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The Co-Occurrence of Parental Alienation Claims and Intimate Partner Violence in Family Court: Theory and Practice

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RESOLVE Manitoba is based at the University of Manitoba, Winnipeg, Manitoba, Canada, on original lands of Anishinaabeg, Cree, Oji-Cree, Dakota, and Dene peoples, and on the homeland of the Métis Nation.

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The brief is based on the presentation Dr. Peter Jaffe, Justice Mirwaldt and Robynne Kazina, "The Co-Occurrence of Parental Alienation Claims and Intimate Partner Violence in Family court: Theory and Practice" held on March 15, 2022, by RESOLVE Manitoba. The webinar can be retrieved from: https://www.youtube.com/watch?v=D0cTJxvbGA8&t=4742s

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In this Brief

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Introduction

In recent years, a troubling connection between intimate partner violence (IPV) and parental alienation has emerged. The concept of parental alienation has been fraught with controversy since its inception in the 1980s, generating rigorous debate in academic and scientific discourse. However, particular concern has emerged over the concept's use in legal proceedings across Canada, where claims of parental alienation have demonstrated a high potential for misuse and misunderstanding in family court cases involving allegations of IPV.

The term ***"parental alienation syndrome"*** was first introduced by child psychiatrist Richard Gardner in 1985. ***Gardner described parental alienation syndrome as "a disorder that arises primarily in the context of child custody disputes," whereby a child unjustifiably rejects one parent on account of manipulation or "brainwashing" by the other parent (Gardner, 2006, p. 5).*** Gardner asserted that parental alienation syndrome was a highly gendered phenomenon, with mothers as its primary perpetrators, and fathers as its victims. These tactics, according to Gardner, were employed by mothers due to developments in family law which increasingly awarded custody to fathers, such as the replacement of the tender years doctrine with the best interests of the child principle, and increasing instances of joint custody (Gardner, 2006).

Gardner's work on parental alienation syndrome attracted widespread criticism. Many noted that Gardner's writings were not published in peer-reviewed journals, and thus lacked scientific validity (O'Donohue et al., 2016). In fact, most of Gardner's work was *self-published*, and admittedly, based on his personal observations alone. Due to the lack of empirical research and scientific evidence for his claims, parental alienation syndrome was never recognized as a psychological phenomenon and no diagnostic criteria was developed for the issue (O'Donohue et al., 2016). Additionally, feminist critics noted an alarming amount of gender bias throughout

Gardner's work, including his unfair focus on mothers as the primary perpetrators of alienation (Zaccour, 2018). Issues impacting women and children in the family unit, such as IPV or child abuse, were also ignored in Gardner's early writings (with parent-child conflicts, once again, being attributed to mothers) (Silberg & Dallam, 2019). Despite such criticism, Gardner's ideas on parental alienation syndrome formed the basis for the term ***"parental alienation,"*** which is now used in many disciplines to describe behaviours designed to foster a child's rejection of a parent.

Parental alienation has had a profound impact on family court proceedings in Canada. This impact is particularly salient in family court proceedings involving IPV, where claims of parental alienation have become a common defense invoked by perpetrators of IPV (Tabibi et al., 2021). In such cases, perpetrators often make false counter-allegations of parental alienation after being accused of IPV, in an effort to divert attention away from their actions and shift the burden of proof to victims/survivors (Tabibi et al., 2021). Additionally, if victims/survivors are concerned for the welfare of their child with an abusive partner, attempts to protect their child have been mistaken for parental alienation by judges (Tabibi et al., 2021). This problematic phenomenon can create further challenges for victims/survivors in the family court system and underscores ***"real concerns that the parental alienation belief system exacerbates the already problematic attitudes of the legal system towards domestic violence"*** (Zaccour, 2018, p. 314).

This short brief explores the issue of parental alienation claims in family court cases involving IPV. The information in this brief is based on the webinar: ***The Co-Occurrence of Parental Alienation Claims and Intimate Partner Violence in Family Court: Theory and Practice,*** featuring keynote speakers Dr. Peter Jaffe (Centre for Research & Education on Violence Against Women & Children, Western University), Robynne Kazina (Taylor McCaffrey LLP), and the Honourable Madam Justice Lore Mirwaldt (Manitoba Court of Queen's Bench, Family Division). The brief specifically outlines issues relating to children resisting and refusing parenting time, best practices for family lawyers handling cases with co-occurring allegations of parental alienation and IPV, and reforms to the family law system in Manitoba.

Making Sense of Children Resisting or Refusing Parenting Time

Professionals across many disciplines agree that it is in a child's best interests to maintain healthy, loving relationships with both parents after separation. Parents are, therefore, expected to minimize a child's exposure to conflict and effectively co-parent during the separation process. When a child resists or refuses contact with one parent after the dissolution of a relationship, these behaviours are often attributed to acts of parental alienation. However, rushing to label such behaviours as alienation can be problematic, as it may mask other factors present in parent-child conflicts—particularly in instances where IPV or abuse have occurred.

Recent research into what has been called the ***"Resist/Refuse Dynamic"*** indicates that accusations of parental alienation often oversimply the many and complex reasons why a child may exhibit negative attitudes or behaviours towards a parent. It is, therefore, important to conduct a multi-factor analysis to account for *all* the factors present in parent-child conflicts that may contribute to such behaviours.

Factors and dynamics at play in parent-child conflicts (Fidler & Bala, 2020, p. 579):

- **Child factors** (age, cognitive capacity, temperament, vulnerability, special needs, resilience)
- **Parent conflict** before and after the separation
- **Sibling relationships**
- **Favoured parent factors** (parenting style and capacity, negative beliefs and behaviours, mental health, and personality, including responsiveness and willingness to change)
- **Rejected parent factors** (parenting style and capacity, negative reactions, beliefs and behaviours, mental health, and personality, including willingness to change)
- **The adversarial process/litigation**
- **Third parties** such as aligned professionals and extended family
- **Lack of functional co-parenting** and poor or conflictual parental communication

Changes to Canada's *Divorce Act*: Definition of Family Violence

Amendments to Canada's *Divorce Act* reframe the definition of family violence in the context of the best interests of the child (Department of Justice Canada, 2022). The amendment acknowledges that family violence can take many forms, including coercive control, and that such behaviour does not have to constitute a criminal offence to be considered family violence (Department of Justice Canada, 2022). It also recognizes a child's exposure to violence—through direct or indirect means—as family violence and child abuse (Department of Justice Canada, 2022).

Family violence means any conduct, **whether or not the conduct constitutes a criminal offence**, by a family member towards another family member, that is violent or threatening or that constitutes **a pattern of coercive and controlling behaviour** or that causes that other family member to fear for their own safety or for that of another person—and in the case of a child, the **direct or indirect exposure** to such conflict—and includes:

a) physical abuse, including forced confinement but excluding

I. the use of reasonable force to protect themselves or another person;

b) sexual abuse;

c) threats to kill or cause bodily harm to any person;

d) harassment, including stalking;

e) the failure to provide the necessaries of life;

f) psychological abuse;

g) financial abuse;

h) threats to kill or harm an animal or damage property; and

i) the killing or harming of an animal or the

Claims of parental alienation are often made in custody and access cases, specifically those involving IPV. An unfortunate pattern has emerged in these cases, whereby parents who have been accused of IPV make counter-allegations of parental alienation in family court. According to this pattern, women who allege abuse by their former partners are then blamed for ***"turning the child against them,"*** when the abusers own violent conduct may in fact be the reason a child is resisting contact (Oleson & Drozd, 2008). In such cases, children may not want to see a parent on account of a justified rejection or estrangement, whereby a child does not want to see a parent on account of their poor behaviour. In fact, research shows that fathers who have been abusive to their partners or children are significantly more likely to engage in alienating behaviours *themselves* than the non-abusive parent (Oleson & Drozd, 2008). It is important to note that what some may identify as the warning signs of parental alienation, may indeed be the signs of a parent who has been traumatized by violence and abuse.

There is concern that increasing focus on parental alienation in such cases

will distract from other important factors in the family assessment process. When assessing a case, all factors must be considered, including: the parenting history and nature of ongoing conflict; the nature of litigation; child abuse and domestic violence/coercive control; trauma symptoms for children and parents affected by abuse; the misuse of alienation to undermine the protective parent and disinformation to confuse the court; and alienation.

Allegations of parental alienation are often accompanied by intervention strategies targeted towards children. However, the efficacy of these intervention strategies remain unproven. For instance, children may be forced into programs that claim to ***"treat"*** alienation. However, outcome evaluations of these treatment programs are still in infancy and often use weak or problematic research designs (Johnston, 2017). Some treatment programs also require custody reversals, when evidence suggests that these practices can be harmful for children and may further traumatize them (Drozd & Bala, 2017).

Similar worries surround counselling or psychotherapy interventions for children—particularly when such treatments are court mandated. Counselling or psychotherapy cannot be provided to a young person without consent. If the young person is capable, they may decide if they want to give, or refuse, consent to treatment. For consent to be valid, it must be informed; given voluntarily; and not obtained through misrepresentation, fraud, or coercion (Canadian Mental Health Association, 2022).

Unfortunately, such interventions can violate the rights of children, and fall short of Canada's commitments under the *UN Declaration on the Rights of the Child*. There are several ways in which legal systems across Canada can improve their response to the issue, which include: ongoing judicial and legal education programs; early intervention for triage and court management; enhanced standards of practice for court-related professionals like mediators and parenting evaluators; child protection workers; access to legal advice and representation for children; and more applied research on the topic.

Best Practices for Family Law Practitioners

Claims of parental alienation are increasingly encountered by family law practitioners. Due to the frequency in which these claims are cited in family law cases involving IPV, it is

essential for family law practitioners to understand the complexities and unique power dynamics at play. Being aware of these intricacies can ensure that victims/survivors, and their children, are safe and supported throughout the family court process.

When dealing with family law cases involving claims of parental alienation, it is important to first assess the nature of the case. For instance, is it a high conflict case? Are there factors present that are specific to the child (i.e., does the child have an affinity to one parent or an alignment with one parent)? Does the child have a justified rejection of one parent? In certain cases, several of these situations will be present simultaneously.

It is also important for family law practitioners to assess whether family violence has occurred. This underscores the importance of screening for family violence when meeting with clients (resources such as the HELP Toolkit can be used to identify and respond to family violence). There are many reasons why clients may not initially disclose violence including embarrassment, shame, or guilt; concerns about being believed; a lack of understanding on relevancy or experience; and a fear for their own safety or safety of others.

Co-occurring claims of parental alienation and IPV in family court cases often fall under two scenarios. First, a victim/survivor of IPV may be accused of alienation by an abusive partner. In these cases, family law practitioners can take a number of steps to best support their clients through the family court process:

1. Control the narrative immediately as to why the child is resisting contact
    - Bring the history of violence and abuse to the forefront and present it in a comprehensive manner.
2. Understand the type of violence to help in making appropriate parenting arrangements
    - Different types of family violence will call for different types of parenting arrangements (i.e., an abuser with a history of physical violence may need supervised access or visitation with children). It is important to ensure safety first for

both the victim/survivor and their children and to utilize safety measures (such as protection orders) when necessary.

3. Help victims/survivors implement a parenting plan
    - Victims/survivors can feel that their every move is criticized, which may lead them to feel ***"frozen"*** and unsure of what to do. Family law practitioners can help victims/survivors brainstorm ideas for what a parenting plan would look like that is specific to their case and needs.
4. Understand the capacity of the victim/survivor to make decisions regarding the children
    - Some victims/survivors may have a hard time making decisions out of fear of being labelled an alienating parent. Family law practitioners can work with survivors to guide them through the decision-making process and develop appropriate, needs-based solutions to problems.

The second scenario involves cases where an abusive partner may be actively alienating children from the victim/survivor as a method of coercive control. Once again, family law practitioners can take a number of steps to best support their clients through the family court process:

1. Conduct a close examination of the alleged ***"parenting deficiencies"*** of the victim/survivor
    - It is important to be aware of the rationale for the victim/survivor's behaviour during the relationship, seeing as victims/survivors often develop coping strategies to maintain their safety, or the safety of their children, that may appear in a negative light. For example, victims/survivors may physically discipline their children in order to save them from harsher treatment at the hands of abusers. Abusers can also weaponize certain issues such as the victim/survivor's mental health struggles from abuse (such as depression, anxiety, and PTSD), as a way to discredit the victim/survivor and their parenting capacity.
2. Control the narrative early on regarding the presence of family violence

- Victims/survivors are up against the fact that many cases of abuse are unsubstantiated or undocumented, and it can be difficult to provide evidence of these claims (particularly in cases that involve acts of coercive control).

3. Early intervention
    - Early intervention is important in all cases. In Manitoba's family court system, emergent motions and court orders can be accessed when necessary.
4. Parenting plan considerations
    - It is important to demonstrate frequent contact between children and the alienating parent. Monitoring communication between parents (using apps like Family Wizard) can be helpful in these cases. Family law practitioners should ensure that there is frequent contact between children and the victim/survivor parent.

In such cases, families are often involved in concurrent criminal and family court proceedings. At present, it is the job of the family law practitioner to coordinate between the criminal and family court systems and understand the different standards of proof and analyses in each set of proceedings. When coordination fails, it can lead to many challenges including confusion for families, ***"retelling"*** the same story, inconsistent orders, increased risk to the survivor, and a lack of public confidence in the system.

Lastly, claims of parental alienation in family court cases contain interwoven access to justice considerations that can impact a victim/survivor's experience within the legal system. This includes litigation being used as a ***"weapon"*** to financially exhaust a former partner; parents having to change lawyers multiple times; litigants who are self-represented; and the absence of culturally appropriate/holistic legal practices. It is important to note that access to justice does not only encompass access to legal representation or the court systems, but a culturally sensitive and holistic legal system that also coordinates with child protection and criminal proceedings to ensure the wellbeing of victims/survivors and their children.

Manitoba's New Family Division Case Flow Model

Access to justice is a fundamental right. Every Canadian has a right to a justice system that is fair, timely, and accessible. An accessible justice system is one that enables Canadians to

obtain the information and assistance they need to help them resolve issues efficiently, affordably, and fairly—either through informal resolution mechanisms, where possible, or the formal justice system, when necessary (Department of Justice Canada, 2019).

A court system that is expensive, slow, or ineffective can hurt families and put children at risk. In Manitoba, there was recognition that the family court system presented a process that was, at times, unnavigable, and inaccessible for those who needed judicial intervention (Joyal, 2018). This included issues such as: delays in obtaining a mandatory first case conference date, inconsistent case conference processes, and delays in family violence determinations that created risk to victims. There was, therefore, a need for a better system in Manitoba.

In December of 2018, the Manitoba Court of Queen's Bench announced that a new Family Division Case Flow Model would be implemented on February 1, 2019, for all contested family proceedings. The creation of the new model was based on several factors, including: internal and external consultations; a review of access to justice studies and data; interviews with judges, court registry personnel, court staff, and collateral services; and three open sessions with legal professionals through the Manitoba Bar Association.

The new Family Division Case Flow Model outlined several objectives. First, the model highlighted objectives relating to the early resolution of cases. These include: ensuring that all reasonable efforts are made to resolve and/or dispose of family cases at the earliest opportunity; to ensure that greater judicial resources are available at the ***"front end"*** or ***"intake stage"***; and to provide early and active judicial intervention in order to resolve cases at the early stage (Man Reg 553/88R, s 70.24(1)). If cases cannot be resolved early on, the model aims to ensure cases flow through the court system within a reasonable, predictable, and finite time period (Man Reg 553/88R, s 70.24(1)). Lastly, the model also seeks to apply the principle of ***"proportionality"*** in all cases (Man Reg 553/88R, s 70.24(1)). Lastly, the model also seeks to apply the principle of "proportionality" in all cases, which ensures that sentencing is proportionate to the gravity of the offence.

Highlights of the new model:

1. **Accessibility** – The mandatory early exchange of information aids parties in resolving disputes.
2. **Navigability** – Forms are accessible and use a checklist format.
3. **Time Limited** – Strict timelines are imposed so that every case has a defined and foreseeable end date. Trials cannot be adjourned without the Chief Justice's permission.
4. **Early and Effective Judicial Intervention** – Emergent hearing can be utilized to address family violence, and issues surrounding denial of access to children are available with duty judges.
5. **Triage Conferences** – Provides an early opportunity to discuss the dispute with a judge, with a view to resolution.
6. **One Judge Model** – The triage conference judge will be the case conference judge.
7. **Effective Case Management** – Each case conference must result in a meaningful step towards resolution or preparation for trial.
8. **The End of Litigation Abuse** – Motions may only be filed with the permission of the case conference judge.
9. **The Prioritization of Family Violence/Parental Alienation Claims** – Heard at the outset of the case, not at the end.

The new model has implications for the way that family violence is assessed in Manitoba courts, particularly in relation to protection orders, emergent hearings, and prioritized hearings. While the process to obtain a protection order has remained unchanged, the process for an application to set aside, vary, or revoke a protection order has been modified. Under the new model, all applications appear on a list every second Wednesday, with the objective of resolving as many matters as possible on a consistent basis or by adjudicating the matter on a summary basis (Joyal, 2020).

Emergent hearings are also available on a limited and defined basis, and may be heard prior to triage, without the requirement of a prerequisite completion. A judge may hear a motion or application prior to triage if the motion or application relates to a situation involving one or more of the following: an immediate or imminent risk of harm to a party or a child; the removal of a child from Manitoba; and/or the loss or destruction of property (Man Reg

Changes to Canada's *Divorce Act*: Best Interests of the Child & Family Violence

Amendments to Canada's *Divorce Act* also include a new section outlining family violence factors relating to best interests of the child considerations. This amendment provides family courts with a non-exhaustive list of factors relating to family violence that they must consider, alongside other best interests of the child factors (Department of Justice Canada, 2022). Courts must consider the type, and nature, of family violence present, in order to adjudicate which type of parenting arrangement is best for each child, and family.

Factors relating to family violence

(4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

- **a)** the nature, seriousness and frequency of the family violence and when it occurred;
- **b)** whether there is a pattern of coercive and controlling behaviour in relation to a family member;
- **c)** whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
- **d)** the physical, emotional and psychological harm or risk of harm to the child;
- **e)** any compromise to the safety of the child or other family member;
- **f)** whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
- **g)** any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
- **h)** any other relevant factor.

553/88R, s 70.24(12)). Regarding child welfare, ***"emergent"*** exceptions include situations involving imminent risk of harm to the child, or situations where one parent has unilaterally eliminated all access and/or contact between the other parent and the child (Joyal, 2020).

If a prioritized hearing is necessary, then the date for a hearing is set within 30 days of the triage conference and before the first case conference. The triage judge will, concurrently, set a first case conference date to occur 30 days after the prioritized hearing. Prioritized hearings will be used for protection order variations/set aside applications, confirmation of the Master's report on dates of cohabitation/separation,[1] a summary judgment motion as directed by the triage judge, and hearings on matters that should

[1] Masters are judicial officers within the Court of Queen's Bench of Manitoba that deal with a wide variety of family law matters. When a Master conducts a reference, a report must be prepared in conclusion. The report is subject to a confirmation process and becomes an order of the court, once confirmed.

not wait for the first case conference (including interim custody and support) (Man Reg 553/88R, s 70.24(25)).

The principles of the new family division model have allowed Manitoba's family court to react and adapt to statutory changes and situational challenges in the delivery of judicial services. It is expected that these changes will result in a more nimble, cost-effective, efficient, and navigable family court process, where the vast majority of cases are resolved at triage or first case conference.

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