUN SENTINEL, May 18, 2006, at 17A; see also L.F. Lowenstein, *Parental Alienation and the Judiciary*, 67 MEDICO-LEGAL J. 121, 121 (1999), available at <http://www.nlada.org/DMS/Documents/1124116592.13/LLowenstein%20-%20Parental%20Alienation%20and%20the%20Judiciary.pdf>.

Because this Article addresses parental alienation and not PAS, the propriety of referring to PAS as a “syndrome” and the admissibility of expert testimony regarding PAS exceed the scope of this Article.

13. This disrespect by some parents flies in the face of judicial recognition of the importance of the parent–child relationship. *Plante v. Engel*, 469 A.2d 1299, 1301 (N.H. 1983) (recognizing the “sanctity in the union of parent and child”). The U.S. Supreme Court has also “recognized that the relationship between [the] parent[s] and the child is constitutionally protected” and “that the rights to conceive and to raise one’s children have been deemed ‘essential,’” considering those rights “far more precious . . . than property rights.” *Laurel S. Banks, Note, Schutz v. Schutz*, 31 U. LOUISVILLE J. FAM. L. 105, 110 (1992) (alterations in original) (quoting *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (internal quotation marks omitted); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *May v. Anderson*, 345 U.S. 528, 533 (1953), respectively).

As the hypothetical demonstrates, parents employ a vast array of tactics to torture each other through their children.¹⁴ Yet the law as it currently stands does not offer a complete remedy for the damage that alienated parents like Betty suffer,¹⁵ nor does it sufficiently deter parental alienation. Traditionally, alienated parents have turned to family law for relief. In some cases, they have found courts hesitant to redress the injuries that parental alienation inflicts upon their relationship with their children. Even when that particular wrong is remedied by family law, alienated parents like Betty are left without a remedy for their resulting emotional distress. This is unsurprising, given that family law is not designed to remedy emotional distress in any context, including parental alienation. Moreover, the relief provided by family law does not impose sufficient costs to deter alienating parents' harmful conduct.

Therefore, in more recent times, alienated parents attempting to upgrade their legal relief have turned to tort law.¹⁶ While parental alienation, as a course of conduct, is nothing new to divorcing couples or their attorneys,¹⁷ asserting a tort-based cause of action to remedy that

14. Maldonado, *supra* note 11, at 449 (“Angry spouses often hurt the other spouse any way they can.”); Kiran Krishnamurthy, *Theory Issue in Custody Dispute*, RICHMOND TIMES DISPATCH, Nov. 12, 2006, at B1 (“[M]anipulative parents will go to extreme lengths to hurt a former spouse.”).

15. Such a parent has also been called the “target parent.” See, e.g., Steinberger, *supra* note 3, at 9 (internal quotation marks omitted). The terms are used synonymously herein.

Certainly others are affected by parental alienation, including the child and the alienator parent. See, e.g., Despina Vassiliou & Glenn F. Cartwright, *The Lost Parents' Perspective on Parental Alienation Syndrome*, 29 AM. J. FAM. THERAPY 181, 182 (2001); Amy J.L. Baker & Katherine Andre, *Working with Alienated Children & Their Targeted Parents*, ANNALS AM. PSYCHOTHERAPY ASS'N, Summer 2008, at 10, 10. The scope of this Article is limited to the injury suffered by the alienated parent.

16. See Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIMONIAL L. 271, 284 (1994) (noting the recent development of “the integration of tort law into domestic relations actions through the recognition of domestic torts”); C. David Bargamian, Note, *Intentional Infliction of Emotional Distress in the Child Custody Context: Proposed Guidelines*, 36 WAYNE L. REV. 125, 142 (1989) (“[T]ort actions arising out of divorce proceedings are on the rise.”); Thomas B. Scheffey, *State Courts Take Stronger Stand on Parental Alienation*, CONN. L. TRIB., Aug. 23, 2004, at 1 (“[I]nterest in finding new legal tools to combat such behavior [as parental alienation] has steadily increased in recent years . . .” (quoting family lawyer Richard G. Kent)).

17. Feinberg & Loeb, *supra* note 16, at 272 (referring to parental alienation syndrome as “a common occurrence”); Fidler & Bala, *supra* note 2, at 12 (noting that parental alienation “is not a new phenomenon”); see also Maldonado, *supra* note 11, at 449–50 (“Casebooks are filled with cases involving divorcing spouses' vengeful behavior, and every matrimonial attorney and therapist has dozens of stories about the lengths to which divorcing clients have resorted to exact revenge on the other spouse, often using the children as pawns in their battles.” (footnote omitted)).

conduct is.¹⁸ Although courts have expressed concern about providing feuding parents such a cause of action, creative parental alienation victims have nevertheless forced the judiciary into the foreign territory of analyzing parental alienation within the rubric of tort law. When doing so, courts have attempted to force parental alienation into existing tort causes of action, typically, alienation of affections or intentional infliction of emotional distress, and sometimes both.¹⁹ Yet, existing tort-based claims do not effectively address or redress parental alienation, leaving some alienated parents without a satisfactory remedy and crying out for a new tort law “app” for parental alienation.

With this background in mind, this Article is structured as follows. Part II explores the concept of parental alienation by providing an overview of such conduct, discussing how and why an alienator parent alienates, and reviewing its deleterious effects upon alienated parents.²⁰ Part II then considers two sources of law—family law and tort law—under which parental alienation could be attacked.²¹ Although many jurists, scholars, and lawyers favor one area of law over the other, Part III posits that neither can wholly remedy the harms suffered by alienated parents, given that each focuses on different harms and offers different remedies.²² Instead, both family law and tort law play an important role in vindicating the rights of alienated parents. Part III proposes that, given the inadequacy of existing tort law claims, tort law should recognize a new cause of action specifically tailored to parental alienation: “inappropriate parental influence.”²³ Part III also develops this proposed new tort claim by suggesting its elements, addressing the valid concerns surrounding the creation such a tort, and ultimately concluding that the policy of protecting the parent–child relationship should trump those concerns.²⁴

18. *Segal v. Lynch*, 993 A.2d 1229, 1234 (N.J. Super. Ct. App. Div. 2010) (referring to such a tort-based remedy as “a novel, complex, and heretofore relatively unexplored area of the law”); Greg M. Geismann, Comment, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 S.D. L. REV. 568, 598 (1993) (referring to such tort actions as “a new trend”).

19. Under very specific factual scenarios, courts may also look to causes of action such as prima facie tort, interference with custody, or interference with visitation. See *infra* notes 173–181 and accompanying text.

20. See *infra* notes 25–83 and accompanying text.

21. See *infra* notes 84–227 and accompanying text.

22. See *infra* notes 228–234 and accompanying text.

23. The name of this proposed tort comes from a suggestion made by Judge Jeffrey S. Sunshine of the Supreme Court of New York in Kings County. *NK v. MK*, No. XX07, 2007 WL 3244980, at *64 n.20 (Sup. Ct. Oct. 1, 2007).

24. See *infra* notes 235–313 and accompanying text.

II. ANALYSIS

A. *The Glitch: Parental Alienation*

Sometimes referred to as “psychological kidnapping,”²⁵ parental alienation is a very broad term that refers to a wide scope of behavior. In this Article, it means “any constellation of behaviors [by a parent], whether conscious or unconscious, that could evoke a disturbance in the relationship between a child and the targeted parent.”²⁶ Parental alienation is a gradual process that is directly related to the amount of time an alienator parent invests in alienating behavior, making time an alienator parent’s greatest weapon.²⁷

1. *Parental Alienation Techniques*

Alienator parents employ a variety of alienating techniques, often-times using several techniques in combination with each other. One simple technique employed by an alienator parent is cutting off the other parent’s access to information about the child, for example, by

25. LINDA A. MOONEY ET AL., UNDERSTANDING SOCIAL PROBLEMS 173 (7th ed. 2011).

26. Darnall, *supra* note 7, at 325. Typically, this person is a parent who has a terminated romantic relationship with the other parent. Of course, those other than a parent can engage in alienating conduct in an attempt to damage the child’s relationship with one or both of his parents, but that situation is beyond the scope of this Article.

A California appellate court set forth a similar definition of parental alienation in 1949. See McGlynn, *supra* note 8, at 532 (“[W]hen 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.” (citing Ludlow v. Ludlow, 201 P.2d 579, 582 (Cal. Dist. Ct. App. 1949))).

The author recognizes that parental alienation could occur in the absence of a marital rupture, although it is far less likely in that situation. See Walsh & Bone, *supra* note 3, at 93. When this occurs, parental alienation should not be actionable for several reasons. First, some jurisdictions bar lawsuits between spouses in most tort cases based on either interspousal immunity or public policy grounds. See, e.g., LA. REV. STAT. ANN. § 9:291 (2008) (immunity); Vaughn v. Vaughn, 806 A.2d 787, 794 (Md. Ct. Spec. App. 2002) (public policy and immunity); Day v. Heller, 653 N.W.2d 475, 478–81 (Neb. 2002) (public policy). Second, unlike a divorced parent, a married parent residing with the child has the opportunity to counteract the other parent’s alienating conduct.

27. Katherine C. Andre, *Parental Alienation Syndrome*, ANNALS AM. PSYCHOTHERAPY ASS’N, Winter 2004, at 7, 10 (“[T]here is a direct and inversely proportional relationship between the amount of time spent with the alienating parent and the ease with which the rejected parent relationship is restored.”); see also Glenn F. Cartwright, *Expanding the Parameters of Parental Alienation Syndrome*, 21 AM. J. FAM. THERAPY 205, 209 (1993) (referring to time in the hands of an alienating parent as “the primary weapon to inflict injury on the lost parent” and the alienator’s manipulation of time as “the prime weapon”). By contrast, the alienated parent may lack ample time with the child, resulting in her inability to combat the alienation tactics of the alienator parent. Cartwright, *supra*, at 209 (“[T]he lost parent needs time with the child to ensure that contact is not completely lost and to prevent the alienation from completely destroying what may be left of a normal, loving relationship.”).

denying him information about the child's activities²⁸ or access to the child's medical or school records.²⁹ Another technique is to limit the other parent's contact with the child by refusing to allow telephone conversations or visits.³⁰ The alienator parent may also try to minimize the other parent's importance in the eyes of the child. To do so, the alienator parent may ignore the other parent;³¹ make negative comments about the other parent (sometimes criticizing his lifestyle or character) in front of the child;³² destroy pictures of the other parent or refuse to allow the child to have them;³³ change the child's last name;³⁴ or not require the child to resolve conflicts with the other parent (despite requiring the child to do so if he were feuding with a third party), conveying to the child that his relationships with non-family members are more important than his relationship with the other parent.³⁵ The alienator parent may also put the child in the middle of the alienator's relationship with the other parent by using the child as a messenger or by discussing issues with the child that should first be discussed with the other parent.³⁶ Another technique is for the alienator parent to "blam[e] the other parent for financial or emotional woes."³⁷

On the more severe side, an alienator parent may ask the child to choose between his parents, convince the child that the other parent does not care for the child, or convey that he is conditioning his own

28. Feinberg & Loeb, *supra* note 16, at 272.

29. See Gail Rosenblum, *Separate, and Not Equal*, STAR TRIB., May 5, 2007, at E1 (highlighting a story about "a mother renam[ing] the children . . . so the father would not be notified about their activities, medical histories or whereabouts").

30. See *id.* (highlighting a story about a mother who refused to answer her ex-husband's calls for two years); Maria Vogel-Short, *Millionaire Pursues New Marital Tort: Alienation of Children's Affection*, N.J. L.J. (Nov. 6, 2007), available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005558300> (discussing a New Jersey case in which a father alleged that the mother "changed her phone number, blocked e-mails and cut off all contact with their two children").

31. Feinberg & Loeb, *supra* note 16, at 272.

32. Maldonado, *supra* note 11, at 454. The alienator parent may also encourage the child not "to see both the good and not so good in the [alienated] parent." Fidler & Bala, *supra* note 2, at 17. In fact, he may "put[] a spin on the rejected parent's flaws, which are exaggerated and repeated." This then influences the child "to believe the rejected parent is unworthy and in some cases abusive." *Id.* at 16. Consider the story of a mother who made her children pray for their safety only on the nights before visits with their father, which quickly led to the children's fear of being alone with their father. Janell Ross, *Therapists Split on 'Parental Alienation'*, TENNESSEAN, Dec. 27, 2009, at 1B.

33. Feinberg & Loeb, *supra* note 16, at 272; Fidler & Bala, *supra* note 2, at 17.

34. Vogel-Short, *supra* note 30.

35. See LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 6:26 (2004); Fidler & Bala, *supra* note 2, at 17.

36. Feinberg & Loeb, *supra* note 16, at 272; Fidler & Bala, *supra* note 2, at 19.

37. Vogel-Short, *supra* note 30.

love for the child upon the child's rejection of the other parent.³⁸ A similarly severe alienating tactic is causing the child to distrust or fear the other parent by convincing the child that the other parent cannot properly care for him. For example, after the child returns from spending time with the other parent, the alienator parent may engage in a derogatory interrogation or physical inspection of the child, or offer "judgmental, opinionated and negative comments" about the alienated parent's child-care abilities.³⁹ The most severe tactic occurs when an alienating parent clandestinely takes the child away without the permission or knowledge of the other parent, effectively kidnapping the child.⁴⁰ Additionally, an alienator parent may also use physical punishment to remedy a child's resistance to his alienation efforts.⁴¹

2. *Motives for Parental Alienation*

The motives prompting parental alienation vary,⁴² and opinions about this issue have been offered for some sixty years.⁴³ Today, most scholars believe that parental alienation is caused by some deficiency in the psychological makeup of the alienator parent.⁴⁴ Some of these

38. Feinberg & Loeb, *supra* note 16, at 272.

39. *Id.*

40. One news column detailed the story of a mother who received a phone call telling her that her children were killed in a car crash, while the children were actually with their father. Mike Jeffries, *Parental Alienation: There's No Co-Parenting Happening*, BASIL & SPICE (Aug. 11, 2010), <http://www.basilandspice.com/love-and-relationships/82010-parental-alienation-theres-no-co-parenting-happening.html> [hereinafter Jeffries, *No Co-Parenting*]. The father, meanwhile, allegedly told the children that their mother had "abandoned them, was dead, in the Army, or the Peace Corps." *Id.* Another highlighted a father who kidnapped his son at age two and told him that his mother was "a demonized whore who wanted nothing to do with the child, and that she had died." BRYAN LEE MCGLOTHIN, *HAVE YOU SEEN MY MOTHER* (2005). Another presented facts showing that a mother encouraged her children "to run away from their father, or throw stones, spit on or hit him, which they did." See Scheffey, *supra* note 16.

41. Feinberg & Loeb, *supra* note 16, at 273.

42. Darnall, *supra* note 7, at 323 ("[A]ny number of events can destroy the fragile balance of peace between parents."); see also Walsh & Bone, *supra* note 3, at 93 (noting the "complex network of . . . motives" surrounding parental alienation syndrome).

43. William Bernet, *Parental Alienation Disorder and DSM-V*, 36 AM. J. FAM. THERAPY 349, 352 (2008); see also Fidler & Bala, *supra* note 2, at 12 ("[C]ertain personality types amongst divorced parents defend themselves from narcissist injury by fighting for custody of the child and defaming the partner in an effort to rob the other parent of the pleasure of the child." (describing the 1949 opinion of psychoanalyst Wilhelm Reich)). In the 1980s, others posited that parental alienation is the result of a combination of the alienator parent's narcissism and anger, and the child's vulnerability. E.g., Fidler & Bala, *supra* note 2, at 12 ("Wallerstein and Kelly (1980) referred to an 'unholy alliance between a narcissistically enraged parent and a particularly vulnerable older child or adolescent, who together waged battle in efforts to hurt and punish the other parent.'").

44. See, e.g., Vestal, *supra* note 8, at 490.

scholars believe that alienators are sociopaths,⁴⁵ while others believe that they suffer from personality disorders,⁴⁶ mental illness,⁴⁷ or an inability to “individuate” herself from the child.⁴⁸ Others think that alienator parents are just impulsive and deceitful people who lack feelings of empathy, sympathy, or guilt.⁴⁹

Alienating conduct serves different functions for different alienator parents. Some of these parents engage in alienating conduct for self-protection.⁵⁰ For example, alienating conduct can offset an “[alienator] parent’s feelings of inadequacy, lack of self-worth, [or] powerlessness” or can calm fears of potential judicial proceedings.⁵¹ It can also protect an alienator parent from her feelings about “a past history of abandonment, alienation, [or] physical or sexual abuse.”⁵² Finally, engaging in alienating conduct can assuage the alienator parent’s fear of losing the child⁵³ or her own role as primary parent,⁵⁴ and satisfies the alienator parent’s desire to control the child.⁵⁵

Some alienator parents engage in alienating conduct not in some delusional attempt to help themselves but, instead, to hurt the other parent. For example, alienating conduct can be used to combat jealousy of the other parent,⁵⁶ satisfy an alienator’s desire for vengeance,⁵⁷ or obtain leverage over the other parent during the division of marital property or the establishment of child support or alimony.⁵⁸

45. See Leona M. Kopetski, *Identifying Cases of Parent Alienation Syndrome—Part II*, COLO. LAW., Mar. 1998, at 61.

46. Fidler & Bala, *supra* note 2, at 11, 18; Martinson, *supra* note 10, at 181–82.

47. Fidler & Bala, *supra* note 2, at 11 (“[T]here are indeed . . . women consciously, or unconsciously, motivated by vengeance or due to personality disorders or mental illness who may alienate their children from fathers . . .”); see also Robert A. Evans, *Treatment Considerations with Children Diagnosed with PAS*, FLA. B.J., Apr. 2006, at 69, 70.

48. Jayne A. Major, *Parents Who Have Successfully Fought Parental Alienation Syndrome*, BREAKTHROUGH PARENTING, <http://www.breakthroughparenting.com/PAS.htm> (last visited July 9, 2011) (explaining that successful alienators are “unable to see the child as a separate human being from him or herself”).

49. Jeffries, *No Co-Parenting*, *supra* note 40.

50. ELROD, *supra* note 35, § 6:26; Bernet, *supra* note 43, at 352; Feinberg & Loeb, *supra* note 16, at 274; Waldron & Joanis, *supra* note 10, at 126.

51. Walsh & Bone, *supra* note 3, at 93.

52. *Id.* at 94; accord Waldron & Joanis, *supra* note 10, at 126.

53. Feinberg & Loeb, *supra* note 16, at 274; Waldron & Joanis, *supra* note 10, at 126.

54. Vestal, *supra* note 8, at 490; Waldron & Joanis, *supra* note 10, at 126.

55. ELROD, *supra* note 35, § 6:26; Feinberg & Loeb, *supra* note 16, at 274; Vestal, *supra* note 8, at 490; Waldron & Joanis, *supra* note 10, at 122, 126; Walsh & Bone, *supra* note 3, at 93–94.

56. ELROD, *supra* note 35, § 6:26; Feinberg & Loeb, *supra* note 16, at 274; Waldron & Joanis, *supra* note 10, at 126; Walsh & Bone, *supra* note 3, at 93–94.

57. ELROD, *supra* note 35, § 6:26; Feinberg & Loeb, *supra* note 16 at 274; Vestal, *supra* note 8, at 490; Waldron & Joanis, *supra* note 10, at 122, 126.

58. Feinberg & Loeb, *supra* note 16, at 274; Vestal, *supra* note 8, at 490.

3. *Deleterious Effects of Parental Alienation upon Alienated Parents*

Parental alienation usually begins somewhat benignly,⁵⁹ with many alienator parents claiming that they are just being honest with the child about the other parent.⁶⁰ This conduct has potential to harm everyone involved, and, when the alienator parent succeeds in causing the child to reject the other parent, it is nothing short of a tragedy. Although this Article focuses on designing a remedy for the alienator parent's injury, if this remedy also deters alienating conduct, then the recognition of such a remedy could benefit children,⁶¹ the alienator parent,⁶² and society.⁶³

59. Darnall, *supra* note 7, at 323 (“[Parental] alienation usually begins without any malicious or conscious intent to harm or destroy the relationship between the other parent and the children.”).

60. Jann Blackstone-Ford & Sharyl Jupe, *Bad-Mouthing an Ex? The Child Ultimately Suffers*, CHARLOTTE OBSERVER, July 5, 2005, at 8E; *see also* Douglas Darnall, *New Definition of Parental Alienation: What Is the Difference Between Parental Alienation (PA) and Parental Alienation Syndrome (PAS)?*, PSY-CARE (1997), <http://www.parentalalienation.org/articles/parental-alienation-defined.html> (“One parent can alienate the children against the other parent simply by harping on faults that are real and provable.”).

61. A child exposed to parental alienation is as much a victim as his alienated parent (if not more). In fact, the American Bar Association's Family Law Section has recognized that “the legal system in most states is not currently adequate to protect children from [parental alienation].” Vestal, *supra* note 8, at 501 (referring to a “12-year research study of 700 to 1,000 cases of programmed and brainwashed children”). A child is harmed by a parent's alienating conduct regardless of whether the parent succeeds in turning the child against the other parent because the alienator parent disengages from appropriate parenting. Maldonado, *supra* note 11, at 457–59. Instead of offering the emotional support the child needs in order to cope with the breakup of the family, an alienator parent becomes obsessed with his own emotions (anger, depression, and humiliation) in the midst or in the wake of a divorce. The alienator parent's disengagement can continue beyond issues related to the divorce. A child who resists the alienator parent's conduct by showing affection for or loyalty to the other parent may suffer from feelings of disloyalty or betrayal toward the alienator parent, causing the child to feel torn between his parents and causing him emotional distress and adjustment difficulties. *See* Fidler & Bala, *supra* note 2, at 20–21. The effects of parental alienation can be so severe that they can mimic those suffered by children who lose a parent to death. Cartwright, *supra* note 27, at 212. Further, a successful parental alienation can cause additional problems as the child matures. According to one study, some alienated children suffered from substance abuse problems during their adolescence. Fidler & Bala, *supra* note 2, at 21.

62. Some research indicates that the alienator parent also suffers because of her own alienating conduct. Although the alienator parent may initially enjoy feelings of victory and revenge after successfully alienating the child from the other parent, these feelings may be short-lived. This is because some alienator parents later experience guilt or regret for their behavior. If not, they may possibly feel sympathy toward the child whom they deprived of an important parental relationship. Cartwright, *supra* note 27, at 213. Further, many successfully alienated children, once they reach adulthood, resent the alienator parent and shift their affiliation to the alienated parent. Rosalind Sedacca, *Emotional Scarring from Divorce Affects 1 in 4 Kids, Most Ages 9 to 12*, BASIL & SPICE (Dec. 18, 2009), <http://www.basilandspice.com/love-and-relationships/emotional-scarring-from-divorce-affects-1-in-4-kids-most-age.html>.

Parental alienation financially and emotionally plagues alienated parents,⁶⁴ who often do not initially recognize the signs.⁶⁵ One self-proclaimed victim reported that it was incomprehensible how he “went from Adored Dad to Despised Dad in the blink of an eye.”⁶⁶ Not surprisingly, every alienated parent participating in one study reported that he would never want to experience such a thing again.⁶⁷

Even when the alienator parent’s efforts do not ultimately destroy the relationship between the other parent and the child, alienating conduct still negatively affects that relationship. In such situations, the alienator parent’s conduct results in a power shift from the other parent to the child.⁶⁸ For example, when the alienator parent gives the child the power to determine whether, when, and under what circumstances to see the other parent, an alienated parent may hesitate to discipline the child, taking caution not to anger him.⁶⁹ This fear of upsetting the fragile parent–child relationship leaves the alienated parent feeling powerless to freely and properly parent.⁷⁰

When an alienator parent’s conduct leads a child to reject the other parent, the alienated parent’s emotional response usually includes a “sense of powerlessness and frustration”;⁷¹ “stress, loss, grief, anger, and fear”;⁷² and feelings of pain, anxiety, deficiency, humiliation, and being unloved.⁷³ As one self-proclaimed alienated parent noted, “To have that human connection [between oneself and one’s child] taken away from you is probably one of the most difficult and painful things

63. Some of the problems suffered by those involved in parental alienation, particularly substance abuse, proclivity for criminal activity, and psychological damage, may also burden society at large.

64. Vassiliou & Cartwright, *supra* note 15, at 186; *see also* Rosenblum, *supra* note 29 (detailing one man’s experience with parental alienation, which cost him approximately \$100,000 in legal fees).

65. Mike Jeffries, *Cuba’s Poster Boy for Parental Alienation: Elian Gonzalez*, BASIL & SPICE (July 2, 2010), <http://www.basilandspice.com/love-and-relationships/72010-cubas-poster-boy-for-parental-alienation-elian-gonzalez.html>.

66. Mike Jeffries, *Parental Alienation 2010: You Are NOT Alone*, BASIL & SPICE (Mar. 10, 2010), <http://www.basilandspice.com/love-and-relationships/parental-alienation-2010-you-are-not-alone.html>.

67. Vassiliou & Cartwright, *supra* note 15, at 189–90.

68. *See id.* at 185.

69. *Id.* at 187, 189.

70. *Id.*

71. Baker & Darnall, *supra* note 2, at 100.

72. Baker & Andre, *supra* note 15, at 14.

73. Sandra Scantling, *A Father Fears His Wife Is Turning the Kids Against Him*, HARTFORD COURANT, Oct. 28, 2007, at H4; *Parental Alienation Awareness Organization Joins Many in Washington, D.C. on August 18th to Commemorate Family Preservation Day*, PR NEWswire (Aug. 9, 2007), <http://www.prnewswire.com/news-releases/parental-alienation-awareness-organization-joins-many-in-washington-dc-on-august-18th-to-commemorate-family-preservation-day-58006327.html> (describing the alienated parent’s experience as “excruciatingly painful”).

for any parent to deal with.”⁷⁴ Additionally, these feelings of pain and suffering are sometimes exacerbated by some outsiders, who at least partially blame the alienated parent for the child’s rejection by pointing to the alienated parent’s flaws.⁷⁵ The intense emotions suffered by an alienated parent can cause him to lash out, even at the child.⁷⁶

Ultimately, “[t]he [alienated] parent experiences the anguish of the loss of a child,”⁷⁷ which in turn causes that parent immense mental pain and suffering.⁷⁸ This is similar to the loss of a child to death,⁷⁹ but in some ways, it can seem worse to the alienated parent because the alienated parent’s feeling of loss is combined with her continuing concern for the child.⁸⁰ Even though these alienated parents want to restore their relationship with their children and will “try anything to end the impasse,”⁸¹ eventually some alienated parents give up on the parent–child relationship.⁸² Some have even attempted suicide.⁸³

B. Proper Law to Address Parental Alienation

The longtime existence of parental alienation, and its lack of correlative consequences, is a problem with great costs.⁸⁴ Unless effective deterrents to parental alienation are implemented, it is a fair prediction that the alienation will continue.⁸⁵ The question then arises:

74. *Saturday Today* (NBC television broadcast Apr. 28, 2007); see also Parker, *supra* note 12 (describing parental alienation’s effect on the alienated parent as “agony”).

75. See Baker & Andre, *supra* note 15, at 14.

76. Take, for example, the highly publicized voicemail left by actor, Alec Baldwin, for his daughter, Ireland, in which Mr. Baldwin called his daughter a “rude, thoughtless, little pig.” *NBC Today Show* (NBC television broadcast Apr. 26, 2007). According to Mr. Baldwin, his unacceptable behavior toward his daughter was triggered by the alienation tactics of his ex-wife, Kim Basinger. *Id.*

77. Cartwright, *supra* note 27, at 212.

78. Baker & Andre, *supra* note 15, at 14.

79. See Iowa Governor Thomas J. Vilsack Proclaims April 25th as Parental Alienation Awareness Day, PR NEWswire (Dec. 27, 2006), <http://www.prnewswire.com/news-releases/iowa-governor-thomas-j-vilsack-proclaims-april-25th-as-parental-alienation-awareness-day-57229367.html> (comparing the pain of the alienated parent to “bereavement without end”).

80. Cartwright, *supra* note 27, at 213.

81. Mike Jeffries, *Dr. Phil and Parental Alienation, Not a Good Choice*, BASIL & SPICE (Sept. 8, 2010), <http://www.basilandspice.com/love-and-relationships/92010-dr-phil-and-parental-alienation-not-a-good-choice.html> [hereinafter Jeffries, *Dr. Phil*].

82. Lowenstein, *supra* note 12, at 122 (“[A]lienated parents sometimes] cease to pursue their role of wishing to play a part in their childrens’ [sic] lives.”); Harvey Brownstone, *That Toxic Tug-of-War*, GLOBE & MAIL, Apr. 25, 2009, at A15 (“Many non-custodial parents simply walk away from an impossible situation, devastated to lose contact with their children, but consoled to know that their children’s exposure to a toxic tug-of-war is over.”).

83. See Foreword to MCGLOTHIN, *supra* note 40.

84. See Vogel-Short, *supra* note 30.

85. See McGlynn, *supra* note 8, at 546.

Which source of law—family law or tort law—is the proper one under which to address parental alienation?

Traditionally, judges, scholars, and practitioners choose one avenue or the other, with many deeming family law to be the most appropriate legal regime to handle parental alienation. These individuals believe that family courts should hold exclusive jurisdiction over all claims related to the parent–child relationship, including parental alienation,⁸⁶ positing that allowing tort claims for familial issues would “undermine or distort the established family law process.”⁸⁷ Others, believing that family law remedies are inadequate and sometimes inappropriate in the context of parental alienation,⁸⁸ claim that parental alienation claims draw attention to a colossal problem with the family law system. They suggest that the more suitable remedy lies with tort law in the civil courts.⁸⁹ Historically, however, tort law has played only a tangential role in addressing parental alienation, as it has been utilized only by the occasional alienated parent who has asserted tort theories that, as discussed further, are not designed to address this particular problem.⁹⁰

86. See *Davis v. Hilton*, 780 So. 2d 974, 976–77 (Fla. Dist. Ct. App. 2001) (Gross, J., concurring specially) (opining that issues like parental alienation “are best handled in a family [court]” because of the speed with which it can handle the problem); Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that Interferes with Parent-Child Relationships*, 33 *LOU. L.A. L. REV.* 449, 510 (2000); see also *Lapides v. Trabbic*, 758 A.2d 1114, 1118 (Md. Ct. Spec. App. 2000) (providing that interference with visitation is “not the type of action[] . . . that transform[s] a family law issue into a tort claim”).

87. Berger, *supra* note 86, at 524; see also *In re Marriage of Segel*, 224 Cal. Rptr. 591, 595 (Ct. App. 1986) (opining that recognizing a tort would undermine family law, which is designed “to regulate and supervise the care, custody and financial support of minor children whose parents are the subject of dissolution proceedings”); *Davis*, 780 So. 2d at 976 (Gross, J., concurring specially) (concluding that “the family court is uniquely positioned” to correct violations of statutory parental rights, minimize harm, and fashion remedies). One attorney has been quoted for the proposition that “the whole point of family court is to safeguard the children’s needs. [Alienation of affection] cases are the proper province of family court” Carmel Sileo, *Seeking New Marital Tort, Frustrated Father Takes Divorce Case to Civil Court*, *TRIAL* (Jan. 1, 2008), available at <http://www.thefreelibrary.com/Seeking+new+marital+tort,+frustrated+father+takes+divorce+case+to...-a0174282021> (internal quotation marks omitted). However, that same lawyer acknowledged that “‘maybe 1 in 10 cases’ would qualify as so extreme that they could not be remedied there.” *Id.* He went on: “[T]here certainly are some extreme cases where a civil remedy may be the only option. In those cases, people absolutely should have the right to bring a lawsuit.” *Id.*

88. See, e.g., Niggemyer, *supra* note 4, at 589.

89. See, e.g., John Appezzato, *Appellate Court Inherits Debate About Alienation-of-Affection Suits*, *NJ.COM* (Dec. 19, 2008, 12:01 AM), http://www.nj.com/news/ledger/topstories/index.ssf/2008/12/appellate_court_inherits_debat.html (“I believe you can’t get justice in these alienation cases in the family court.” (quoting Woodbridge attorney John Paone Jr.)).

90. See discussion *infra* Part II.B.2.

Forcing parental alienation into one area of the law is a mistake. Relief for parental alienation should not be an “either/or” proposition. Because of the dual nature of an alienated parent’s injuries—harm to his relationship with his child, on the one hand, and emotional distress on the other—neither family law nor tort law, standing alone, has the capacity to offer complete relief. This is not due to any failure on the part of either source of law, but rather their respective focuses. For example, preserving and repairing relationships lies at the heart of family law.⁹¹ Thus, family law can redress an alienated parent’s first harm (his damaged relationship with his child), but it cannot remedy the second (his emotional distress). By contrast, tort law focuses on compensating the wrongfully injured and deterring blameworthy and harmful conduct,⁹² frequently allowing recovery for damage to relationships (such as wrongful death, loss of consortium, and interference with business or contractual relations). Therefore, tort law can redress an alienated parent’s second harm but not his first. Ultimately, each area of law has a very important role to play in the parental alienation context, and each offers unique remedies (that address different injuries) to alienated parents.

Therefore, family law and tort law should complement each other and serve dual purposes for alienated parents. More specifically, an alienated parent should employ family law to repair his relationship with his child and “to discourage future disparagement by the alienating parent,”⁹³ and under certain, limited circumstances, he should also be allowed to employ tort law to “salv[e] the pain of the alienated parent through monetary compensation.”⁹⁴

1. The Old Equipment: Family Law’s Role in Remediating Parental Alienation

Because of the plethora of remedial tools in its arsenal,⁹⁵ family law offers a wide variety of relief to alienated parents. While these family law tools may salvage the parent–child relationship in some parental

91. See, e.g., Berger, *supra* note 86, at 510 (“[T]he purpose of the child custody and support provisions [in a state’s family law] is to preserve parent-child relationships and to enforce parental rights and obligations.”).

92. 86 C.J.S. *Torts* § 1 (2006) (“[T]ort law has a deterrent function, imposing liability for conduct below the acceptable standard of care.” (footnote omitted)); MARSHALL S. SHAPO, *BASIC PRINCIPLES OF TORT LAW* ¶ 71.03(E), at 343 (1999) (“A familiar rationale for tort damages is that of deterrence.”).

93. Niggemyer, *supra* note 4, at 587.

94. *Id.*; see also discussion *infra* Part II.B.2.

95. *Davis v. Hilton*, 780 So. 2d 974, 977 (Fla. Dist. Ct. App. 2001) (Gross, J., concurring specially).

alienation cases, they may not be available or effective for all parental alienation cases. Furthermore, the universal problem with all family law remedies is that they can never remedy an alienated parent's emotional distress because doing so simply is not within the purview of family law.

Most alienated parents' first line of defense against parental alienation is an attempt to gain custody of their child—either initially or by a change of custody, depending on the timing of the parental alienation. In making initial custody decisions,⁹⁶ courts in most jurisdictions employ a “best interest of the child” standard,⁹⁷ under which they consider a variety of factors.⁹⁸ Some courts have explicitly stated that parental alienation is “an act inconsistent with the best interest of the child.”⁹⁹ Many courts, in justifying such a statement, point particularly to two of the “best interest” factors recognized in most jurisdictions: (1) each party's willingness and ability to facilitate and encourage the child's close and continuing relationship with the other parent¹⁰⁰ and (2) the moral fitness of the parent.¹⁰¹

Some jurisdictions describe the parents' willingness and ability to facilitate and encourage the child's relationship with the other parent as “important”¹⁰² or “significant,”¹⁰³ and many courts base initial custody and custody-modification decisions on this factor, among others. For example, in *Orrill v. Orrill*, a Louisiana appellate court affirmed the trial court's decision to award custody to the father, finding that the mother was unwilling and unable to facilitate and encourage a

96. Typically, even when parents agree to joint custody, the court must assess the best interest of the child before awarding it. See, e.g., LA. CIV. CODE ANN. art. 132 (1999); Gainer-Jennings v. Jennings, No. FA104113000S, 2010 WL 4722461, at *1 (Conn. Super. Ct. Oct. 27, 2010); Roguska v. Roguska, No. 291352, 2009 WL 3119630, at *2 (Mich. Ct. App. Sept. 29, 2009).

97. See, e.g., IDAHO CODE ANN. § 32-717(1) (2006); TENN. CODE ANN. § 36-6-106(a) (repl. vol. 2010); UTAH CODE ANN. § 30-3-10(1)(a) (LexisNexis 1953 & repl. vol. 2007).

98. See, e.g., 750 ILL. COMP. STAT. 5/602 (2010); *Orrill v. Orrill*, 5 So. 3d 279, 282–83 (La. Ct. App. 2009); *Price v. Price*, 611 N.W.2d 425, 430 (S.D. 2000). Note, however, that some states have no statutory factors.

99. *Lauren R. v. Ted R.*, No. 203699-02, 2010 WL 2089283, at *1 (N.Y. Sup. Ct. May 25, 2010) (citing *Zeis v. Slater*, 870 N.Y.S.2d 387 (App. Div. 2008); *Zafran v. Zafran*, 814 N.Y.S.2d 669 (App. Div. 2006); *Bobinski v. Bobinski*, 780 N.Y.S.2d 185 (App. Div. 2004); *Stern v. Stern*, 758 N.Y.S.2d 155 (App. Div. 2003)).

100. E.g., *Orrill*, 5 So. 3d at 285–86; *Ciannamea v. McCoy*, 760 N.Y.S.2d 774, 776 (App. Div. 2003); see also 750 ILL. COMP. STAT. 5/602(a)(8); UTAH CODE ANN. § 30-3-10(2); VT. STAT. ANN. tit. 15, § 665(b)(5) (2010).

101. E.g., *Goodwin v. Goodwin*, 618 So. 2d 579, 586 (La. Ct. App. 1993) *Renaud v. Renaud*, 721 A.2d 463, 466 (Vt. 1998); LA. CIV. CODE ANN. art. 134(6); UTAH CODE ANN. § 30-3-10(1)(a)(i); WYO. STAT. ANN. § 20-2-201 (2006); IDAHO CODE ANN. § 32-717.

102. *Orrill*, 5 So. 3d at 285.

103. IOWA CODE ANN. § 598.41(1)(c) (West 2001).

close and continuing relationship between the child and the father.¹⁰⁴ In that case, the mother unnecessarily exposed the child to police intervention on four occasions in the course of one year, adding more trauma to the child's life and creating a false fear of the father's drinking.¹⁰⁵

Similarly, in *Grigsby v. Grigsby*, a Florida appellate court affirmed the award of custody to the father because the mother "actively interfered with the love and emotional ties that previously existed between the [f]ather and the children."¹⁰⁶ In *Grigsby*, the mother refused to encourage the children to participate in scheduled time-sharing with their father, threatened to obtain an injunction when the father attended the children's school functions and sports activities, and refused to comply with a subsequent court order regarding time-sharing.¹⁰⁷ She also falsely reported to authorities that the father was sexually abusing the children, which kept the father from the children; filed various police reports falsely alleging criminal activity by the father (unrelated to the children); refused to cooperate with the court-appointed parenting coordinator; and filed complaints against the licenses of the court-appointed psychologists and social workers, falsely contending that these professionals were biased against her and, therefore, acting unethically.¹⁰⁸

In addition to considering a parent's alienating conduct as a violation of her responsibility to foster the child's relationship with the other parent, many courts also consider it relevant to her moral fitness.¹⁰⁹ Several courts have found that engaging in parental alienation indicates a "strong likelihood of unfitness."¹¹⁰ For example, in

104. See *Orrill*, 5 So. 3d at 285–87.

105. *Id.* at 286.

106. *Grigsby v. Grigsby*, 39 So. 3d 453, 456 (Fla. Dist. Ct. App. 2010).

107. *Id.* at 455–56.

108. *Id.* at 456; see also *In re Marriage of Hake*, No. 97,737, 2007 WL 2080539, at *4–6 (Kan. Ct. App. July 20, 2007) (awarding custody to the father because, given the mother's alienation tactics, the father was in the best position to facilitate a relationship between the children and both parents); *Cloutier v. Lear*, 691 A.2d 660, 661–63 (Me. 1997) (awarding custody to the father because, among other things, the mother and her family denigrated him to his children); *McIntire v. Hake (In re McIntire)*, 33 S.W.3d 565, 572 (Mo. Ct. App. 2000) (awarding custody to the mother because the father attempted to alienate their daughter, inhibited the mother–daughter relationship, and failed to involve mother in child rearing decisions).

109. See, e.g., LA. CIV. CODE ANN. art. 134(6) (1999); *Renaud v. Renaud*, 721 A.2d 463, 466 (Vt. 1998).

110. *Lauren R. v. Ted R.*, No. 203699-02, 2010 WL 2089283, at *1 (N.Y. Sup. Ct. May 25, 2010); see also *Goodwin v. Goodwin*, 618 So. 2d 579, 586 (La. Ct. App. 1993); *Renaud*, 721 A.2d at 466 (“[A] sustained course of conduct by one parent designed to interfere in the child's relationship with the other casts serious doubt upon the fitness of the offending party to be the custodial parent.”).

M.W. v. S.W., a New York court found that, for at least two years, the mother had demeaned the father and made disparaging remarks about him to others in front of the children.¹¹¹ Additionally, she threatened to make their father's life "a living hell" in front of their children.¹¹² The court found her behavior to be "a form of alienation which reflects adversely upon [her] fitness."¹¹³ Similarly, in *Palazzolo v. Mire*, a Louisiana appellate court explained that "moral fitness includes a parent's attitudes toward the other parent,"¹¹⁴ and the court weighed this factor against the alienator parent.¹¹⁵

One problem with a custody-related remedy for most alienated parents in many jurisdictions is one of timing. Oftentimes, alienation does not occur until after an initial custody award is made,¹¹⁶ and an alienated parent must therefore seek a modification of the custody award. This, in turn, means that the alienated parent, as the one seeking to modify custody, must make a higher showing than just the best interest of the child in order to succeed. Courts generally change custody only when doing so is necessary to serve the best interests of the child¹¹⁷ and the party seeking modification can show a change in circumstances of the child or the parties.¹¹⁸ This showing is typically satisfied in situations when the child's present environment endangers his physical or emotional health or impairs his emotional development, and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.¹¹⁹ While some

111. *M.W. v. S.W.*, No. 3942/02, 2007 WL 1228613, at *14 (Sup. Ct. Apr. 26, 2007) (noting that among the words the mother used to describe plaintiff, in the presence of the children, were "deadbeat," "bastard," and "asshole").

112. *Id.*

113. *Id.*

114. *Palazzolo v. Mire*, 10 So. 3d 748, 775 (La. Ct. App. 2009) (citing *Goodwin*, 618 So. 2d at 586).

115. *Id.*; see also *J.F. v. L.F. (In re J.F.)*, 694 N.Y.S.2d 592, 598 (Fam. Ct. 1999) ("Indeed, a custodial parent's interference with the relationship between a child and a noncustodial parent has been said to be an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent." (quoting *Young v. Young*, 628 N.Y.S.2d 957, 958 (App. Div. 1995)) (internal quotation marks omitted)).

116. See, e.g., *Waldron & Joanis*, *supra* note 10, at 129 (explaining that the severity of parental alienation will depend on several factors, including the amount of time the child spends with the alienator parent).

117. See, e.g., *T.C.T.B.M. v. B.T.*, No. 2090370, 2010 WL 3722549, at *5 (Ala. Civ. App. Sept. 24, 2010); *Vasquez v. Ortiz*, 909 N.Y.S.2d 155, 156 (App. Div. 2010); *Daniel v. Daniel*, 42 P.3d 863, 870 (Okla. 2001).

118. See, e.g., MINN. STAT. ANN. § 518.18(d); *In re Kosek*, 871 A.2d 1, 5 (N.H. 2005).

119. See, e.g., MINN. STAT. ANN. § 518.18(d)(iv) (West 2006); *Wilcher v. Wilcher*, 566 S.W.2d 173, 175 (Ky. Ct. App. 1978) (citing KY. REV. STAT. ANN. § 403.340 (LexisNexis repl. vol. 2010)). Some courts require additional or different showings. See, e.g., *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000) (requiring a change of circumstances and an ability to minister more effectively to the children's well-being).

courts acknowledge that parental alienation is “a nefarious form of conduct that must be met with careful consideration and immediate, comprehensive remediation,”¹²⁰ the reality is that many courts hesitate to modify custody decrees,¹²¹ reserving the remedy for situations in which the custodial parent has violated court orders.¹²² Further, most courts refuse to change custody when the parent seeking the change merely fears future alienation; these courts instead demand proof that active alienation is occurring at the time the custody modification is sought.¹²³

A second problem with custody modification is the potentially harmful effect on the child. Some courts are reluctant to modify custody because they fear that disrupting a child’s life would, in effect, punish the child for the alienator parent’s conduct.¹²⁴ Also, some courts, like some mental health professionals,¹²⁵ question the effectiveness of a change of custody as a remedy for parental alienation, characterizing the remedy as “drastic”¹²⁶ or “extreme.”¹²⁷ Imagine

120. *Lauren R. v. Ted R.*, No. 203699-02, 2010 WL 2089283, at *1 (Sup. Ct. May 25, 2010) (citing *Lew v. Sobel*, 849 N.Y.S.2d 586 (App. Div. 2007); *Zafran v. Zafran*, 814 N.Y.S.2d 669 (App. Div. 2006)).

121. H. Joseph Gitlin, *When a Parent Bases Transfer of Custody on PAS*, CHI. DAILY L. BULL., Mar. 8, 2010 at 6, 6 (“[I]t has taken an extremely strong situation before a court of review has ruled that custody should be transferred because the custodial parent has alienated the child from the noncustodial parent.”).

122. Major, *supra* note 48.

123. See, e.g., *Brown v. Brown*, 600 N.W.2d 869, 874 (N.D. 1999). But see *Hanna v. Hanna*, No. CA 09-214, 2010 WL 183413 (Ark. Ct. App. Jan. 20, 2010) (demonstrating that it is not necessary that a parent successfully alienate before the court is justified in changing custody).

124. See, e.g., *V.U. v. L.U.*, No. FM-15-0468-03-C, 2006 WL 2707346, at *4-6 (N.J. Super. Ct. App. Div. Sept. 22, 2006) (refusing to transfer custody in the face of alienation and medical recommendations because it would punish the children); *Renaud v. Renaud*, 721 A.2d 463, 466 (Vt. 1998) (“Children are not responsible for the misconduct of their parents toward each other, and will not be uprooted from their home merely to punish a wayward parent.”). This is not to say that parents are never successful in obtaining a modification to the custody award. See, e.g., *In re Marriage of Divelbiss*, 719 N.E.2d 375, 381-82 (Ill. App. Ct. 1999) (affirming the transfer of custody due to the mother’s conduct in alienating the child from the father); *Mullins v. Mullins*, 490 N.E.2d 1375, 1391 (Ill. App. Ct. 1986) (affirming the transfer of custody due to the custodial parent’s failure to allow visitation and other alienating misconduct); *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214-15 (Iowa Ct. App. 1994) (transferring custody from the father to the mother because of his and his new wife’s alienating behavior); *J.F. v. L.F.* (*In re J.F.*), 694 N.Y.S.2d 592, 598 (Fam. Ct. 1999) (transferring custody to the father from the mother due to the “mother’s constant and consistent single-minded teaching of the children that their father is dangerous” and her inability and unwillingness to support the father’s visitation (quoting *Young v. Young*, 628 N.Y.S.2d 957, 958 (App. Div. 1995))).

125. See, e.g., Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 773-74 (2005) (“Only in those relatively rare situations where the aligned parent is found to be psychotic, severely character-disordered, or a serious abduction risk, and has corresponding serious parenting deficits do we consider a change of custody warranted.”).

126. *Palazzolo v. Mire*, 10 So. 3d at 748, 774 (La. Ct. App. 2009).

the reaction of a child who has been alienated against a parent to a modification of custody that results in her spending more time with that very parent. Changing custody to the alienated parent “is like throwing a child who is afraid of reptiles into a snake pit.”¹²⁸ Finally, at least one court has stated that a change of custody “has not been proven scientifically to be successful” in parental alienation cases.¹²⁹

Other family law remedies fare no better at universally remedying parental alienation cases. For example, courts often turn to mental health professionals for answers to accusations of parental alienation.¹³⁰ Courts see therapy, which can be ordered for one, some, or all of those involved in or affected by parental alienation,¹³¹ as the key to preventing continuing litigation (thereby reducing a court’s case load) and equipping an alienated parent with the necessary tools to repair and sustain a relationship with his child.¹³² While therapy may be helpful in some parental alienation cases, it is subject to many criticisms. Some condemn it for its coercive nature¹³³ and financial bur-

127. See Feinberg & Loeb, *supra* note 16, at 277. Some commentators refer to a transfer of custody and an order for contact between the alienating parent and the child as “[t]he strongest response to a parent who alienates a child.” Rachel Birnbaum & Nicholas Bala, *Toward the Differentiation of High-Conflict Families: An Analysis of Social Science Research and Canadian Case Law*, *FAM. CT. REV.*, July 2010, at 403, 413; accord Robert Z. Dobrish, *Pretrial Approaches to Divorce and Custody in New York*, in *NEW YORK FAMILY LAW STRATEGIES* 7, 10 (Jo Alice Darden ed., 2009) (referring to a change of custody as “[t]he most radical approach”).

128. Dobrish, *supra* note 127, at 10.

129. Palazzolo, 10 So. 3d at 774.

130. See, e.g., *J.F. v. L.F. (In re J.F.)*, 694 N.Y.S.2d 592, 600 (Fam. Ct. 1999); *Johnson v. Schlotman*, 502 N.W.2d 831, 835–36 (N.D. 1993); *White v. Williamson*, 453 S.E.2d 666, 677 (W. Va. 1994); see also Baker & Andre, *supra* note 15, at 12. Dr. Gardner professed that “[j]udges are quick to refer PAS families into treatment.” Richard A. Gardner, *The Role of the Judiciary in the Entrenchment of the Parental Alienation Syndrome (PAS)*, CUSTODY CENTER, <http://www.custodycenter.com/PAS/pasnewsletter.pdf>.

131. Some courts have focused therapy on the alienator parent, recognizing that the relationship between the child and the alienated parent may never recover without mandated treatment for the alienator parent. See, e.g., *Haber v. McNally*, No. FA064104074S, 2010 WL 5030121, at *1 (Conn. Super. Ct. Nov. 9, 2010); *Hendrickson v. Hendrickson*, 603 N.W.2d 896, 903 (N.D. 2000). However, some in the psychiatry field recommend therapy for both parents individually as well as therapy for the child and the alienated parent in order to restore their damaged relationship. Baker & Darnall, *supra* note 2, at 119–20. Some courts agree. See, e.g., *J.F.*, 694 N.Y.S.2d at 600.

132. Baker & Andre, *supra* note 15, at 12; see also Brownstone, *supra* note 82 (“[F]amily counseling and therapy are the most important resources that separated parents need to overcome their pain and anger.”). The goal of therapy in parental alienation situations “is for the child to have a comfortable, healthy, and mutually satisfying relationship with both of his or her parents.” Bernet, *supra* note 43, at 360. *But see* Lowenstein, *supra* note 12, at 122 (“Judges are reluctant to advise that therapy should take place . . .”).

133. Most alienated children ordered by the court to attend therapy sessions react with, at best, reluctance and, at worst, resistance. See Dobrish, *supra* note 127, at 10. Not surprisingly, alienator parents react similarly to court-mandated therapy for the child because they have no desire to see the damaged relationship between the alienated parent and the child repaired. *Id.*;

den,¹³⁴ as well as for the idea that it is too little, too late.¹³⁵ Others question the effectiveness of therapy for the alienator parent.¹³⁶ Still others believe that therapy not only is ineffective in severe and some moderate alienation cases, but that it can actually backfire.¹³⁷

Another remedial tool for parental alienation is a court-mandated parenting program,¹³⁸ which educates parents about the process of divorce and how it affects them and their children.¹³⁹ “Some believe these specialized programs may be the best hope for reducing conflict and teaching parents how to communicate.”¹⁴⁰ While parental education is undoubtedly a positive thing, the effectiveness of these programs hinges on many variables, including the degree of existing conflict, the timing of attendance, the content of the course, and the teaching strategies of the instructor.¹⁴¹ Additionally, the more specialized parenting programs (which have proven most successful) are

see also Jeffries, *Dr. Phil*, *supra* note 81 (explaining that the goal of the alienator parent is to keep the alienated parent and the child apart).

134. Richard A. Warshak, *Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children*, 48 *FAM. CT. REV.* 48, 50 (2010).

135. Dobrish, *supra* note 127, at 10.

136. One study of self-reported alienated parents revealed that the psychological services received did not help the situation, while another noted that individual and family interventions in parental alienation cases have been “dismal failure[s].” Vassiliou & Cartwright, *supra* note 15, at 188. Dr. Richard Gardner posited that therapy for the alienator parent never works because those parents do not appreciate their own psychiatric problems that cause them to emotionally abuse their child. *See* Gardner, *supra* note 130. Some commentators believe that therapy could work only if paired with “a temporary interruption of contact between the child and the alienating parent or a more permanent custody reversal.” Fidler & Bala, *supra* note 2, at 10.

137. Warshak, *supra* note 134, at 50 (“[T]herapy may even make matters worse; the alienated child and preferred parent feel the need to dig in their heels and prove their point, thereby further entrenching their distorted views The reality is that we have many more treatment failures than successes when it comes to our intervention with some moderate and all severe cases.”).

138. First appearing in the late 1970s, these programs now exist in almost every state. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 *FAM. L.Q.* 381, 408 (2008). A few jurisdictions even consider a parent’s satisfactory completion of a parent education course when determining whether to grant visitation rights to that parent. *Id.* When initially created, parenting courses served to familiarize parents with the emotions surrounding divorce and to educate them about the danger of putting their child in the middle of their own discord. *Id.* at 408–09.

139. *Id.* at 408; Maldonado, *supra* note 11, at 475; McGlynn, *supra* note 8, at 541. The goal of these programs “is to improve parental attitudes and behavior through awareness and knowledge.” McGlynn, *supra* note 8, at 541. Over time, these programs have become more specialized. Elrod & Dale, *supra* note 138, at 409.

140. Elrod & Dale, *supra* note 138, at 409.

141. *Id.*

not universally available,¹⁴² and even where they are, heavy case loads lead to shorter classes,¹⁴³ which dilutes their effectiveness.

Over the last forty years, alternative dispute resolution (typically mediation) has become a popular tool for resolving family law issues¹⁴⁴ arising before, during, or after divorce proceedings,¹⁴⁵ including those involving parental alienation. Although mediation is generally perceived as achieving positive outcomes,¹⁴⁶ it cannot always remedy parental alienation. Unless publicly funded, mediation is expensive and, therefore, is not an option for all alienated parents.¹⁴⁷ Additionally, as mediation has increased in popularity, heavy case loads, inadequate staffing, and increasingly complex cases make it difficult for families to receive the time necessary for satisfactory results.¹⁴⁸ Parental alienation cases bring additional problems to the mediation process. At least some opine that “referrals to mediation . . . are often futile because implicit in these processes is a lack of a swift directive that is often perceived by the alienator [parent] as denoting approval of his or her behavior.”¹⁴⁹ Additionally, mediation is

142. See Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Medicine?*, 47 *FAM. CT. REV.* 371, 373 (2009) (explaining that such programs were offered by less than half of responding agencies). The more general programs have not been shown to improve parental relationships or substantially reduce litigation. Elrod & Dale, *supra* note 138, at 409.

143. Generally these shorter classes last only two to four hours. Maldonado, *supra* note 11, at 475.

144. Salem, *supra* note 142, at 373; see also Vestal, *supra* note 8, at 488. Some jurisdictions require the parties to any custody dispute (including those involving allegations of parental alienation) to participate in mediation. See, e.g., NEV. REV. STAT. ANN. § 3.500 (West 2000); N.C. GEN. STAT. ANN. § 50-13.1 (West 2000); OR. REV. STAT. ANN. § 107.765(1) (West 2003). In others, participation is voluntary. ALASKA STAT. § 25.24.060 (2010); KAN. STAT. ANN. § 23-602 (2007); MINN. STAT. ANN. § 518.619 (West 2006).

145. McGlynn, *supra* note 8, at 541.

146. E.g., Salem, *supra* note 142, at 373–74 (explaining that mediation, as compared to the adversarial processes, results in faster settlement, greater levels of party satisfaction, and improved post-separation family relationships). “[M]ediation can reduce the initial level of conflict, which can in turn reduce the long term level of conflict.” *Carter v. Carter*, 470 S.E.2d 193, 201 (W. Va. 1996); see also Maldonado, *supra* note 11, at 469 (discussing the benefits of mediation). Note, however, that some professionals argue that mediation is, at best, ineffective in severe alienation cases. Vestal, *supra* note 8, at 501 (“[M]ediating [parental alienation] cases may provide a platform for the accusing parent to continue to espouse his/her hurtful views which causes more pain to the other parent. [S]ince one parent is framing the other parent as a villain, it is most unlikely that any agreement can be reached.” (quoting Ramona Buck, director of mediation services for the Seventh Judicial Circuit of Maryland)). At worst, some believe it to “be inappropriate, and even dangerous.” Elrod & Dale, *supra* note 138, at 408.

147. See Salem, *supra* note 142, at 382; Vestal, *supra* note 8, at 499.

148. Maldonado, *supra* note 11, at 473–74; Salem, *supra* note 142, at 377.

149. Walsh & Bone, *supra* note 3, at 95; see also *Lauren R. v. Ted R.*, No. 203699-02, 2010 WL 2089283, at *2 (N.Y. Sup. Ct. May 25, 2010) (“Protraction or delay in parental alienation cases often serve to reinforce the offending conduct and potentially undermine any remediation that a

not effective in situations where the parties' bargaining power is unequal¹⁵⁰ or where one of the parties is unreasonable or uncooperative so as to sabotage the mediation effort.¹⁵¹ These situations are typical in parental alienation cases, making mediation an unrealistic remedy.

Certain jurisdictions have begun to utilize parent coordinators in some hostile custody cases in which the parties engage in prolific motion practice or destructive behaviors¹⁵² (including those involving parental alienation).¹⁵³ Although parenting coordination is certainly a step in the right direction, it too is expensive,¹⁵⁴ and in most jurisdictions, the parenting coordinator is allowed to make only minor decisions that may not be binding in some cases.¹⁵⁵ Finally, some question the propriety of judicial delegation of authority to a neutral third party.¹⁵⁶

Parental alienation victims may also pursue family law remedies designed to punish the alienator parent. These include contempt orders,¹⁵⁷ sanctions,¹⁵⁸ costs, attorney fees, and the suspension of child

court could fashion with appropriate therapy, parent coordination, and/or, a change in custody." The delays and continuances associated with judicial proceedings may also have the same result. See Vassiliou & Cartwright, *supra* note 15, at 183.

150. Elrod & Dale, *supra* note 138, at 408; Maldonado, *supra* note 11, at 470.

151. See Vestal, *supra* note 8, at 496.

152. See, e.g., Grigsby v. Grigsby, 39 So. 3d 453, 456 (Fla. Dist. Ct. App. 2010); L.S. v. B.S., No. 2009-CA-002288-ME, 2010 WL 4366367, at *1 (Ky. Ct. App. Nov. 5, 2010).

153. The parent coordinator is trained to protect the child, manage recurring disputes, and assist the parties in creating parenting plans and in complying with judicial orders. Elrod & Dale, *supra* note 138, at 409–10. They also assist with the "day-to-day monitoring of the parents' activities" in high-conflict cases. *Id.* at 409.

154. Salem, *supra* note 142, at 373; Maldonado, *supra* note 11, at 477.

155. In these cases, the parenting coordinator's decision is not binding "unless the attorneys file a detailed stipulation with the court or the court approves the decision after a judicial review." Elrod & Dale, *supra* note 138, at 410.

156. *Id.* One commentator has noted that such delegations are only proper in cases in which parents have consented, but not all parents are willing to do so. Maldonado, *supra* note 11, at 477.

157. Referred to as "the most common remedy used to enforce violations of [rights]," an order of contempt compels a parent interfering with the other's visitation to comply with the court-ordered visitation schedule. See Geismann, *supra* note 18, at 596 n.202.

158. Sanctions may accompany an order of contempt and punish the violator parent in a variety of ways, including, for example, by ordering (1) extra visitation to the alienated parent (also referred to as "make-up time"), see, e.g., DEL. CODE ANN. tit. 13, § 728(b)(1) (1974 & repl. vol. 2009); (2) a temporary transfer of custody or primary residence or both to the alienated parent, see, e.g., *id.* § 728(b)(2); (3) the alienator parent to pay a fine, see, e.g., MICH. COMP. LAWS ANN. § 552.644(2)(d) (West 2005); and (4) the alienator parent to post a bond to secure compliance with court orders, see, e.g., LA. REV. STAT. ANN. § 9:342 (2008). Some jurisdictions have even criminalized intentional interference with visitation. See, e.g., ALASKA STAT. § 11.51.125 (2010); ARK. CODE ANN. § 5-26-501 (1987 & repl. vol. 2006); MONT. CODE ANN. § 45-5-631 (2011).

support obligations.¹⁵⁹ While each remedy standing alone has its own share of problems,¹⁶⁰ the more universal limitation to all of them is that they are usually available only in situations where the alienator parent has actually denied the alienated parent physical contact with the child.¹⁶¹ Furthermore, awarding such remedies can sometimes be counterproductive because a child, having already rejected an alienated parent, will only further reject him if he causes trouble for the alienator parent with whom the child is aligned.¹⁶²

In addition to the drawbacks of individual family law remedies, critics of the family law approach to parental alienation universally assert that the “system is broken.”¹⁶³ However, consensus is lacking in their

159. *See, e.g.*, *Lew v. Sobel*, 849 N.Y.S.2d 586, 587 (App. Div. 2007) (deciding that, because the mother deliberately interfered with the father’s visitation rights, fifty percent of the father’s child support obligation would be held in escrow until the mother was able to “certify[], to the satisfaction of the New York Supreme Court, her compliance with the visitation provisions of the [court’s] order” and her lack of interference with the father’s visitation rights).

160. Contempt orders are “time consuming and costly.” *Feinberg & Loeb, supra* note 16, at 276–77. Any associated relief can be difficult to enforce and fails to compensate the alienated parent for time lost or emotional distress, therefore “rarely deter[ring] future parental interference.” *Id.* at 277.

Relief for civil sanctions are frequently denied because of the lack of specificity regarding visitation in the judgment or court order, making it difficult for the court to find a wrongdoing by one of the parents. Even when the court makes such a finding, the effectiveness of sanctions is questionable, given that fines may be so nominal as to fail “to cause any change in active access, let alone changing subversive or subconscious behavior.” *Id.* at 276.

Suspension of child support obligations is not an adequate remedy for alienated parents. The Uniform Reciprocal Child Support Act, and many jurisdictions specifically disallow it. *See, e.g.*, *Moffat v. Moffat*, 612 P.2d 967, 970 (Cal. 1980) (finding that the obligation to pay child support is unaffected by the custodial parent’s interference with visitation); *In re Marriage of Harper*, 764 P.2d 1283, 1286 (Mont. 1988) (“The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by the court.” (quoting MONT. CODE ANN. § 40-5-124 (2011))); *Hendrickson v. Hendrickson*, 590 N.W.2d 220, 223 (N.D. 1999) (finding that the trial court erred in ordering child support payments to be placed in a separate account to be used for the children’s secondary education). Suspending child support obligations creates a circular problem in that the noncustodial parent is withholding child support because of the interference with his visitation rights, whereas the custodial parent is interfering with visitation because of the withholding of child support.

Ultimately, it is repugnant to the child’s interest, and the child is the loser when this remedy is granted. *Carter v. Carter*, 470 S.E.2d 193, 203 n.20 (W. Va. 1996). *But see* *Welsh v. Lawler (In re Welsh)*, 534 N.Y.S.2d 539, 540 (App. Div. 1988) (affirming the family court’s decision to suspend child support obligations until the noncustodial parent was allowed overnight visitation with children).

161. *See, e.g.*, *In re Marriage of Major*, No. 91,658, 2004 WL 2085794, at *5 (Kan. Ct. App. Sept. 17, 2004) (ordering the mother to pay the father’s attorney fees, explaining that the father “was forced to incur a substantial amount of attorney fees in order to defend his parental rights in light of [the mother’s] attempts to alienate the children from [the father]”).

162. *Brownstone, supra* note 82 (explaining that alienated parents pursuing this route may win the battle but lose the war).

163. *NBC Today Show, supra* note 76.

beliefs regarding the cause of this inadequacy. Some alienated parents think that the court system is uneducated or is not ready to deal with parental alienation.¹⁶⁴ In essence, they believe that the judiciary does not truly understand and appreciate the devaluation that alienated parents suffer at the hands of the alienator parent, which in turn causes them to feel anger and pain toward the courts.¹⁶⁵ Further, they believe the courts' inattention to parental alienation allows the alienator parent to continue alienating the children.¹⁶⁶ Some also express frustration that all custody cases move too slowly through the court system, regardless of the courts' knowledge of, and preparation for, parental alienation.¹⁶⁷

Alienated parents, and even some not personally victimized by parental alienation, also question whether family law packs the punch needed to fight parental alienation. The critics maintain "that a forceful judgement [sic] is required to counter the force of alienation,"¹⁶⁸ but some believe that family law does not seriously punish alienator parents. This could be due to the belief that some of the judges applying family law exhibit a sort of laissez faire attitude toward parental alienation. As one attorney noted, "Judges are inevitably conservative in their orders. . . . Judges have been slow to place serious sanctions on the alienating parent. If there is no threat of severe fines, jail time or sole custody to the targeted parent, the chances are remote that the out-of-control parent can be stopped."¹⁶⁹ Another commentator went further, stating, "[W]hen a judge refuses to impose consequences on an alienating parent for ignoring court orders designed to maintain, and in some cases, restore, the other parent's normal, loving relationship with his . . . child, the judge effectively tells the alienating parent that the bad behavior is okay."¹⁷⁰

Additionally, even when family law remedies do help the alienated parent obtain physical access to the child, they do nothing to prevent

164. Danielle Holewa, Editorial, *Learn to Recognize Signs of Parental Alienation Syndrome*, KALAMAZOO GAZETTE, Apr. 25, 2007, at A13.

165. *Id.*

166. *Id.*

167. *Id.*

168. Vassiliou & Cartwright, *supra* note 15, at 183–84.

169. Major, *supra* note 48; see also *Four Myths of Parental Alienation*, *Richmond County B. Ass'n* (2005) ("Many judges don't punish the alienating parent for disobeying court orders aimed at repairing the other parent's relationship with the child. . . . There are no teeth in most court orders." (quoting Bonnie Amendola, a family law lawyer)); Lowenstein, *supra* note 12, at 122–23 (imploping judges to act decisively when it comes to alienator parents).

170. Mike Jeffries, *Parental Alienation Lands in Jail*, BASIL & SPICE (June 9, 2010), <http://www.basilandspice.com/love-and-relationships/62010/parental-alienation-lands-in-jail.html> [hereinafter Jeffries, *Jail*].

the alienator parent from subsequent alienating conduct.¹⁷¹ Finally, while family law may seek to repair familial relationships in the context of parental alienation, the greater problem with employing family law to redress parental alienation is that it lacks an adequate vehicle with which to remedy the emotional distress suffered by alienated parents, leaving them without full compensation for the loss caused by the disruption or the destruction to their relationship with their child.¹⁷² In fact, it is antithetical to the objectives of family law to impose emotional distress damages on a blameworthy alienator parent.

2. *Upgraded Relief: Tort Law's Role in Remediating Parental Alienation*

Family law does not redress all of an alienated parent's injuries in all cases,¹⁷³ and it does not adequately deter alienating conduct, thus leaving tort law an important role to play in parental alienation cases. In recent times, creative alienated parents have realized this and, more and more, have begun alleging parental alienation within the rubric of tort law. Faced with this relatively new phenomenon,¹⁷⁴ civil courts have attempted to force parental alienation cases into the scope of existing tort causes of action.

None of the existing causes of action are adequate vehicles with which to address parental alienation. Under very narrow circumstances, courts have turned to prima facie tort,¹⁷⁵ interference with custody,¹⁷⁶ and interference with visitation.¹⁷⁷ However, none of

171. Feinberg & Loeb, *supra* note 16, at 276.

172. See Berger, *supra* note 86, at 526.

173. See Feinberg & Loeb, *supra* note 16, at 276.

174. See Rohan Mascarenhas, *N.J. Appeals Court Allows Lawsuits in Extreme Cases of Alleged Parental Alienation*, NJ.COM (May 3, 2010, 9:00 PM), http://www.nj.com/news/index.ssf/2010/05/nj_appeals_court_allows_lawsui.html.

175. See, e.g., R.J. v. S.L.J., 810 S.W.2d 608, 609 (Mo. Ct. App. 1991). The *Restatement (Second) of Torts* explains a claim for prima facie tort: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability." *RESTATEMENT (SECOND) OF TORTS* § 870 (1979). The prima facie tort is not intended to duplicate other tort causes of action, nor is it a catch-all remedy for claims that cannot satisfy the elements of other recognized torts. 86 C.J.S. *Torts* § 8 (2006).

176. The cause of action is based on "society's interest in discouraging the disregard of custody decrees." Don C. Smith Jr., *Causes of Action Against Noncustodial Parent for Interference with Custody Rights to Child*, in 5 *CAUSES OF ACTION* 799, 805 (1984). The *Restatement (Second) of Torts* details the elements for interference with custody (also called "intentional interference with parental rights" in some jurisdictions): "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the

these claims are effective for parental alienation cases. Very few jurisdictions recognize *prima facie* tort,¹⁷⁸ and, even in some of those jurisdictions that do, the elements of *prima facie* tort are directly contrary to the allegations of parental alienation, such that pleading parental alienation effectively pleads a plaintiff out of a claim for *prima facie* tort.¹⁷⁹ Similarly, interference with custody and interference with visitation are not suitable claims under which to allege parental alienation. Despite the argument that a custodial parent may suffer harm without actual loss of custody,¹⁸⁰ success on either of these claims requires a plaintiff-parent to prove that the defendant-parent either abducted the child or induced the child to either leave or not return.¹⁸¹

parent.” RESTATEMENT (SECOND) OF TORTS § 700 (1977). Today, most jurisdictions will allow a custodial parent to assert a claim for interference with custody only in very narrow circumstances.

177. Public policy in most states favors allowing a child access to both parents. ELROD, *supra* note 35, § 6:26. Some courts have gone so far as to recognize that visitation is a right of the child. *See, e.g., Dschaak v. Dschaak*, 479 N.W.2d 484, 487 (N.D. 1992) (“Ordinarily, visitation between a child and noncustodial parent is viewed as being in the best interests of the child and not merely a privilege of the noncustodial parent but a right of the child.”). *But see In re Marriage of Elmer*, 936 P.2d 617, 620 (Colo. App. 1997) (noting that visitation “is primarily a right of the child and only secondarily a right of the parent”). Yet, a 1994 study of the Children’s Rights Council revealed that interference with visitation had affected approximately six million children in the United States. Vassiliou & Cartwright, *supra* note 15, at 183. Injury to parental rights may be less severe in visitation cases, as compared to custody cases, but courts recognizing interference with visitation as a cause of action also recognize that this “is a matter of degree that logically relates to damages rather than liability.” *Ruffalo v. United States*, 590 F. Supp. 706, 711 (W.D. Mo. 1984).

178. Research reveals that *prima facie* tort is recognized in California, Missouri, New Mexico, and New York. *See, e.g., Young v. City of Visalia*, 687 F. Supp. 2d 1155, 1165 (E.D. Cal. 2010); *Ruby v. Sandia Corp.*, 699 F. Supp. 2d 1247, 1267–68 (D.N.M. 2010); *Carlson v. Geneva City Sch. Dist.*, 679 F. Supp. 2d 355, 370–73 (W.D.N.Y. 2010).

179. *See, e.g., Meikle v. Van Biber*, 745 S.W.2d 714, 715–17 (Mo. Ct. App. 1987). Additionally, in some jurisdictions, to have a claim for *prima facie* tort, a defendant must be solely motivated by malevolence. *See, e.g., Carlson*, 679 F. Supp. 2d at 371–72 (“Under New York law, a claim for *prima facie* tort has four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful. The plaintiff must plead special damages, and that the defendant was solely motivated by disinterested malevolence.” (citation omitted) (internal quotation marks omitted)); *Empire One Telecomms., Inc. v. Verizon N.Y., Inc.*, 888 N.Y.S.2d 714, 731–32 (Sup. Ct. 2009) (“The elements necessary to plead a claim of *prima facie* tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful. Moreover, in order to make out a claim sounding in *prima facie* tort, the plaintiff must allege that disinterested malevolence was the sole motivator for the conduct of which [it] complain[s].” (alterations in original) (citations omitted) (internal quotation marks omitted)). In the parental alienation context, this could be a difficult element to satisfy, given that many alienator parents truly believe that their alienating conduct is done for the best interest of their child and not as an attack on the alienated parent.

180. Bargamian, *supra* note 16, at 142.

181. *See, e.g., Bouchard v. Sundberg*, 834 A.2d 744, 757–58 (Conn. App. Ct. 2003); *Lapides v. Trabbic*, 758 A.2d 1114, 1121 (Md. Spec. Ct. App. 2000); *Murphy v. I.S.K. Con. of New Eng., Inc.*,

Obviously, not all parental alienation cases involve such extreme facts. More typically, courts facing tort actions for parental alienation have relied on alienation of affections or intentional infliction of emotional distress as the appropriate cause of action. Yet, as discussed in detail below, neither is designed specifically for parental alienation claims. In essence, tort law in its current form forecloses a remedy for alienated parents.

571 N.E.2d 340, 351 (Mass. 1991). In some jurisdictions, a claim for interference with visitation further requires that the physical interference be over a long period of time or that the defendant commit some other egregious act. Edward B. Borris, *Torts Arising out of Interference with Custody and Visitation*, 7 *DIVORCE LITIG.* 192, 197 (1995); see also *Ruffalo*, 590 F. Supp. at 712 (recognizing the cause of action but also suggesting that state courts “restrict this type of claim to situations that are not insubstantial in duration and effect” (internal quotation marks omitted)); *Hixon v. Buchberger*, 507 A.2d 607, 612 (Md. 1986) (ruling that the defendant’s “belligerent words” were “a relatively minor interference” with visitation).

Other problems exist as well. As to interference with custody, some jurisdictions, including Illinois, Minnesota, and Oklahoma, do not recognize the cause of action. See, e.g., *Whitehorse v. Critchfield*, 494 N.E.2d 743, 745 (Ill. App. Ct. 1986); *Larson v. Dunn*, 460 N.W.2d 39, 46 (Minn. 1990); *Zaharias v. Gammill*, 844 P.2d 137, 138–39 (Okla. 1992). Even in jurisdictions that do recognize it, its effectiveness as a remedy is severely limited because the cause of action is so narrow for reasons beyond the requirement that a defendant-parent abduct the child or persuade him to leave or not return. For example, as many courts have recognized, only custodial parents may take advantage of the cause of action. See, e.g., *Stevens v. Redwing*, 146 F.3d 538, 544 (8th Cir. 1998); *Stewart v. Walker*, 5 So. 3d 746, 749 (Fla. Dist. Ct. App. 2009); *Cosner v. Ridinger*, 882 P.2d 1243, 1246, 1248 (Wyo. 1994); see also *Bargamian*, *supra* note 16, at 130. In fact, some courts have ruled that a parent with joint custody cannot sue the other joint custodial parent for interference with custody, even when the other joint custodial parent actually abducts the child or induces him to leave. *Feinberg & Loeb*, *supra* note 16, at 278; see also *RESTATEMENT (SECOND) OF TORTS* § 700 cmt. c (1977) (“When the parents are by law jointly entitled to the custody and earnings of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other.”); *Smith*, *supra* note 176, at 813. *But see* *State v. Vakilzaden*, 742 A.2d 767, 770–71 (Conn. 1999) (providing that a parent enjoying joint custody may be guilty of the crime of interference with custody). Others states allow recovery when the defendant is a third party. See, e.g., *Stone v. Wall*, 734 So. 2d 1038, 1041 (Fla. 1999). In sum, “[t]he tort of custodial interference does not provide a complete remedy.” Joseph R. Hillebrand, Note, *Parental Kidnapping and the Tort of Custodial Interference: Not in a Child’s Best Interests*, 25 *IND. L. REV.* 893, 906 (1992).

As to interference with visitation, only a handful of jurisdictions recognize it as a cause of action in tort. See, e.g., *Ruffalo*, 590 F. Supp. 706. Although critics deride courts rejecting the claim as potentially insensitive, outdated, or reluctant to entertain novel claims, *id.* at 711–12, these courts base their refusal to recognize the tort, in many cases, upon their fear that doing so would “encourage claims for petty infractions.” *Gleiss v. Newman*, 415 N.W.2d 845, 846 (Wis. Ct. App. 1987). One court even opined that “visitation rights of a parent are not sufficiently significant to be protected.” *Cosner*, 882 P.2d at 1247 (citing *Politte v. Politte*, 727 S.W.2d 198 (Mo. Ct. App. 1987)).

a. Alienation of Affections

Alienation of affections is a tort-based cause of action under which a plaintiff¹⁸²—traditionally a “jilted spouse”¹⁸³—seeks to recover damages from “a third party adult who ‘steals’ the affection of the plaintiff’s spouse.”¹⁸⁴ Thus, it has been dubbed one of the “heart balm” causes of action.¹⁸⁵ According to § 683 of the *Restatement (Second) of Torts*: “One who purposely¹⁸⁶ alienates¹⁸⁷ one spouse’s¹⁸⁸ affections from the other spouse¹⁸⁹ is subject to liability for the harm¹⁹⁰

182. Alienation of affections originated as a cause of action at a time when women were considered the property of their husbands. During this time any attempt by another to have relations with one’s wife was considered a property tort committed against the husband. Jamie Heard, Comment, *The National Trend of Abolishing Actions for the Alienation of a Spouse’s Affection and Mississippi’s Refusal to Follow Suit*, 28 MISS. C. L. REV. 313, 314 (2009). Although originally the cause of action was granted only to men, it was later extended to women. RESTATEMENT (SECOND) OF TORTS § 683 cmt. d (1977); Heard, *supra*, at 315.

183. Some jurisdictions allow such claims outside of the martial context. For example, some allow alienation of affections claims by spouses against third parties who cause alienation of affections in a nonromantic way. See *Carrieri v. Bush*, 419 P.2d 132, 137–38 (Wash. 1966) (allowing a husband to sue members of a religious sect for alienation of his wife’s affections).

184. *Bouchard*, 834 A.2d at 752 n.13; see also William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 990 (2001) (“The name suggests that the recovery [for alienation of affections] is for the defendant’s destroying the affection of one spouse for the other. In reality, however, the recovery was for loss of consortium, meaning rights to monopolistic sexual relations, society, and companionship.”).

185. See, e.g., Corbett, *supra* note 184, at 992 & n.27. Other heart balm torts are breach of a promise to marry, seduction, and criminal conversation. *Id.*

186. This means that the acts referred to in the context of the second element “must have been done for the very purpose of accomplishing [the alienation].” *Veeder v. Kennedy*, 589 N.W.2d 610, 619 n.14 (S.D. 1999). “It is not enough that the actor as a reasonable person should have known that the acts might diminish one spouse’s affection for the other” or that he or she realize that the alienation was “the probable or even certain result” of his alienating conduct. RESTATEMENT (SECOND) OF TORTS § 683 cmt. h (1977). Note, though, that defendant could still be liable under other sections of the *Restatement*. See *id.* § 685. The defendant need not have been “motivated by ill will toward the [plaintiff] or a desire to bring about a divorce or separation” to be found liable; a defendant need only have diminished or diverted the affections of plaintiff’s spouse. *Id.* § 683 cmt. j.

187. In order to prove this element, a plaintiff must show “active and affirmative conduct” by the defendant. *Id.* § 683 cmt. g. “Inaction is not enough . . .” *Id.* Stated aptly:

One does not become liable for alienation of affections, without any initiative or encouragement, merely by becoming the object of the affections that are transferred from a spouse. It is only when there is such active participation, initiative or encouragement on the part of the defendant that he or she has in fact played a substantial part in inducing or causing one spouse’s loss of the other spouse’s affections, that liability arises.

Id.

188. Under the *Restatement (Second) of Torts*, only a married person may assert this cause of action, including one who is part of a valid common law marriage. *Id.* § 683 cmt. i.

189. “Loss of affection must be evidenced by objective manifestations,” such as “by refusal of cohabitation, by separation or divorce or by any other conduct on the part of one spouse that indicates a diminution of regard for the other spouse.” *Id.* § 683 cmt. f. Failure to show loss of

thus caused¹⁹¹ to any of the other spouse's legally protected marital interests."¹⁹² A defendant can successfully defend a claim for alienation of affections by showing that he did not know or did not believe that the plaintiff's spouse was married.¹⁹³

Alienation of affections is not an adequate tort remedy under which to address parental alienation.¹⁹⁴ It is not even an option in most jurisdictions because they have abrogated the cause of action,¹⁹⁵ with

existing love and affection is fatal. *Id.* However, "[t]he fact that the spouses were living apart at the time of the acts complained of, whether because of the fault of one of them or by mutual consent, does not bar recovery, nor does the fact that the parties were living together unhappily." *Id.*

Note, however, that even without a loss of affection, a plaintiff may, depending upon the facts of her case, assert a cause of action under other sections of the *Restatement (Second) of Torts*, including, for example, § 684 or § 685, which detail causes of action for loss of services in the home and loss of exclusive sexual relations by an act of adultery, respectively. *See id.* §§ 684, 685.

190. A plaintiff need only show that her legally protected marital interests, including the "affections, society and companionship of the other spouse, sexual relations and the exclusive enjoyment of them, services in the home and support" are harmed. *Id.* § 683 cmt. c; *see also* § 683 cmt. f (explaining that even if the spouses were living apart or together unhappily at the time of the alienation, "[i]f any affection remained, its destruction or diminution may be the basis of an action"). This element does not require a plaintiff to prove that she suffered any financial loss.

191. This element does not require a plaintiff to show that the defendant's conduct was the sole cause; it only has to have been a "substantial factor." *Id.* § 683 cmt. k.

192. *RESTATEMENT (SECOND) OF TORTS* § 683 (1977). Some jurisdictions do not follow the exact elements set forth in the *Restatement (Second) of Torts*, but the elements they adopt are similar. *See, e.g.,* *McCutchen v. McCutchen*, 624 So. 2d 620, 623 (N.C. 2006) (stating that under North Carolina law, a plaintiff asserting a claim for alienation of affections must prove that (1) he and his spouse were happily married and that a genuine love and affection existed between them; (2) the love and affection so existing was alienated and destroyed; and (3) the wrongful and malicious acts of the defendant produced and brought about the loss and alienation of such love and affection).

193. However, one could be liable for any loss of affections caused as a result of her "sexual relations with a spouse under the conditions stated in § 685," regardless of knowledge or belief of the marital status of the spouse. *RESTATEMENT (SECOND) OF TORTS* § 683 cmt. i (1977).

194. *Borris, supra* note 181, at 199 ("[C]ourts are most reluctant to award damages on a theory of alienation of affections . . .").

195. *See, e.g.,* *ARK. CODE ANN.* § 16-118-106 (1987 & repl. vol. 2006); *CONN. GEN. STAT. ANN.* § 52-572b (West 2005); *FLA. STAT. ANN.* § 771.01 (West 2011); *N.J. STAT. ANN.* § 2A:23-1 (West 2010); *TENN. CODE ANN.* § 36-3-701 (repl. vol. 2010); *see also* *Hester v. Barnett*, 723 S.W.2d 544, 555-56 (Mo. Ct. App. 1987) (refusing to recognize the claim of alienation of the affections of a child in Missouri).

The predominant reason for the abrogation was the public perception that such a cause of action was nothing more than a weapon for blackmail and extortion. *See, e.g.,* *Segal v. Lynch*, 993 A.2d 1229, 1236 (N.J. Super. Ct. App. Div. 2010) (stating that such claims were "devices for extracting large sums of money without proper justification" as "a fruitful source of coercion, extortion and blackmail" (quoting *Magierowski v. Buckley*, 121 A.2d 749, 756 (N.J. Super. Ct. App. Div. 1956))); *Heard, supra* note 182, at 316.

Some states, like Louisiana, never recognized it in the first place. *See, e.g.,* *Moulin v. Monteleone*, 115 So. 447, 449 (La. 1927), *rev'd on other grounds*, 9 to 5 *Fashions, Inc. v. Spurney*, 538 So. 2d 228 (La. 1989). *But see* *Corbett, supra* note 184, at 1005 n.81 ("The Louisiana Supreme Court

many states also specifically stating that no claim exists in the parent-child context.¹⁹⁶ Only seven states continue to recognize any form of alienation of affections,¹⁹⁷ but even for these few jurisdictions, parental alienation is a distinctive problem. After all, one of the most legitimate objections to a traditional alienation of affections claim is that two adults, the plaintiff's spouse and the defendant, are both to blame for their own consenting conduct that caused the destruction of the relationship between the plaintiff and her spouse. Therefore, the defendant should not bear legal liability alone. This objection is not valid in the context of parental alienation, as blame and causation can be more reasonably assigned to the alienator parent.¹⁹⁸ In sum, alienation of affections is an old tort theory that has been fading from con-

definitively rejected the theory of alienation of affections in 1927. However, a panel of the court had appeared to recognize such a right of recovery in 1924." (citation omitted)).

196. See, e.g., *Davis v. Hilton*, 780 So. 2d 974, 975 (Fla. Dist. Ct. App. 2001); *Bock v. Lindquist*, 278 N.W.2d 326, 326-27 (Minn. 1979); *Hester*, 723 S.W.2d at 555-56; *Bartanus v. Lis*, 480 A.2d 1178, 1181 (Pa. Super. Ct. 1984). Other courts have declined to rule on the issue. See, e.g., *Mackintosh v. Carter*, 451 N.W.2d 285, 288 (S.D. 1990) ("We need not reach the issue of whether the tort of alienation of affection of a child is a valid cause of action in South Dakota . . .").

However, some courts have ruled that the abrogation of alienation of affections actions extends only to marital or conjugal relationships and, therefore, does not bar claims for parental alienation. For example, in *Segal v. Lynch*, the court ruled that because a New Jersey statute repealed only alienation of affections claims in the marital context, it did not operate to bar the plaintiff's claim for parental alienation. 993 A.2d at 1237-38. Other jurisdictions disagree, ruling that the abolition of alienation of affections as a cause of action applies to all such claims, including those for parental alienation, because parental alienation ultimately sounds in alienation of affections. See, e.g., *Hyman v. Moldovan*, 305 S.E.2d 648, 648-49 (Ga. Ct. App. 1983) (refusing to interpret a statute abolishing alienation of affection suits as abolishing only claims related to spouses); *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181, 189 (Sup. Ct. 1970) (dismissing the husband's complaint against his former wife and her parent, which alleged that they conspired to conceal the whereabouts and condition of his child, because it was essentially a claim for alienation of affections barred by statute). The *Restatement (Second) of Torts* follows this logic as well. RESTATEMENT (SECOND) OF TORTS § 699 (1977) ("One who, without more, alienates from its parent the affections of a child, whether a minor or of full age, is not liable to the child's parent.").

197. These seven states are Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah. See, e.g., *Hunt v. Chang*, 594 P.2d 118, 123 (Haw. 1979); *Schroeder v. Winyard*, 873 N.E.2d 35, 40 (Ill. App. Ct. 2007); *Fitch v. Valentine*, 959 So. 2d 1012, 1025 (Miss. 2007); *Thompson v. Chapman*, 600 P.2d 302, 304 (N.M. Ct. App. 1979); *Heller v. Somdahl*, 696 S.E.2d 857, 860-61 (N.C. Ct. App. 2010); *Hershey v. Hershey*, 467 N.W.2d 484, 488 (S.D. 1991); *Heiner v. Simpson*, 23 P.3d 1041, 1043 (Utah 2001).

198. Some, particularly those advocating for the recognition of PAS, might argue that the child is a participant, pointing to the child's rejection of the alienated parent. While this is technically correct in some instances of parental alienation (but not all), it is important to note that by the time the child rejects the parent, he has been strongly influenced by the alienator parent, who is usually the domiciliary parent whom the child trusts implicitly. Fidler & Bala, *supra* note 2, at 11 ("[M]ost successful alienation is perpetrated by the parent with custody or primary care of children . . ."); *Alabama, Arkansas, Georgia, Mississippi, West Virginia, and Maryland Declare April 25th Parental Alienation Awareness Day*, PR NEWSWIRE (Apr. 29, 2008), <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/04-29-2008/>

temporary tort law for some time.¹⁹⁹ Such a tort is an inadequate weapon against a common and dangerous social problem like parental alienation in its current form.

b. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress (IIED), also known in some jurisdictions as “outrage,”²⁰⁰ is a relatively new cause of action in the tort law arena.²⁰¹ Section 46(1) of the *Restatement (Second) of Torts* provides a commonly accepted definition of IIED: “One who by extreme and outrageous conduct²⁰² intentionally or recklessly²⁰³ causes severe emotional distress²⁰⁴ to another is subject to liability for

0004802049&EDATE= (“Parental Alienation behaviors take advantage of the suggestibility and dependency of children . . .”).

199. Corbett, *supra* note 184, at 989.

200. *See, e.g.*, Poindexter v. Armstrong, 934 F. Supp. 1052, 1054–55 (W.D. Ark. 1994); Spurrell v. Bloch, 701 P.2d 529, 535 (Wash. Ct. App. 1985).

201. *See* Bargamian, *supra* note 16, at 128 (“Intentional infliction of emotional distress is a relatively recent development in tort law. The tort was slow to develop due to concerns that emotional distress could be easily feigned.” (footnote omitted)); *see also* RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (1965) (“[T]he law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone.”). It was not until the 1940s that IIED was “fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort.” *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (1965); *see also* Sheltra v. Smith, 392 A.2d 431, 431–32 (Vt. 1978) (detailing the evolution of IIED).

202. This element requires the plaintiff to show that the defendant’s conduct was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). In other words, a “recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’” *Id.* Courts have ruled that acting with a tortious, or even criminal, intent will not suffice, nor will acting with intent to inflict emotional distress. *Id.*; *see also* Heavrin v. Boeing Capital Corp., 246 F. Supp. 2d 728, 733 (6th Cir. 2004) (concluding that filing false claims in a bankruptcy proceeding and offering false testimony were arguably bad acts, and potentially criminal as well, but they did not rise to the level of going beyond all possible bounds of decency, nor were they behaviors considered utterly intolerable in a civilized community). Comment d goes on to explain that liability under § 46 “clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . There is no occasion for the law to intervene in every case where some one’s feelings are hurt. There must still be freedom to express an unflattering opinion . . .” RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

203. This element requires that

the actor desire[] to inflict severe emotional distress, and also . . . know[] that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965).

204. This element requires that the emotional distress be severe. *Id.* § 46 cmt. j. Although “[c]omplete emotional tranquility is seldom attainable in this world, and some degree of tran-

such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”²⁰⁵

For multiple reasons, IIED is also not an appropriate cause of action under which to assert parental alienation. First, while it is very difficult for any plaintiff to recover under IIED because of the strict judicial interpretation of the “extreme and outrageous” element,²⁰⁶ that difficulty is only exacerbated for alienated parents.²⁰⁷ In most of the reported cases, courts seemed sympathetic to IIED claims for parental alienation only when the alienator parent actually abducted or concealed the child from the alienated parent.²⁰⁸ When such facts are not present, courts have almost universally disallowed recovery. For example, in *Hixon v. Buchberger*, the Court of Appeals of Maryland ruled that a third-party friend of the custodial parent was not liable to a noncustodial parent for IIED when the friend made belligerent statements to the noncustodial parent in front of the child, made it physically difficult for the noncustodial parent to take the child with him, and intended to replace the noncustodial parent as the child’s father figure.²⁰⁹ The court explained that the noncustodial parent failed “to describe conduct which is ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency,

sient and trivial emotional distress is a part of the price of living among people,” severe emotional distress “includes all highly unpleasant mental reactions.” *Id.*

205. *Id.* § 46(1). The latest tentative draft of the corresponding section of the *Restatement (Third) of Torts* provides a similar definition: “An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance and, if the emotional disturbance causes bodily harm, also for the bodily harm.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 (Tentative Draft No. 5, 2007).

206. Borris, *supra* note 181, at 192–95.

207. See, e.g., Sharon McDonnell Dobbs, Recent Case, *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990), 17 WM. MITCHELL L. REV. 1159, 1170 (1991) (recognizing “the difficulty in establishing the boundaries of outrageous conduct”); Kristyn J. Krohse, Note, *No Longer Following the Rule of Thumb—What to Do with Domestic Torts and Divorce Claims*, 1997 U. ILL. L. REV. 923, 931 (“Problems in defining what constitutes outrageous behavior plagues courts both in and out of the marital context.”).

208. See, e.g., *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 20–21 (E.D.N.Y. 1978) (finding a father liable for IIED after he abducted his child from the custodial mother and took the child to Yugoslavia); *Pankratz v. Willis*, 744 P.2d 1182, 1189 (Ariz. Ct. App. 1987) (“Courts that have squarely faced the issue have concluded that the unilateral separation of a child from its parent can be extreme and outrageous conduct within the meaning of § 46.”); *Zaharias v. Gammill*, 844 P.2d 137 (Okla. 1992) (denying the maternal grandparents’ motion to dismiss the custodial father’s IIED claim against them, in which the father alleged that they aided the mother in concealing the child from their father after becoming aware of the father’s court-ordered custodial rights). *But see* *Ervin v. Estopare*, No. CV 08-122-M-DWM-JCL, 2009 WL 50169, at *4 (D. Mont. Jan. 6, 2009) (ruling, on a motion to dismiss, that a parent stated a claim for negligent infliction of emotional distress caused by other parent’s alleged interference with visitation rights).

209. *Hixon v. Buchberger*, 507 A.2d 607, 607–08 (Md. 1986).

and to be regarded as atrocious, and utterly intolerable in a civilized community.”²¹⁰

In fact, some courts have denied recovery for IIED even when the facts of the case did involve an actual abduction. For example, in *Larson v. Dunn*, less than twenty-four hours after the court awarded sole custody to the father, the mother fled the state with the child.²¹¹ The mother’s parents, who provided the necessary financial assistance for the escape, refused to tell the father where the mother and child were located, forcing him to seek help from local law enforcement and the FBI.²¹² The father did not see his child for seven years. Yet, the Minnesota Supreme Court dismissed his claim for IIED.²¹³ This ruling spurred one commentator to note, “IIED is virtually useless as a remedy for victimized parents whose emotional distress, although severe and genuine, provides insufficient tangible proof to withstand a motion to dismiss. Consequently, most victimized parents are left without a tort cause of action to recover damages for emotional distress.”²¹⁴

While the “extreme and outrageous” element has proven difficult to satisfy in past parental alienation cases, doing so is likely to become even tougher in the future. The latest trend in IIED analysis is to require that the conduct at issue be both outrageous *and* extreme.²¹⁵ Further, comment c to § 45 of Tentative Draft No. 5 of the *Restatement (Third) of Torts* (using marital infidelity as an example) explains

210. *Id.* at 609 (quoting *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977)); see also *Davis v. Hilton*, 780 So. 2d 974, 976 (Fla. Dist. Ct. App. 2001) (Gross, J., concurring specially) (“The allegations of the complaint [that the mother, stepfather, and maternal grandparents engaged in parental alienation but not physical interference] do not describe conduct so outrageous in character and extreme in degree as to go beyond all bounds of decency, the standard for intentional infliction of emotional distress.”). Note that in *Segal v. Lynch*, a New Jersey appellate court suggested that, in addition to allowing recovery for IIED when one parent abducts the child, an alienated parent may also recover when one parent falsely and intentionally accuses the other parent of sexually abusing the child. *Segal v. Lynch*, 993 A.2d 1229, 1240 (N.J. Super. Ct. App. Div. 2010).

211. *Larson v. Dunn*, 460 N.W.2d 39, 41 (Minn. 1990).

212. *Id.*

213. *Id.* at 47; see also *Settle v. Settle*, 858 F. Supp. 610, 615 (S.D. W. Va. 1994) (explaining that, even if the defendant’s sole purpose in moving the children to Florida and requiring the plaintiff to post a bond before enjoying his visitation rights had been to inflict emotional distress upon the plaintiff, the conduct still would not rise to the level of outrageousness sufficient to sustain a cause of action and that such behavior would be considered “mean-spirited” or “harmful of one’s rights or expectations”); Smith, *supra* note 176, at 817 (“[R]easonable persons may differ on whether the removal of children from a custodial parent and the subsequent secreting of them in locations around the country without the custodial parent’s consent, constitutes outrageous conduct.”).

214. Dobbs, *supra* note 207, at 1183.

215. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. c (Tentative Draft No. 5, 2007).

that some conduct that may qualify as outrageous is nonetheless so common that it cannot be characterized as extreme.²¹⁶ Parental alienation could be similarly classified. As early as fifteen years ago, one commentator recognized, “Apparently, with a few exceptions, because of the popularity of denials of custody and visitation, it is difficult to prove that such denials are outrageous in modern society.”²¹⁷

Parental alienation has become even more prevalent in recent times for numerous reasons.²¹⁸ The occurrences are so prevalent that they may be considered a common occurrence.²¹⁹ Further, it will probably

216. *Id.*

217. Borris, *supra* note 181, at 200. *But see* Mark Gruber & Natalie L. Moran, *Parental Alienation in New Jersey*, PARENTAL ALIENATION AWARENESS ORG., <http://www.parental-alienation-awareness.com/article.asp?articleid=194> (last visited Feb. 25, 2011) (“A parent who has had a child alienated from them, by the acts of the other parent could easily make out a claim against the alienating parent that would satisfy the ‘outrageous’ element necessary to establish a cause of action for intentional infliction of emotional distress or outrageous conduct. . . . [I]nterfering with parenting time and purposely destroying the relationship between parent and child, is the type of behavior that could be seen as so extreme, to go beyond all possible bounds of decency and be regarding [sic] as atrocious, and intolerable in a civilized community.”).

218. *See* Darnall, *supra* note 7, at 324; Dobrish, *supra* note 127, at 9; April J. Walker, *The Extreme Consequence of Parental Alienation Syndrome—The Richard Lohstroh Case of a Child Driven to Kill His Father—Will Courts Move Toward Allowing Children to Use Parental Alienation Syndrome as a Defense to the Crime of Murder of Their Own Parent?*, 27 WOMEN’S RTS. L. REP. 153, 159 (2006).

The reasons for the rise in parental alienation are numerous. First of all, the number of divorces and terminated relationships between unmarried parents is on the rise. Approximately one in two marriages in the United States ends in divorce, affecting approximately one million children each year. *See, e.g.*, RALPH SLOVENKO, *PSYCHIATRY IN LAW/LAW IN PSYCHIATRY* 485 (2002); Sandra Leigh King, *Abandonment: How the Texas Legislature and Family Court System Fail to Meet the Needs of Texas Children*, 51 S. TEX. L. REV. 75, 78 (2009). Second, parental roles have changed. Not only have fathers gained confidence in their parenting skills (which makes them more willing to seek more custody and increased visitation time with their children, as well as more passionate about doing so), *see* Darnall, *supra* note 7, at 324, but also more women have begun to seek careers of their own, forfeiting the judicial preference for mothers in custody decisions. *See* McGlynn, *supra* note 8, at 531. Third, courts observing this relatively new change in traditional parental roles have discarded the tender years doctrine, which favored women with the presumption that the mother of a child is the superior parent. Baker & Andre, *supra* note 15, at 15; Major, *supra* note 48. Instead, in the last 40 years, most states have shifted to the best interest of the child standard and a presumption that joint custody is the better option, refusing to automatically assume that the mother is the preferred custodial parent. *See, e.g.*, Baker & Andre, *supra* note 15, at 15; Darnall, *supra* note 7, at 325; McGlynn, *supra* note 8, at 531. As a result, custody decisions are a closer call, leading to increased struggles between parents to gain custody. Baker & Andre, *supra* note 15, at 15. As one author opined: “The struggle between two passionate parents is a byproduct of modern-day divorce, and it sets the stage for alienation.” Darnall, *supra* note 7, at 324; *see also* Rosalind Sedacca, *Divorce 2010: Parental Alienation—Hurting Your Kids?*, BASIL & SPICE (Feb. 23, 2010), <http://www.basilandspice.com/love-and-relationships/divorce-2010-parental-alienation-hurting-your-kids.html> (“When you mix two egos with dramatically differing perspectives, you’re bound to get an entanglement of emotions compounded by allegations, defensiveness and self-righteousness.”).

219. Baker & Andre, *supra* note 15, at 15 (“[T]he absolute numbers [of parental alienation] are mounting.”); Debra Cassens Moss, *Teaching Kids to Hate*, A.B.A. J., June 1, 1988, at 19, 19

become even more commonplace as the number of divorces and custody battles continues to increase.²²⁰ As one commentator noted, “As long as the divorce rate remains high and divorce proceedings are conducted in accordance with the traditional American advocacy system, America will continue to battle over children and prevent parents from exercising their parental rights.”²²¹ Therefore, it is likely that future alienated parents will find IIED even less accessible as a viable tort claim than do alienated parents today.

In addition to the difficulties of the “extreme and outrageous” element, there is a second problem with using IIED for parental alienation; namely, the categorical refusal by some courts to allow IIED claims for parental alienation. They do so because they view such claims as nothing more than disguised alienation of affections claims. Although some commentators opine that “courts should not dismiss the action on the premise that it is a derivative of other torts,”²²² courts do not hesitate to do so. For example, in *Bouchard v. Sundberg*, a Connecticut appellate court disallowed recovery because “the emotional distress complained of flowed from the alienation of the children’s affections.”²²³ As the court explained, when the legislature abolished alienation of affections claims, it “expressed its intent to ‘abolish common law actions seeking damages for a particular type of conduct, regardless of the name that a plaintiff assigns to that conduct.’”²²⁴ Similarly, in *R.J. v. S.L.J.*, a Missouri appellate court noted that “the action for intentional infliction of emotional distress cannot be maintained where the underlying claim for alienation of affection is not actionable and the emotional distress is the alleged consequence of the same acts which caused the children to separate from the parent.”²²⁵

(referring to parental alienation as “a growing problem”). A twelve-year study of over 1,000 divorces, which was commissioned by the Family Law Section of the American Bar Association, found that parental alienation occurs regularly sixty percent of the time and sporadically another twenty percent of the time. Chaim Steinberger, *Father? What Father? Parental Alienation and Its Effect on Children* (pt. 1), N.Y. ST. B.A. FAM. L. REV., Spring 2006, at 10, 10. That same study revealed that eighty percent of divorcing parents engaged in alienation tactics in varying degrees, with twenty percent of those doing so daily. Baker & Andre, *supra* note 15, at 15; Vassiliou & Cartwright, *supra* note 15, at 183.

220. Darnall, *supra* note 7, at 324.

221. Borris, *supra* note 181, at 200.

222. Bargamian, *supra* note 16, at 142.

223. *Bouchard v. Sundberg*, 834 A.2d 744, 754 (Conn. App. Ct. 2003).

224. *Id.* at 756 (quoting *McDermott v. Reynolds*, 530 S.E.2d 902, 903 (Va. 2000)); see also *Poindexter v. Armstrong*, 934 F. Supp. 1052, 1068 (W.D. Ark. 1994) (rejecting the plaintiff’s outrage claim as a disguised alienation of affections claim).

225. *R.J. v. S.L.J.*, 810 S.W.2d 608, 609 (Mo. Ct. App. 1991).

A final problem with using IIED as a cause of action for parental alienation is that, in many jurisdictions, IIED is unavailable to a non-custodial parent. For example, in *Cosner v. Ridinger*, a noncustodial father sued the child's mother and third parties for IIED, alleging that they concealed the child and prevented his court-awarded visitation.²²⁶ The Supreme Court of Wyoming affirmed the trial court's dismissal of the plaintiff's IIED claim, finding no allegations of outrageous conduct by the defendants.²²⁷

III. A NEW TORT LAW APP FOR PARENTAL ALIENATION: "INAPPROPRIATE PARENTAL INFLUENCE"

Current tort remedies "are sadly inadequate and virtually ineffective,"²²⁸ leaving many parental alienation victims without a remedy to make them whole.²²⁹ It is time for state legislatures and judges to design a new app for parental alienation, a unique tort better tailored to the factual context in which parental alienation occurs: "inappropriate parental influence" (IPI).

The new IPI claim utilizes the elements of alienation of affections and IIED because both address the effects of a destroyed relationship.²³⁰ It also contains some of its own, unique elements. As a result, IPI includes elements that are more difficult to satisfy than those of an alienation of affections claim, but less difficult to satisfy than those of an IIED claim. By combining elements of alienation of affections with unique elements, IPI would be a tort claim better suited to address parental alienation.

Because IPI would be specifically tailored to parental alienation, it would avoid the pitfalls associated with existing tort-based causes of action. Recognizing IPI would distance parental alienation from traditional alienation of affections claims. In the jurisdictions that have abolished alienation of affection claims, it is likely that the abolition is complete and that the courts are unwilling to recognize a viable vestige of that tort for parental alienation claims. Moreover, IPI will have elements more closely aligned with the realities of parental alien-

226. *Cosner v. Ridinger*, 882 P.2d 1243 (Wyo. 1994); see also Feinberg & Loeb, *supra* note 16, at 279 (noting that courts may find IIED inapplicable as against public policy when asserted by a noncustodial parent against a custodial parent).

227. *Id.*

228. Niggemyer, *supra* note 4, at 587.

229. See Kristin A. Wentzel, Note, *In the Best Interests of the Child? Minnesota's Refusal to Recognize the Tort of Intentional Interference with Custodial Rights: Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990), 14 HAMLINE L. REV. 257, 276 (1990).

230. Bargamian, *supra* note 16, at 135 (noting that IIED "addresses the ramifications of impaired relations").

ation. Adopting IPI will also avoid the problems associated with using IIED as a vehicle for relief for parental alienation, namely, allowing plaintiffs to avoid the “extreme and outrageous” element. This assuages the concern that parental alienation is a mere derivative of alienation of affections and extends relief to all parents.

Some may question the propriety of creating a new tort-like IPI, given that many jurisdictions lack precedent for allowing tort claims for parental alienation. However, lack of precedent is no reason for denying a remedy to an alienated parent.²³¹ After all, the law is not designed to be static but instead should be changed, adapted, and supplemented to keep pace with the needs of an ever-evolving society and the contemporary conditions and relationships within it.²³² Others may believe that creation of such a new tort is unlikely or would be unpopular.²³³ Nonetheless, recognizing such a tort would be beneficial,²³⁴ as it would provide more complete compensation for victims, hold tortfeasors accountable for their actions, punish harmful and socially unacceptable behavior, and better protect the parent–child relationship.

A. *Proposed IPI Claim*

As proposed and discussed in detail below, IPI will include the following five elements: (1) a sufficiently substantial relationship existed between the plaintiff-parent and the child prior to the alienating conduct; (2) the defendant-parent engaged in severe or pervasive alienating conduct; (3) damage to or destruction of the plaintiff-parent’s relationship with the child; (4) the damage to or destruction of the relationship between the plaintiff-parent and the child was caused by

231. See *Strode v. Gleason*, 510 P.2d 250, 252 (Wash. Ct. App. 1973) (“The novelty of an asserted right and the lack of precedent are not valid reasons for denying relief to one who has been injured by the conduct of another.”).

232. *Id.* (“The common law has been determined by the needs of society and must recognize and be adaptable to contemporary conditions and relationships. ‘[S]tability should not be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires.’” (alteration in original) (citations omitted) (quoting *In re Stranger Creek*, 466 P.2d 508, 511 (Wash. 1970))).

233. McGlynn, *supra* note 8, at 539–40 (“An unpopular suggestion in dealing with parental alienation was to create a tort for parental alienation.”); Niggemyer, *supra* note 4, at 576 (“[T]he widespread acceptance of a specific cause of action for parental alienation seems unlikely to occur in the near future . . .”).

234. See Feinberg & Loeb, *supra* note 16, at 278 (“Severe psychological or physical interference in the parenting relationship demands extreme remedies.”). Even officers of state chapters of the American Academy of Matrimonial Lawyers feel that when the alienator parent is “intentionally alienating and go[ing] out of [his] way to turn the child against the other parent, maybe [he is] responsible for damages.” Appezato, *supra* note 89.

the defendant-parent's severe or pervasive alienating conduct; and (5) the plaintiff-parent suffered severe emotional distress as a result.

The first proposed element to a claim for IPI is that a sufficiently substantial relationship existed between the plaintiff-parent and the child prior to the alienating conduct.²³⁵ This threshold element should be carefully analyzed by the court,²³⁶ and any claim lacking such a relationship should be dismissed.²³⁷ However, given that a loving relationship is the natural state in most parent-child relationships, a presumption should exist in favor of the plaintiff-parent, requiring the defendant-parent to bear the burden of proving that such a relationship did not in fact exist between the plaintiff-parent and the child.

Logically, given that IPI is designed to remedy the emotional distress suffered by a parent whose relationship with the child is negatively impacted by the alienating conduct of the other parent, a parent without a sufficiently substantial pre-alienation relationship with the child does not suffer the requisite harm. Courts routinely assess the nature of relationships in numerous tort claims; for example, those for loss of consortium and wrongful death. In analyzing the prior parent-child relationship in the IPI context, a court could consider such factors as the amount of time the plaintiff-parent physically spent with the child,²³⁸ the efforts of the plaintiff-parent to maintain contact with the child when not physically with the child (for example, by letter, telephone, text message, or email),²³⁹ as well as the plaintiff-parent's participation in, and attendance at, the child's extracurricular events.²⁴⁰ This element will eliminate the IPI claims of parents who have no committed, loving relationship with their child and who may be simply looking to litigation as an opportunity for revenge or for a financial windfall.

235. This element is similar to one of the elements of a claim for alienation of affections. *See supra* notes 182-99 and accompanying text (discussing the elements of alienation of affections claims). Yet IPI differs from alienation of affections because, among other distinctions, it will not include an element requiring damage or destruction to certain interests associated with the relationship at issue.

236. Bargamian, *supra* note 16, at 138.

237. *See id.* at 138-39 (explaining, in the IIED context, that "[o]nly the destruction of a relationship involving close emotional bonds can give rise to [the type of] severe emotional distress" that will be required to succeed on a claim for parental alienation and that "[m]inimal contacts between the child and parent will not support a claim").

238. For example, a claim by a parent who only sporadically sees his child should fail unless worthy circumstances dictated the limited contact. *Id.* at 141 n.103.

239. *Id.* at 139.

240. This factor will be especially important when assessing parental alienation claims asserted by a custodial parent because it is assumed that the child spends a vast amount of time with the custodial parent. *Id.* at 139.

A plaintiff-parent should bear the burden of proving the second proposed element of IPI: that the defendant-parent engaged in severe or pervasive²⁴¹ alienating conduct.²⁴² Some parental alienation activities occur in almost every divorce,²⁴³ and most high-conflict divorce cases carry with them at least some brainwashing and programming of children.²⁴⁴ In fact, one study revealed that parental alienation occurs “sporadically . . . twenty percent of the time.”²⁴⁵ Obviously, not all alienating conduct should be actionable, and the severe-or-pervasive requirement will ensure that IPI claims based on minor, petty incidents of alienation are excluded. Further, a parent accused of IPI should be allowed to defend against such a claim if he can prove that his interference with the relationship between the plaintiff-parent and the child was justified.²⁴⁶

In assessing the severe-or-pervasive element, the court should examine the defendant-parent’s role in influencing a child to reject the plaintiff-parent.²⁴⁷ The components assessing the severity or pervasiveness of the conduct should be disjunctive, allowing a plaintiff who successfully proves either severe or pervasive conduct by the alienator parent to satisfy this element. A plaintiff-parent who could prove that his child was alienated through an intense or extreme but brief incident—for example, kidnapping or secreting by the alienator parent—could satisfy the “severe” prong of the second element of IPI. A plaintiff-parent who could prove that his child was alienated through multiple instances of more minor conduct—for example, a pattern of consistent and persistent alienating conduct of a long duration by the alienator parent—could satisfy the pervasive prong of the second ele-

241. Because “severe” and “pervasive” are elements of claims for sexual harassment under Title VII and interpretive jurisprudence, courts could benefit from existing judicial interpretation of these elements in the employment discrimination context. See 42 U.S.C. § 2000e-2 (2006); see also, e.g., *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

242. “Severe or pervasive” is a unique element of IPI that, in essence, replaces the intent component of alienation of affections and the intent or recklessness component of IIED claims. IPI will not require proof of intent or recklessness because it can be assumed that any parent engaging in severe or pervasive conduct, such as that described herein, had the intent to harm the other parent’s relationship with the child or was acting in a reckless manner. In other words, severe or pervasive conduct should be actionable regardless of the defendant’s intent or recklessness, provided the other elements of IPI are satisfied. By omitting an intent or recklessness element, IPI will preclude a defendant who admits to harmful conduct from arguing that he had no intent to harm the relationship between the child and the other parent.

243. ELROD, *supra* note 35, § 6:26.

244. Vestal, *supra* note 8, at 489.

245. Steinberger, *supra* note 219, at 10.

246. See Berger, *supra* note 86, at 530 (“If, for example, a spouse has abused a child, there is obviously justification for attempting to sever an established parental relationship.”).

247. William L. Hill, Note, *Tort Recovery for Intentional Interference with Visitation Rights: A Necessary Alternative*, 32 U. LOUISVILLE J. FAM. L. 657, 668 (1993–1994).

ment of IPI. In other words, interference falling short of deprivation of physical contact should satisfy this element.²⁴⁸

Although this element is similar to one of the elements of IIED (“extreme and outrageous”) and alienation of affections (“interference with a relationship”), “severe or pervasive” is a more suitable element for a claim for parental alienation. A plaintiff alleging an alienation of affections claim must satisfy the interference-with-a-relationship element, which is too lenient a standard for parental alienation claims.²⁴⁹ A plaintiff alleging a claim for IIED must satisfy the extreme and outrageous element, which is a nearly insurmountable barrier for parental alienation plaintiffs.²⁵⁰ “Severe or pervasive” captures the intense harm to the child but is notably less stringent than IIED. Also, the severe-or-pervasive element elevates the harm recognized in its alienation of affections counterpart and will ensure that IPI claims based on minor incidents of alienation are excluded.

Third, a plaintiff-parent must prove damage to or destruction of his relationship with his child. However, a plaintiff-parent need not prove that the child has completely rejected him as this element does not require the complete destruction of the parent-child relationship.²⁵¹ An alienated parent may satisfy this element by proving damage to his relationship with his child. After all, parental alienation is harmful regardless of the success of the alienator parent’s efforts, and parents have a duty to promote and encourage the relationship between the child and the other parent.²⁵² Dealing with alienating conduct before a child completely rejects the alienated parent may save

248. Recognizing the damage to a parent-child relationship by interference that falls short of deprivation of physical contact is harmonious with the current status of modern tort law, given that it recognizes recovery for emotional-distress harm even in the absence of accompanying physical injury. As early as 1973, one court noted the damage to a parent caused by

the loss of the love and affection of a child who continues to reside with the parent he or she has come to despise as a result of wrongful action of a third party. Not only would the loss of companionship and mental distress be present, but the constant antagonism of the alienated child would be an omnipresent reminder and aggravation of the injury.

Strode v. Gleason, 510 P.2d 250, 253-54 (Wash. Ct. App. 1973) (citing Schurk v. Christensen, 497 P.2d 937 (Wash. 1972); Smith v. Rodene, 418 P.2d 741 (Wash. 1966); Murphy v. City of Tacoma, 374 P.2d 976 (Wash. 1962)).

249. See discussion *supra* Part II.B.1.

250. See discussion *supra* Part II.B.2.

251. J. Michael Bone & Michael R. Walsh, *Parental Alienation Syndrome: How to Detect It and What to Do About It*, FLA. B.J., Mar. 1999, at 44 (advocating for recognition of “attempted PAS,” a term they used to describe the behavior described herein as parental alienation).

252. *Id.* at 48.

the parent-child relationship.²⁵³ In assessing this element, the court should compare the current status of the relationship between the plaintiff-parent and the child to the status of that relationship pre-alienation (which will already have been established pursuant to the first element). Only when the court determines that the comparison yields a notable, negative change in the child's attitude toward the plaintiff-parent will this element be satisfied.²⁵⁴

Fourth, an IPI plaintiff must also prove a causal link between the defendant's severe or pervasive alienating conduct and the destruction or damage of the plaintiff-parent's relationship with the child.²⁵⁵ However, if a plaintiff-parent proves that the defendant-parent engaged in severe or pervasive alienating conduct, then the plaintiff-parent should be entitled to a presumption of causation.²⁵⁶ Thus, the burden of proof for this element would shift to the defendant-parent to prove that the destruction or damage to the plaintiff-parent's relationship with the child was not caused by his inappropriate parental influence.

Damage to or destruction of the relationship between the plaintiff-parent and his child, standing alone, should not be enough to satisfy causation. After all, the child could reject the plaintiff-parent based on his own experiences with that parent,²⁵⁷ such as when that parent recently remarried, changed his personal life in some way with which the child disagrees, or became involved with something the child regards as repugnant.²⁵⁸ Alternatively, the child could reject the plaintiff-parent for reasons not related to either the defendant-parent's alienating conduct or the plaintiff-parent's lifestyle choices. For example, the child may simply suffer separation anxiety from the defendant-parent or just prefer the defendant-parent because of their common interests.²⁵⁹ Thus, the court must also ascertain the reason

253. *Id.* (“[W]hen attempted PAS has been identified, successful or not, it must be dealt with swiftly by the court. If it is not, it will contaminate and quietly control all other parenting issues and then lead only to unhappiness, frustration, and, lastly, parental estrangement.”).

254. Hill, *supra* note 247, at 668.

255. This element mirrors one of the elements of the claims for alienation of affections and IIED. See *supra* notes 182-227 and accompanying text (discussing of elements of alienation of affections and IIED).

256. In some IIED cases in which it is impossible to prove the defendant's role in creating the injury, courts have shifted the burden of proof to the defendant to show that he did not cause the injury. Berger, *supra* note 86, at 528-29.

257. Waldron & Joanis, *supra* note 10, at 121.

258. See Bargamian, *supra* note 16, at 140.

259. Susan Taylor Martin, *Parental Alienation: Sickness or Psych Job?*, ST. PETERSBURG TIMES, May 23, 2010, at 1A.

behind the child's attitude change,²⁶⁰ and only when the defendant-parent's inappropriate parental influence is a substantial factor in the child's attitude change should the plaintiff-parent have a cause of action for IPI.²⁶¹ This element will eliminate the vast majority of frivolous parental alienation claims.

Finally, the plaintiff-parent should bear the burden of proving that he suffered severe emotional distress.²⁶² The basic premise of a claim for IPI, much like one for IIED, "is that destruction of a close relationship results in severe emotional distress."²⁶³ Because this element is also an element of a claim for IIED, the *Restatement* comments addressing emotional distress lend guidance. Comment j explains that severe emotional distress "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."²⁶⁴ To be actionable, though, the emotional distress must be such "that no reasonable man could be expected to endure it."²⁶⁵ Nevertheless, the emotional distress must be reasonable and justified under the circumstances, and generally speaking, no liability should be imposed when the plaintiff's emotional injuries are exaggerated and unreasonable.²⁶⁶ That said, an exception should exist when the plaintiff's emotional distress is the result of his "peculiar susceptibility to such distress" and the defendant has knowledge of it,²⁶⁷ which could be the situation in some parental alienation cases.

While the plaintiff bears the burden of proving severe emotional distress, "the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."²⁶⁸ Courts should consider both the intensity and the duration of the distress in determining its severity.²⁶⁹ A plaintiff-parent with only a minimal relationship with his child (as assessed under the first element)

260. Bargamian, *supra* note 16, at 140.

261. Alienation of affections cases also require alienating conduct to be a substantial factor. RESTATEMENT (SECOND) OF TORTS § 683 cmt. k (1977). This requirement will allow courts to avoid difficulty when the child's attitude change toward the plaintiff-parent is based on a myriad of factors, including alienating conduct.

262. Bargamian, *supra* note 16, at 133-41 (discussing the same requirement in the context of an IIED claim for parental alienation). This element mirrors one of the elements of IIED. See *supra* notes 200-27 and accompanying text (discussing the elements of an IIED claim).

263. Bargamian, *supra* note 16, at 139.

264. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

will only suffer a minimal level of emotional distress and will, therefore, be unable to recover for IPI.²⁷⁰ Likewise, a plaintiff-parent who initially enjoyed a close relationship with his child should not be allowed to succeed on an IPI claim if he cannot prove severe emotional distress. This element serves to distinguish a claim of IPI from one for traditional alienation of affections. Whereas a traditional claim for alienation of affections requires only the loss of the relationship and does not require a showing of any emotional distress (much less severe emotional distress), IPI would require a high degree of resulting emotional disturbance.

Because IPI is a proposed tort claim, it logically follows that a plaintiff succeeding on such a claim should be allowed to recover any and all proven damages that tort law allows. As with any tort claim, in the event that a plaintiff-parent succeeds on an IPI claim, the amount awarded to him should be based upon the damages (actual and non-pecuniary) that he suffered because of the defendant-parent's wrongful conduct. Because IPI is a hybrid of alienation of affections and IIED claims, damages recoverable under either of those causes of action should guide courts and juries in awarding damages.²⁷¹

B. Potential Objections to IPI

Providing parents with a tort-based cause of action for parental alienation opens the door to several concerns.²⁷² While these concerns are valid and deserve serious and careful consideration, preserving and protecting the parent-child relationship from inappropriate parental interference outweighs them.

The same concern that confronts practically any new tort will probably be raised in response to IPI: that the floodgates of litigation will

270. See Bargamian, *supra* note 16, at 133–35 (explaining a similar correlation in IIED cases).

271. For example, much like an alienation of affections plaintiff, one recovering for IPI should be allowed to recover compensation for loss of a child's services, care, comfort, and companionship. Like an IIED plaintiff, he should also be allowed to recover compensation for his own emotional distress. In the event that the defendant-parent abducted or concealed the child, the plaintiff-parent should also be allowed to recover any expenses incurred in recovering the child, including actual expenses and legal fees. See, e.g., *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983).

272. *Segal v. Lynch*, 993 A.2d 1229, 1240 (N.J. Super. Ct. App. Div. 2010) (“Even a cursory examination of this [parental alienation] question reveals the profound public policy implications raised by either permitting or denying such a cause of action.”); see also *Berger*, *supra* note 86, at 511 (“[A] real conflict exists between parents’ legally protectable interests in their relationships with their children and the possibility that allowing a tort claim may provide another vehicle for exacerbating the psychological and financial damages of divorce.”).

be opened.²⁷³ But one purpose of the law is to remedy wrongs, even in the face of a potential opening of litigious floodgates.²⁷⁴ Also, in all actuality, IPI may actually deter parental alienation,²⁷⁵ conserving judicial resources.²⁷⁶ Most courts confronting a tort claim between ex-spouses fail to consider this competing policy.²⁷⁷ Ultimately, no one will know whether it will open the floodgates of litigation or whether it will actually serve a valuable deterrent function unless and until IPI is accepted as a cause of action.

Concern may also arise that a disgruntled parent, motivated by anger and vengeance, could gravely abuse the action by wielding the claim as a weapon of spite.²⁷⁸ This, in turn, could lead to baseless or petty lawsuits.²⁷⁹ However, banning claims on this basis evidences an unwarranted lack of trust in the judicial system; after all, courts and

273. Mascarenhas, *supra* note 174; *Larson v. Dunn*, 460 N.W.2d 39, 47 (Minn. 1990) (noting the possibility that recognizing a tort for interference with parental rights could “result in a proliferation of litigation”).

274. Courts and commentators have acknowledged this. *See, e.g., Raftery v. Scott*, 756 F.2d 335, 340 (4th Cir. 1985) (“The implicit threat of an avalanche of cases, arising whenever one parent makes an uncomplimentary remark about the other . . . [will not] seriously undermin[e] society or its laws.”); *Wentzel, supra* note 229, at 273 (“[I]t is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation.’” (quoting W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 12, at 56 (5th ed. 1984))).

275. *See Hill, supra* note 247, at 673 (“[A] clear and concise statement of a party’s rights under the law actually limits litigation in the long run.”).

276. *Niggemyer, supra* note 4, at 588–89 (“[D]eterrence of potential parental alienation directly translates to a savings of judicial time and energy.”).

277. *Borris, supra* note 181, at 194 (discussing *Whitehorse v. Critchfield*, 494 N.E.2d 743 (Ill. App. Ct. 1986)). Of course, some courts have recognized that “there are specialists in family law who view the potential of damage suits as a useful deterrent to lawless conduct.” *E.g., Khalifa v. Shannon*, 945 A.2d 1244, 1263 (Md. 2008) (quoting *Ruffalo v. United States*, 590 F. Supp. 706, 712 (W.D. Mo. 1984)). Others disagree. *See, e.g., Wood v. Wood*, 338 N.W.2d 123, 125 (Iowa 1983) (“A tort claim will obviously furnish little deterrent or likelihood of recovery in the case of an impecunious defendant.”); *Zaharias v. Gammill*, 844 P.2d 137, 139 (Okla. 1992) (“[R]ecognition of a tort for custodial interference will not deter parental abduction of children.”); *Borris, supra* note 181, at 200 (“Civil remedies have, in fact, had little deterrent value.”); *Mary Louise Taylor, Note, Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 513 (1983) (“The major weakness of the tort action for interference with custody is the possibility that it may not succeed in pressuring an abductor-parent to return a child.”). The reason could be that a former spouse determined to hurt an ex-husband or ex-wife may not be deterred from such conduct by the threat of a damage award or that an alienator parent views a potential damage award as a small price to pay for alienating the child from the other parent. *Berger, supra* note 86, at 484; *see also Davis v. Hilton*, 780 So. 2d 974, 977 (Fla. Dist. Ct. App. 2001) (Gross, J., concurring specially) (“If the prospect of contempt cannot deter conduct deleterious to the parties’ child, then the abstract possibility of a damages judgment in the distant future will be even less likely to modify behavior.”).

278. *Larson*, 460 N.W.2d at 46; *Bock v. Lindquist*, 278 N.W.2d 326, 327–28 (Minn. 1979); *Zaharias*, 844 P.2d at 140; *Segal v. Lynch*, 1229, 1233 (N.J. Super. Ct. App. Div. 2010).

279. *Bargamian, supra* note 16, at 136 (“Recovery for actual damages may not be the motivation for bringing the action, so courts are concerned about frivolous claims.”).

juries must differentiate between valid and meritless claims.²⁸⁰ In essence, just because the action could be misused does not mean that it should not exist.

Others may argue that recognizing IPI will inappropriately shift the focus away from repairing the damaged or destroyed parent-child relationship and onto compensating the alienated parent.²⁸¹ However, lawmakers have supported the policy of a child's enjoying a relationship with both parents and have evinced a desire to punish those who interfere with it.²⁸² The common law has followed suit,²⁸³ with tort law traditionally protecting relational interests from interference.²⁸⁴

Some fear that a tort such as IPI may "escalat[e] intrafamily warfare,"²⁸⁵ making unhappy relationships even worse.²⁸⁶ This argument is unpersuasive because, given that the parents are already divorced or separated and only one of them has legal custody of the child, there is no remaining family, at least in the sense of a family unit.²⁸⁷ Thus, litigation is unlikely to cause much additional harm.²⁸⁸ To the extent that any "family" remains to be protected, it could be that prohibiting an action for damages would in fact be what actually worsens the already unhappy relationship. After all, the alienated parent has suffered damages at the hands of the alienator parent, and denying the

280. See Berger, *supra* note 86, at 522 ("Although some courts and commentators are concerned about the filing of false claims for emotional distress, there is little evidence that plaintiffs regularly malingering to file tort actions, and courts and juries have been able to discern false claims for physical injury and to put dollar amounts on physical pain and suffering.")

281. Appezzato, *supra* note 89. One court has noted that a parent's "interest in compensation should not outweigh the effects of bitter accusations on young children." *Larson*, 460 N.W.2d at 46.

282. Bargamian, *supra* note 16, at 135 ("Legislatures have endorsed the importance of a child maintaining contact with both parents Legislatures support legal sanctions for interfering with the parent-child relationship.")

283. *Khalifa v. Shannon*, 945 A.2d 1244, 1253 (Md. 2008) ("The common law has traditionally recognized a parent's interest in freedom from tortious conduct harming his relationship with his child" (quoting *Murphy v. I.S.K.Con. of New Eng., Inc.*, 571 N.E.2d 340, 251 (Mass. 1991)).

284. *Larson*, 460 N.W.2d at 48 (Popovich, C.J., dissenting) ("Tort law long has protected 'relational' interests, such as between family members, from interference.")

285. *Id.* at 46; see also *Bock v. Lindquist*, 278 N.W.2d 326, 327-28 (Minn. 1979) (expressing concern over potential intrafamily conflict); *McKinney v. Cunniffe*, No. 55631-2-I, 2005 WL 3150319, at *3 (Wash. Ct. App. Nov. 28, 2005) (same).

286. See *Larson*, 460 N.W.2d at 46; *Bock*, 278 N.W.2d at 328.

287. Of course, the child may consider both parents her family, and both parents will normally consider the child to be part of their family. It is the "family," as a unit, that is no longer existent.

288. *Wentzel*, *supra* note 229, at 269; see also *Larson*, 460 N.W.2d at 48 (Popovich, C.J., dissenting) ("[F]amilial relationships [are] already wounded by divorce Depriving the victimized parent of a forum for redress . . . will not necessarily promote the family's healing."); Danielle Jsman, *Gardner's Wüch-Hunt*, U.C. DAVIS J. JUV. L. & POL'Y, Fall 1996, at 12 (noting that after divorce, the family falls apart and is not a stable unit).

alienated parent a damage remedy will not undo the alienating conduct he has suffered.²⁸⁹ Instead, it will allow the alienator parent to avoid liability,²⁹⁰ leaving the alienated victim to suffer financially and emotionally.²⁹¹ Both results are unacceptable and could logically lead to more anger and discontent on the alienated parent's part.²⁹² Additionally, these results contradict basic tort propositions.²⁹³

Others are apprehensive of a tort like IPI because it might be contrary to the best interest of the child.²⁹⁴ However, a child victim of parental alienation would have already been emotionally harmed by the alienating conduct, and a judicial foreclosure of the alienated parent's action will not undo that harm.²⁹⁵ Critics of tort claims for parental alienation fear that the child could be pushed into the role of key witness and therefore be subjected to intense psychological evaluations and legal questioning at depositions and trial.²⁹⁶ However, as distasteful as this may seem, the reality is that children are already

289. See Dobbs, *supra* note 207, at 1178 ("Preventing an aggrieved parent from recovering damages will not make the abduction any less acrimonious or painful for the child or for other family members. In fact, leaving one parent to bear the financial and emotional burdens resulting from the abducting parent's wrongful conduct may exacerbate an already volatile situation.").

290. See Bargamian, *supra* note 16, at 136.

291. Dobbs, *supra* note 207, at 1178.

292. See Niggemyer, *supra* note 4, at 587 ("Ignoring the tortious wrong to a parent whose child's affections are intentionally alienated is unacceptable.").

293. See Bargamian, *supra* note 16, at 137 ("Disallowing the [tort] case allows the tortfeasor to avoid liability, while leaving the victim to suffer. This contradicts the basic tort proposition of social responsibility for one's acts." (footnote omitted)); Wentzel, *supra* note 229, at 268 ("[M]aintaining family harmony [is] secondary to affording a remedy to a party injured by another's conduct.").

294. *Davis v. Hilton*, 780 So. 2d 974, 977 (Fla. Dist. Ct. App. 2001) (Gross, J., concurring specially) ("Involvement of children in protracted litigation in pursuit of a money judgment cannot be in their best interest."); *Larson v. Dunn*, 460 N.W.2d 39, 45 (Minn. 1990); *Segal v. Lynch*, 993 A.2d 1229, 1233 (N.J. Super. Ct. App. Div. 2010) (expressing concern that tort suits for parental alienation could be used by a "parent with little to no consideration of how the litigation will affect the child," potentially causing great harm to the child, and explaining that plaintiff's IIED suit is "inimical to and irreconcilable with the best interests of the children involved in this suit"); *Apezzato*, *supra* note 89; *Mascarenhas*, *supra* note 174. *But see Berger*, *supra* note 86, at 511 ("[I]t is difficult to discern how allowing one parent to escape liability for interfering with the child's existing relationship with the other parent can support the best interests of the children.").

295. See Bargamian, *supra* note 16, at 136.

296. *Larson*, 460 N.W.2d at 45-46 (noting with regard to a similar tort that it "would create a new burden on children who . . . may be forced to testify against his or her own mother or father," and commenting that allowing tort suits "would place innocent children in the middle of a vigorous, probably vicious, lawsuit between their parents[]" and "would duplicate the ambivalence and dislocation of the dissolution itself"); *Segal*, 993 A.2d at 1240-41.

courtroom participants, both in family law and criminal matters.²⁹⁷ In fact, it is likely that even absent a tort claim, the alienated parent will petition the judiciary for a custody remedy, which will require the child's participation.²⁹⁸

A further concern is that allowing one parent to recover large damage awards from the other parent could have a negative financial impact on the child. Particularly, some may fear that the child will lose his financial support from the liable parent if that parent must pay damages to the other parent.²⁹⁹ However, it is possible that shifting money between parents will not necessarily deprive the child of financial support. In most states, an income-shares model is used to determine child support obligations. This means that the amount necessary to support a particular child is set by statute, and each parent is assessed a certain percentage of that amount based on his ability to do so.³⁰⁰ For example, a court may determine that the amount necessary to support a particular child is \$600. If the noncustodial parent earns \$200,000 per year and the custodial parent earns \$100,000 per year, the noncustodial parent, responsible for two-thirds of the \$600, will pay the custodial parent \$400 in child support. In the event that the noncustodial parent successfully asserts an IPI claim, obtaining a damage award to be paid by the custodial parent, the figure needed to support the child (\$600) will not change. What will change is the fraction of that \$600 for which each parent bears responsibility. Either way, the noncustodial parent who has been bettered financially by the damage award in his favor will be responsible for a bigger fraction of the \$600. By contrast, the custodial parent whose financial position is worse as a result of the damage award against her will be responsible for a smaller fraction of the \$600. Ultimately, \$600 will be going to the child for his support.

Opponents may argue that IPI will be a difficult claim for courts to handle and point to the courts' potential struggle to fashion a remedy for alienated parents.³⁰¹ While this may be true, "difficulty in fashion-

297. Dobbs, *supra* note 207, at 1178 ("[A] child's testimony or participation in a civil lawsuit . . . is no more necessary than in a criminal prosecution [for kidnapping or in family law matters].").

298. Bargamian, *supra* note 16, at 137 ("[A] parent suffering severe emotional distress from the loss of a relationship would resort to legal proceedings to enforce or modify the custody order in any event. An intentional infliction claim merely substitutes a damage action for a custody action.").

299. See Berger, *supra* note 86, at 511 ("[J]udges should protect against the possibility that a child's future support may be diminished by allowing a spouse to recover excessive damages from the other spouse."); Feinberg & Loeb, *supra* note 16, at 280; Taylor, *supra* note 277, at 515.

300. See, e.g., LA. REV. STAT. ANN. § 9:315.1 (2008).

301. Niggemyer, *supra* note 4, at 584.

ing relief for injured parties must not deter the judicial system from taking every step necessary to create a remedy that fits the problem—a remedy that truly rights the wrong.”³⁰² In the IPI context, tort law will do what it ordinarily does: compensate a victim with money. This gives rise to the concern that tort damages will be incalculable because they are uncertain and speculative.³⁰³ This problem is not unique to IPI claims, as it is seen elsewhere in the tort system, and other tort claims are not barred on this basis.³⁰⁴ Further, because IPI is based on alienation of affections and IIED, courts and juries may be guided by prior decisions involving those torts in determining remedies for IPI claims.

Of course, this raises an additional objection to IPI: money cannot fix the problem of parental alienation. Yet, money cannot bring back a victim of wrongful death or replace a tort victim’s limb, and awarding damages for those injuries is not questioned.³⁰⁵ Further, damages have a place in parental alienation cases. After all, money can ensure a victim’s access to psychological care, and it also legitimizes her injuries and reinforces society’s expectations that a tortfeasor will be punished and not allowed to profit from her wrongs.³⁰⁶ In other words, while money may not sufficiently remedy all harm, it is nonetheless necessary.

Finally, others may be concerned with difficulties of proof associated with an IPI claim.³⁰⁷ Again, this is not a new problem for tort claims and has not been fatal to other tort claims. Also, because the concern is largely based on the difficulty in establishing causation,³⁰⁸ and given the presumption of causation proposed above, this concern is less problematic for IPI claims than it would be for other tort claims.

While the concerns that may be raised in response to tort claims for alienated parents are legitimate, none are so great as to preclude recognition of a new tort for parental alienation such as IPI. Even if there were no other responses to them, these concerns should be

302. *Id.* at 587.

303. Berger, *supra* note 86, at 522.

304. *See id.* at 522 (“Difficult problems of establishing the amount of damages and deciding the cause of injuries are encountered elsewhere in the tort system and are not seen as impediments when physical injury is involved. . . . Courts and juries have been able to . . . put dollar amounts on physical pain and suffering.”).

305. *Id.* Because IPI is based on alienation of affections and IIED, courts and juries may be guided by prior decisions involving those torts in determining awards for IPI claims.

306. *Id.*

307. *See* Appezzato, *supra* note 89 (referencing comments made by Dale Console, president-elect of the New Jersey chapter of the American Academy of Matrimonial Lawyers).

308. Berger, *supra* note 86, at 528–29.

trumped by the prevailing public policy of preserving and protecting the bond between parent and child. As one court aptly noted, “The high place accorded filiation stems . . . from a recognition that there is a sanctity in the union of parent and child that . . . deserves the utmost respect.”³⁰⁹ Interference with that relationship is socially unacceptable and considered by some to be a danger to society,³¹⁰ such that absent exceptional circumstances, the best interest of everyone involved—as well as society at large—demands the preservation and protection of parent–child relationships. Ultimately, a parent suffering damage to his relationship with his child at the hands of an alienator parent endures the loss of his child, the destruction of his hopes, insulted feelings, and an “irreparable loss of that comfort and society”;³¹¹ he should be allowed to recover for his injuries. Because parental alienation is such a threat to those relationships, recognizing a new tort like IPI outweighs the concerns mentioned.

Further, given the stringency of the proposed elements of an IPI claim, courts would be able to summarily dismiss frivolous IPI claims early in the litigation,³¹² particularly those “brought solely as a means of harassment or revenge.”³¹³ This in turn would conserve judicial resources and save parents money. Courts should also freely award costs and attorneys’ fees in favor of those defending against baseless suits and should impose sanctions upon litigants—and their attorneys—who file them. Such threats of punishment should reduce the number of lawsuits filed. Furthermore, another tool, the counterclaim, may deter baseless IPI suits. Because one asserting a petty claim for parental alienation may be met with a claim against him for defamation, invasion of privacy, IIED, or malicious prosecution, he may think twice before instituting an IPI lawsuit. All of these factors should preclude an opening of “the floodgates of litigation,” whereby

309. *Plante v. Engel*, 469 A.2d 1299, 1301–02 (N.H. 1983). That court went on to note, “[T]his relationship is so intimately connected with the parent’s person . . .” *Id.* at 1301.

310. *Raftery v. Scott*, 756 F.2d 335, 340 (4th Cir. 1984) (“The harm or deliberate frustration of a close or affectionate relationship between parent and child . . . were there no remedy available to a parent who as a result was psychologically damaged strikes us as . . . potentially a danger to society.”).

311. *Strode v. Gleason*, 510 P.2d 250, 252 (Wash. Ct. App. 1973).

312. Courts should not hesitate to employ the tried-and-true methods of weeding out frivolous lawsuits and punishing the litigants who bring such suits. A court faced with an IPI claim should carefully examine the pleadings, and, when a plaintiff has failed to plead allegations sufficient to state a claim or who is unable to produce evidence sufficient to satisfy his burden of proof, the court should grant motions to dismiss or motions for summary judgment. *Berger*, *supra* note 86, at 525.

313. *Dobbs*, *supra* note 207, at 1188.

greedy parents file baseless lawsuits, and should avoid exacerbating familial discord and injecting the child into the forefront of litigation.

IV. CONCLUSION

Parental alienation is a serious problem that harms all parties involved and society as a whole. Yet family law remedies simply cannot compensate alienated parents for their resulting injuries, nor can they effectively deter alienating conduct. Therefore, alienated parents need the additional relief that only tort law can provide. While some courts have allowed alienated parents to assert tort claims, existing tort causes of action cannot adequately address and redress parental alienation. Thus, a new tort should be fashioned from a combination of the elements of alienation of affections and IIED, as well as from elements uniquely targeted at parental alienation. Such a tort will provide alienated parents who satisfy specific criteria with a tailored cause of action that remedies their injuries and will provide potential alienator parents with a financial incentive to refrain from alienating conduct. Although allowing such relief raises compelling objections, protecting the parent-child relationship from inappropriate parental interference should trump them. Parental alienation is a problem as old as the dissolution of the marriage, but, given its prevalence and intensity in contemporary society, tort law needs a new app for that.