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Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act

Submission to Regulate the Junk Science of “Parental Alienation”

Associate Professor Carrie Leonetti

Introduction

Biography

I am an Associate Professor at the University of Auckland School of Law, where I lecture Evidence, Psychiatry and the Law, and Miscarriages of Justice. I am also the Co-Director of the New Zealand Centre for Human Rights Law, Policy and Practice at the University of Auckland. I previously lectured in the Forensic Psychiatry Fellowship Program in the Department of Psychiatry at Oregon Health Sciences University and the Department of Criminalistics and Criminology at the University of Sarajevo. I have researched and written extensively on the intersection of science and justice decision making in both the criminal-justice and family-law systems internationally. I was a member of the American Bar Association task force responsible for drafting the ABA's *Criminal Justice Standards for DNA Evidence* in the United States. My current research agenda focuses on the use of behavioural-science evidence in systemic responses to child abuse and neglect. I have included a selected curriculum vitae with this submission. I am happy to provide my full CV on request.

Context

The vast majority of parents, when they separate, resolve the care arrangements for their children amicably.¹ Only a small percentage have “custody battles” – engaging in months or years of litigation and ultimately requiring a family court to determine their children’s living arrangements. This small percentage of parents do not occur at random. Instead, research demonstrates that most of these litigious parents comprise a family violence perpetrator and victim and that what underlies their contentious litigation is the victim’s fear for the safety of their children in the care of the perpetrator.²

One thing that makes these cases so contentious is that family courts are notoriously bad at fact finding when it comes to allegations of family violence during proceedings involving care and contact arrangements for children. Many family law judges overestimate the likelihood of false allegations and are unwilling to make factual findings about family violence without a psychological evaluation. They appoint psychologists in part to advise them about whether victims’ claims of family violence are true or fabricated.³

In this context, court psychologists have inundated the Family Court with “expert” evidence that is neither based on scientifically valid principles nor applied reliability in the forensic

¹ Debra Pogrund Stark et al, “Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal” (2019) 26 Michigan J Gender & L 1, 43.

² At 43.

³ Joan S. Meier, “Denial of Family Violence in Court: an Empirical Analysis and Path Forward for Family Law” (2022) 110 Georgetown LJ 835, 853.

context of individual cases. Expert opinions regarding “parental alienation” are regularly introduced in the Family Court without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the application of the psychological principles on which they purport to be based.

The Court not only regularly admits but places a great deal of reliance on these pseudo-scientific theories. The social-science literature documents the Court’s tendency to characterise protective mothers as “hostile” and “alienating” when they attempt to protect their children from violent fathers.⁴

Because “parental alienation” is not recognised by mainstream health organisations or contained in any diagnostic manuals or treaties, it lacks a concise or consistent definition. The construct tends, however, to contain a constellation of four core beliefs: (1) that children’s disclosures of abuse have high rates of falsity (typically, 90%) if they occur after parental separation; (2) that child abuse and neglect are not significantly harmful to children, particularly non-physical forms of abuse; (3) that the loss of extensive, unsupervised contact with a violent father does more harm to children than exposure to ongoing violence; and (4) that children, even mature young people, are incapable of forming and expressing autonomous beliefs after parental separation. None of these beliefs have been scientifically validated; on the contrary, each of them has been disproven by a large consensus of validated scientific research. This constellation of beliefs supports the typical expression of the construct: that mothers who attempt to protect their children from violent fathers are “psychologically abusing” their children by inhibiting shared care.

This evidence should be inadmissible under existing ss 25 and 26 of the Evidence Act 2006 (EA), but Family Court Judges have systematically failed at their gatekeeping obligation to screen this evidence for validity and reliability or to require court psychologists to demonstrate objectivity and ethical practice.

Background

In the 1980s, an ideological rift developed within the field of clinical psychology. At one end of the ideological continuum, psychologists who specialised in treating abused children became concerned that decision makers in child-protection institutions (police, child-welfare agencies, counsellors, and courts) were underestimating the prevalence of child abuse and neglect (particularly intra-familial abuse), disbelieving children’s truthful accounts, minimising the damaging impact of family violence and sexual violence on children, and failing to protect children from re-experiencing it.⁵

⁴ Vivienne Elizabeth et al, “Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes” (2010) 18 Feminist L Studies 253.

⁵ Carrie Leonetti, “Opposite Sides of the Same Coin: Syndrome Evidence, Child Abuse, and the Wrongful Conviction of Peter Hugh McGregor Ellis”, Psychiatry, Psychol & L (forthcoming

At the other end of the ideological spectrum, a (smaller) subset of psychologists remained convinced that child abuse and neglect were rare, “low level” family violence was not harmful to children, and the mantra of “believe the children” harmed both children making allegations of child abuse and parents who were falsely accused.⁶ In particular, these family-reunification advocates were convinced that mothers were using tactical false claims of child sexual abuse in custody proceedings, that protective responses were dividing families, and that children were losing important paternal relationships.⁷ Saunders et al (2011) document: “Among [family-court] evaluators, the belief that allegations of domestic violence are usually false was part of a constellation of beliefs, including beliefs that false allegations of child abuse and parental alienation by DV survivors are common.”⁸

These philosophical positions are not equivalently supported by research. Validated studies support the correlations between child abuse and long-term negative outcomes.⁹ Research shows that child abuse and neglect are horrifyingly prevalent and under-detected, cause long-term damage to victims, and false claims are rare.¹⁰ Nonetheless, this subset of family-reunification practitioners continues to cling to beliefs about the relative infrequency of “real” child abuse and the benign nature of most child mistreatment.¹¹ Miller-Perrin and Perrin (2012) explain: “[T]he literature would suggest that each of these backlash claims is false. That is, sexual abuse is not uncommon. Children do not tend to exaggerate their victimization.”¹²

The “backlash” against new social-science insights and advocacy around child abuse and neglect in the 1980s is well documented in the social-science literature.¹³ Conte (1994)

2023); New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

⁶ Leonetti, “Opposite Sides”, above; eg, Robert L. Emans, “Psychology’s Responsibility in False Accusations of Child Abuse” (1988) 44 J Clinical Psychol 1000

⁷ Leonetti, “Opposite Sides”, above; eg, Douglas J. Besharov, “Unfounded Allegations – a New Child Abuse Problem” (1986) 83 Pub Int 18.

⁸ Daniel G. Saunders et al, *Child Custody Evaluators’ Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations* (US Dept of Justice 2011) at 14.

⁹ Anja Heilmann et al, “Physical Punishment and Child Outcomes: a Narrative Review of Prospective Studies” (2021) 398 *The Lancet* 355.

¹⁰ R. Kim Oates et al, “Erroneous Concerns About Child Sexual Abuse” (2000) 24 Child Abuse & Neglect 149.

¹¹ Saunders et al, above.

¹² Cindy L. Miller-Perrin & Robin D. Perrin (eds), *Child Maltreatment* (Sage 2012) at 309.

¹³ John E.B. Myers (ed), *The Backlash: Child Protection Under Fire* (Sage 1994); Carole Jenny & Thomas A. Roesler, “Quality Assurance – a Response to ‘the Backlash’ against Child Sexual Abuse Diagnosis and Treatment” (1993) 2 J Child Sexual Abuse 89; Robin D. Perrin & Cindy L.

describes the “backlash” as consisting of “extreme positions or points of view that challenge concerns about sexually abused children, and that nearly always have the purpose of defending adults accused of sexual abuse, or that otherwise minimize, rationalize, or deny the realities of childhood sexual abuse; lack of supporting research data for extreme positions or points of view; and near total rejection of the knowledge, experience, or realities of childhood sexual abuse.”¹⁴ Finkelhor (1994) documents the reactive and oppositional nature of the child-abuse backlash, noting that the backlash was driven primarily by parents accused of child abuse and their lawyers.¹⁵

Family-reunification practitioners became embedded in larger ideological beliefs about the harms of the demise of the “traditional family”. They not only assert that false allegations of child abuse are rampant and harming children’s relationships with fathers but also that men and women are equally likely to perpetrate family violence and that equal division of relationship assets and child support are unfairly detrimental to men.¹⁶ These claims have been seized upon by “men’s rights” groups, who argue that false allegations of child sexual abuse are the “weapon of choice” for vindictive women post-separation.¹⁷

Coined by Richard Gardner, a clinician with no academic experience or understanding of research methodology or forensic application, the theory of “parental alienation syndrome” was that, when children exhibited certain “symptoms” (in Gardner’s formulation, rejection of one parent without a valid reason), the rejection had to be caused by the encouragement of the other parent.¹⁸ By the late 1980s, lawyers representing parents (overwhelmingly fathers) accused of family violence in child-custody cases started calling family-reunification practitioners to discredit children’s claims of abuse.¹⁹ As Walker (2020) explains, the concept of parental alienation “quickly became admissible in family courts and used by custody

Miller-Perrin, “Interpersonal Violence as Social Construction: the Potentially Undermining Role of Claims Making and Advocacy Statistics” (2011) 26 *J Interpersonal Violence* 3033, 3041.

¹⁴ Jon R. Conte, “Child Sexual Abuse: Awareness and Backlash” (1994) 4 *Sexual Abuse of Children* 224, 228

¹⁵ David Finkelhor, “The ‘Backlash’ and the Future of Child Abuse Advocacy” in Myers (ed), *The Backlash*, above.

¹⁶ Leonetti, “Opposite Sides”, above; eg, M.A. Straus, “Gender Symmetry and Mutuality in Perpetration of Clinical-Level Partner Violence: Empirical Evidence and Implications for Prevention and Treatment” (2011) 16 *Aggression & Violent Behav* 279.

¹⁷ N. Trocmé & N. Bala, “False Allegations of Abuse and Neglect When Parents Separate” (2005) 29 *Child Abuse & Neglect* 1333.

¹⁸ J. Mercer & Margaret Drew, *Challenging Parental Alienation: New Directions for Professionals and Parents* (Routledge 2022) at 24-30.

¹⁹ Carrie Leonetti, “Endangered by Junk Science: How the Family Court’s Admission of Unreliable Expert Evidence Endangers Victims of Family Violence” (2022) 43 *Children’s Rights LJ* 17.

evaluators to blame mothers for children not wishing to have contact with their often angry and controlling fathers”.²⁰ She notes: “Mental health professionals were more inclined to believe mothers were ‘gatekeeping’ by overprotecting children or somehow poisoning them against a relationship with their fathers.”²¹

This evidence was latched onto with furor by accused perpetrators and men’s rights groups as evidence of the vindictiveness and untrustworthiness of women’s family violence complaints.²² Sometimes, the evidence was explicitly called “parental alienation syndrome”. Other times, the language of diagnosis or syndromes was scrupulously avoided, but the syndrome reasoning was nonetheless evident.²³ Family-reunification practitioners would testify that a particular child was exhibiting behaviours “associated” or “consistent with” parental alienation.²⁴

Syndrome evidence, as that phrase is used in this submission, consists of a quasi-diagnostic process. Syndromes are typically characterised by a cluster of symptoms believed to correlate with an underlying cause. It does not matter whether the proponents of a syndrome use the terminology “syndrome” or “symptoms”. The crucial defining factors are that an underlying pathological cause is divined from a cluster of observable characteristics. What makes syndrome evidence concerning in forensic contexts is that, while the symptoms may (or may not) correlate with a particular cause, they can also exist independent of that cause. The determination that an individual is suffering from a “syndrome” entails at least an implicit determination that the symptoms were not caused by an alternate trigger or occurred at random.

The alienation theory relies on two asserted but unvalidated correlations. The first is a correlation between the attitudes or behaviour of one parent (the “aligned” parent) and the child’s negative response to the other parent (“alienation”). The second is a correlation between the child’s “alienation” and long-term psychological damage to the child.

The first correlation is not established by identifying concrete behaviours by the “aligned” parent and tracing them to the child’s “alienation”. Instead, consistent with forensic syndrome evidence generally, the theory asserts that, when children show certain observable characteristics (“symptoms” of alienation), those characteristics are evidence that they have been subjected to “alienating behaviours” by one parent targeting their relationship with their other parent, even though the alienating behaviours are not directly observed. In this way, the untested correlation morphs into a baseless theory of causation.

The theory also asserts that, uncorrected, alienation will have devastating psycho-social consequences for the “alienated” child – again, conflating a correlation between estrangement

²⁰ Lenore E.A. Walker, “Nonjudicial Influence on Family Violence Court Cases” (2020) 64 Amer Behav Sci 1749, 1756.

²¹ At 1756.

²² Molly Dragiewicz, *Equality with a Vengeance* (Northeastern University Press 2011).

²³ Carrie Leonetti, “Sub Silentio Alienation: Deceptive Language, Implicit Associations, Cognitive Biases, and Barriers to Reform” 62 Washburn LR (forthcoming 2023).

²⁴ Leonetti, “Endangered by Junk Science”, above.

and poor adult outcomes, even if one were established, with causation. This conflation is particularly concerning since there are obvious confounding variables at play in the correlation between childhood estrangement and adult outcomes. For example, if “alienated” parents are more likely to have drug and alcohol problems, engage in poor parenting, or have committed family violence, then those characteristics would have to be eliminated as causes for the subsequent dysfunction before any causal relationship between the other parent’s behaviour and the adult dysfunction could be established reliably. This work has never been done.

There is a third – never articulated or validated – assertion that underlies this “expert” evidence: that forensic evaluators can identify parental alienation with accuracy. Even if the correlation between alienating behaviours and parental rejection were sufficiently validated in research, whether any given psychologist could reliably determine whether a child has been “alienated” in a given case is a different question. This conclusion involves drawing a reverse inference from the suspected correlation – divining the existence of the cause merely from evidence of the result. For example, in [REDACTED]

26

There has never been a study validating this claim. There has never been a double-blind experiment in which psychologists are given case-specific information and asked to determine whether children have been “alienated” and then measured their accuracy rates. The little research that has been done demonstrates the opposite, that “[p]ractitioners who apply parent-alienation syndrome (PAS) or parent-alienation disorder formulations tend to automatically label a parent as an ‘alienator’ without a thorough investigation of the allegations.”²⁷

The sensitivity of these findings – the rate at which psychologists in forensic contexts falsely identify “alienation” – is unknown (and likely unknowable), although even Richard Warshak, one of the leading proponents of alienation theory, recently conceded that it is likely high.²⁸ Warshak (2020) concedes that “parental alienation critics have raised valid concerns that expert witnesses make false positive identifications of parental alienation.” He agrees: “A poor grasp of parental alienation issues results in evaluators wielding the concept of parental alienation like a blunt sword.”²⁹ He cautions: “It is a mistake to leap to the conclusion, without considering reasonable alternative explanations, that a child’s rejection of a parent is irrational, or that the parent with whom the child is aligned has perpetrated the child’s alienation.”³⁰ Both

²⁵ [REDACTED].

²⁶ At [95].

²⁷ Saunders et al, above, at 23.

²⁸ Richard A. Warshak, “When Evaluators Get It Wrong: False Positive IDs and Parental Alienation” (2020) J Psychol, Pub Policy, & L 54.

²⁹ At 63.

³⁰ At 60.

errors occur regularly in the New Zealand Family Court. Warshak also notes that “no study has documented the prevalence and source of false positive identifications of parental alienation.”³¹ This is unacceptable in a system in which the proponent of purportedly expert evidence is supposed to show that the evidence is valid and reliable before it can be read, let alone relied upon in judicial decision making.

While Warshak’s concessions are refreshing, they only partly acknowledge the scope of the reliability problem. The problem with the alienation construct is not that certain evaluators are incompetent in its application. The problem is that its forensic application has no standardised protocols, and its results are fundamentally non-testable and non-falsifiable. The types of “alienating behaviours” identified by proponents of the construct include vague and conclusory characterisations like allowing the child to make decisions regarding contact with the other parent, exaggerating the other parent’s flaws, creating barriers to telephone contact between the child and the other parent, considering the other parent’s attempts at contact to be harassing, being “obsessed with the moral values” of the other parent, and having “righteous indignation” about the other parent.³² These characteristics are impermissibly subjective. Many of these factors are not inherently binary. They could exist on a continuum, but no consideration is given to severity, and no algorithm exists to weight their prevalence. There is no way to distinguish a false positive from a true positive in the context of a finding of parental alienation. Error rates can only be derived from testing, so applications that are not testable cannot have known rates of error (and therefore cannot demonstrate the foundational validity that comes from low error rates).³³ That is a form of error that cannot be cured simply by tightening the level of practice in a forensic field. It is the quintessential type of error that EA s 25 and *Daubert* cannot tolerate in expert evidence.

While clinicians frequently insist that they observe “alienation” in their casework,³⁴ there is no objective way to verify whether the estrangements are caused by “alienation” rather than a healthy or benign response to a destructive or disconnected parent. Janet Johnston’s studies have found that children who reject a parent have multiple reasons for their rejection. These reasons include negative behaviors by the hated parent, such as child abuse or inadequate parenting, or the children’s own developmental or personality difficulties.³⁵ Dougherty et al

³¹ At 55.

³² [REDACTED].

³³ Paul C Giannelli et al, “Reference Guide on Forensic Identification Expertise”, in National Research Council (NRC) (ed), *Reference Manual on Scientific Evidence* (3d ed, National Academies Press 2011) at 64.

³⁴ Janet R. Johnston & Joan B. Kelly, “Commentary on Walker, Brantley, and Rigsbee’s (2004) ‘A critical analysis of Parental Alienation Syndrome and Its admissibility in the Family Court’” (2004) 1 J Child Custody 77.

³⁵ Janet R. Johnston, “Children of Divorce who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child” (2005) 38 FLQ 757; Janet R.

(2020) conclude: "No reliable mechanism for identifying parental alienation was found to exist."³⁶ They explain: "The tools that do exist are unhelpful, poorly validated and serve to undermine the focus on the child. There is a risk that the assessments, and debates about them, might serve to mislead the court and practice generally."³⁷ As Fidler and Bala (2010) succinctly note: "A child may resist or reject a parent for many reasons."³⁸

One of the indicators of the subjective and amorphous nature of this "syndrome" is that court psychologists do not agree on the "symptoms" of alienation. Some evaluators will identify a child as "alienated" if they express fear, distrust, or dislike of a parent. Others will identify a child as "alienated" if they refuse contact with a parent (generally regardless of the conduct of the rejected parent). Others will identify a child as "alienated" if they express love and a desire for conflict with a parent but simply object to a particular form of court-ordered contact (unsupervised contact, overnight contact, shared care). As Warshak notes: "Some parents and custody evaluators mistakenly conclude that any expression of preference to live primarily with a parent means that the child is becoming alienated from the less preferred parent."³⁹

Parental alienation evidence suffers from at least two irremediable flaws. First, the "behavioural signs" of parental alienation are amorphous, subjective, and common in all children. In fact, the "symptoms" of alienation and child abuse are basically the same – fluctuating anger and conciliation with the parent accused of abuse, social withdrawal, developmental regression, acting out, anxiety, depression, and self-harm.⁴⁰ This is not surprising. These "symptoms" are symptoms of any traumatic childhood experience, not to mention "symptoms" of merely being a child, adolescent, or teenager. The second, related problem with parental alienation evidence is that it is fundamentally unreliable as used in forensic contexts. While it is important for clinicians to know that certain behavioural changes in a child could indicate psychologically abusive conduct by one parent, it cannot be reliably said that any given child demonstrating those behavioural changes has experienced "parental alienation".⁴¹

In sum, there is no empirical evidence supporting evaluators' assertions that one parent's behaviour is the primary cause of a rupture in the child's relationship with the other parent, that "alienated" children suffer significant long-term damage, or that an evaluator could identify "alienation", even if it were validated as a phenomenon, with any reliability (as

Johnston et al, "Is it Alienating Parenting, Role Reversal or Child Abuse? A Study of Children's Rejection of a Parent in Child Custody Disputes" (2005) 5 J Child Custody 191.

³⁶ Julie Doughty et al, "Professional Responses to 'Parental Alienation: Research-Informed Practice" (2020) 42 J Soc Welfare & Fam L 68, 73.

³⁷ At 73.

³⁸ Barbara Jo Fidler & Nicholas Bala, "Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums" (2010) 48 FCR 10, 14.

³⁹ Warshak, above, at 59.

⁴⁰ Leonetti, "Opposite Sides", above.

⁴¹ *ibid*

opposed to other causes for parental estrangement).⁴² As a result, several countries have prohibited the use of alienation evidence in their court systems.⁴³

To this day, family-reunification practitioners not only give opinions derived from unreliable forensic assessments based on the theory of parental alienation, but judges base their care and contact decisions on them. It has been documented for decades that, in cases involving care of children and family violence allegations, the accused perpetrator is more likely to be granted care of children than the alleged victim.⁴⁴ Alienation-based ideology is the source of this baffling disparity.⁴⁵

In Family Court, the ideological project of parental alienation has largely succeeded. It is well-documented that Family Court Judges and other personnel lack specialised expertise in family violence and exhibit a "pro-contact ideology".⁴⁶ This is the result of the entrenchment of the science fiction of parental alienation. Because the appellate courts did not rein in unreliable alienation evidence in the 1990s when they were reining in unreliable syndrome evidence in criminal courts, alienation took over the Family Court.⁴⁷

It has simply become an article of faith among many psychological evaluators, lawyers, and judges that alienation causes disastrous psychological harm to children. For example, in [REDACTED],⁴⁸ Judge Murfitt noted that parental alienation syndrome was not "supported by scientific methodology", then went on to apply the construct of parental alienation in his analysis anyway.⁴⁹

In its submission in response to the Government's 2015 discussion document regarding family-violence law, the New Zealand Psychological Society described parental alienation as lacking research validation and insisted that it should not "be applied by judges, lawyers or others."⁵⁰ The Society: "Judges, lawyers and others in the New Zealand Family Court urgently need to cease applying this non-existent syndrome."⁵¹

⁴² J. Teoh et al, "Parental Alienation Syndrome: Is it Valid?" (2018) 30 Singapore Acad LJ 727.

⁴³ Mercer & Drew, above, at 33; Teoh et al, above.

⁴⁴ Joan S. Meier, "US Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?" (2020) 42 J Soc Welfare & Fam L 92.

⁴⁵ Leonetti, "Opposite Sides", above.

⁴⁶ Leonetti, "Endangered by Junk Science", above, at 18.

⁴⁷ Leonetti, "Opposite Sides", above.

⁴⁸ [2013] NZFC 5910.

⁴⁹ At [54].

⁵⁰ New Zealand Psychological Society (NZPS), Submission on Behalf of the New Zealand Psychological Society on the Review of Family Violence Law, 18 September 2015, at 10.

⁵¹ At 20.

In 2019, the Independent Panel appointed by the Minister of Justice released its report, *Te Korowai Ture ā-Whānau*.⁵² The Panel documented common criticisms of the Court, including that “children’s views are often not heard or taken into account when considering contact where violence has been alleged or established”; “professionals in the Family Court do not understand the dynamics of family violence”; the Court does not “fully underst[an]d or acknowledge[] the harm caused to children and their carers by family violence”; and “contact with a violent parent was prioritised over considerations of children’s and their parent’s safety”.⁵³ The Panel noted: “Amongst the issues most often raised was the Family Court’s response to allegations of family violence and its relevance to children’s safety.”⁵⁴ It noted: “Some studies show that children are believed when they say they want contact with a violent parent, but they are more likely to be ignored or over-ruled if they say they do not want contact.”⁵⁵ The Panel’s “key findings” included: “Knowledge of family violence in all its forms is still not widespread and its impact on children, including on their safety, is still poorly understood.”⁵⁶

Evidence Law Implications

Lack of Validity and Reliability

The theory of parental alienation was developed by clinicians based on psychodynamic theory and anecdotal experience rather than academic research employing correlational studies and statistical controls.⁵⁷ The alienation construct, which originated in the United States in the 1980s, has been rejected as lacking in scientific validity by the American Psychological Association,⁵⁸ the American Psychiatric Association, the American Medical Association, the

⁵² *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (May 2019).

⁵³ At [99], [120].

⁵⁴ At [103].

⁵⁵ At [121].

⁵⁶ At 6-7.

⁵⁷ Leonetti, “Opposite Sides”, above.

⁵⁸ American Psychological Association, Presidential Task Force on Violence in the Family, *Violence and the Family* (1996) (“Although there are no data to support the phenomenon called parental alienation syndrome, in which mothers are blamed for interfering with their children’s attachment to their fathers, the term is still used by some evaluators and courts to discount children’s fears in hostile and psychologically abusive situations.”).

National Council of Juvenile and Family Court Judges in the United States,⁵⁹ the Association of Clinical Psychologists in the UK,⁶⁰ and the New Zealand Psychological Society.⁶¹ Proponents of the theory of parental alienation lobbied for its inclusion in both the Fourth and Fifth Editions of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-4 and DSM-5), but the Association rejected the proposals because the construct lacked scientific validation.⁶²

In December 2021, the Association of Clinical Psychologists in the United Kingdom issued a statement relating to the appointment of unqualified "expert" psychological witnesses in the British family courts. Alluding to evaluators pressing the junk science of parental alienation in the family courts, they warned that unqualified psychologists had "suggested inappropriate diagnoses and made recommendations for children to be removed from their mothers based on these diagnoses."⁶³ They admonished that qualified psychologists "understand the importance of using evidence-based and well-validated methodologies to assess individuals and make recommendations."⁶⁴

There is no meaningful distinction between "parental alienation syndrome" and "parental alienation" as a dynamic, construct, or occurrence. Proponents of alienation theory dropped the word "syndrome" from their construct after the American Psychiatric Association rejected the inclusion of parental alienation syndrome in the *DSM-4*.⁶⁵ In their proposal for the *DSM-5*, they employed the new terminology of "parental alienation" rather than "parental alienation syndrome".⁶⁶ It is clear from their proposal, however, that they still understood parental alienation to be a psychiatric condition capable of identification by a psychologist based on a

⁵⁹ National Council of Juvenile and Family Court Judges, *A Judicial Guide to Child Safety in Custody Cases* 12 (2008) ("Any testimony that a party to a custody case suffers from 'parental alienation' should 'be ruled inadmissible and/or stricken from the evaluation report.'").

⁶⁰ Association of Clinical Psychologists in the UK (ACP-UK), *The Protection of the Public in the Family Courts*, December 2021, at <acpuk.org.uk/the-protection-of-the-public-in-the-family-courts/>.

⁶¹ NZPS, above ("It is a deep concern and a major threat to the safety of women and children that the New Zealand Family Court continues to apply the doctrine of Parental Alienation Syndrome, which has long been discredited in the United States, from where it originated. It is now accepted in the United States that there is no scientific evidential basis for Parental Alienation Syndrome. No research conducted in the United States has ever been able to produce valid evidence of Parental Alienation Syndrome.").

⁶² Mercer & Drew, above, at 34-35; Paul Fink, "Parental Alienation Syndrome", in Mo Therese Hannah & Barry Goldstein (eds), *Domestic Violence, Abuse, and Child Custody* (2010).

⁶³ ACP-UK, above, at 2.

⁶⁴ At 2.

⁶⁵ Leonetti, "Opposite Sides", above.

⁶⁶ *ibid*

child's behaviour ("strong alignment", "rejection without a legitimate reason") thought to correlate with un-observed parental conduct ("accommodating" the child's "attitude" and "embracing" the child's suffering). In their proposal to include parental alienation in the *DSM-5*, the proposers explained:

[O]ur collection of authors proposes a decidedly less polemical new definition of parental alienation. From now on, we define parental alienation as "a particular psychological condition in a child (typically when their parents are engaged in a highly conflictual separation) who strongly aligns himself with one of his parents (the preferred parent) and rejects a relationship with the other parent (the rejected parent) without a legitimate reason."

The first key idea in this definition is: "a child who aligns". The idea of alliance shows that the "fault" of the favored parent is not having manipulated the child but more often having accommodated his attitude, embraced his suffering and resistance to join with him in a fortress of solidarity. The other key term in the definition, undoubtedly the main psychiatric issue, is the idea of the "absence of a legitimate reason": it is evidence that shortcomings or mistreatment prior to rejection must exclude a diagnosis of parental alienation.⁶⁷

The American Psychiatric Association again rejected this "new" definition of parental alienation.⁶⁸

In 2019, the World Health Organization removed the terms "parental alienation" and "parental estrangement" from the 11th Edition of its *International Classification of Diseases*. The WHO issued an explanatory note stating: "During the development of ICD-11, a decision was made not to include the concept and terminology of 'parental alienation' in the classification, **because it is not a health care term. The term is rather used in legal contexts**, generally in the context of custody disputes in divorce or other partnership dissolution."⁶⁹ The WHO expressly disclaimed endorsement of the term "parental alienation" due to concerns about "the misuse of the term to undermine the credibility of one parent alleging abuse as a reason for contact refusal".⁷⁰ They noted: "There are no evidence-based health care interventions specifically for parental alienation."⁷¹ This is a key point of this submission. The theory of parental alienation (syndrome) developed entirely as a subject matter of expert

⁶⁷ M. Berger, "Le Refus de Contact d'un Enfant avec un Parent dans un Contexte de Divorce Conflictuel – Partie I: Recension des Recherches Cliniques et Judiciaires", (2021) 69 *Neuropsychiatrie de l'Enfance et de l'Adolescence* 32, 34.

⁶⁸ Leonetti, "Opposite Sides", above.

⁶⁹ World Health Organisation, "Parental Alienation" at <www.who.int/standards/classifications/frequently-asked-questions/parental-alienation>.

⁷⁰ *ibid*

⁷¹ *ibid*

evidence for use in family courts and has no counterpart in mainstream psychology or psychiatry.

Syndrome Reasoning

The problem with syndrome evidence is that it is employed in forensic contexts to demonstrate proximate causation. Factual evidence relating to the “symptoms” of the syndrome are the basis for the expert opinion that the sufferer has the syndrome even though there are other causes for the symptoms and no direct evidence of the cause. The expert, therefore, is at least implicitly finding that other possible causes for the symptoms are not the primary cause. In reality, however, there is no way to know whether the suspected syndrome has caused the observed phenomena in a particular case. Any syndrome or behavioural construct that is advanced not only to describe an effect but also establish to a cause must be viewed with special concern.

Evidence relating to “parental alienation” in the Family Court fits this pattern. The observed symptoms are a child’s rejection of a relationship or a particular type of contact with a parent. By opining that the child has been “alienated” by the other parent’s conduct, based solely on evidence of the Child’s reaction to the rejected parent, the psychologist is finding that the rejection is not the result of some other plausible cause, such as the conduct of the rejected parent (particularly in cases involving family violence) or a neutral cause like a personality clash, lack of commonality, or ordinary adolescent development.

In “Endangered by Junk Science”, I explain the “G2i problem” (which is closely related to the concept of attribution error in research psychology and the anterior probability fallacy in statistics), which arises when probabilistic evidence is deployed in individual forensic applications.⁷² Even if certain conduct by the favoured parent *could* cause rejection of the other parent, there is no reliable way to determine whether it *did* in a particular case.

██████████⁷³ demonstrates the illogical and unreliable syndrome nature of alienation reasoning. Child, who was almost thirteen, lived with Father and Stepmother and had supervised contact with Mother.⁷⁴ Mother applied for shared care.⁷⁵ Child was opposed to the change in her care arrangements. Father was concerned that Child was unsafe in Mother’s care because of Mother’s history of physically and psychologically abusing her.⁷⁶ When Child was young, Mother broke her arm.⁷⁷ When Child was twelve, she returned from contact with Mother “visibly upset” and reported that, when she refused to eat breakfast, Mother “placed one hand across her mouth and nose so that she could not breathe and gripped her neck with

⁷² Leonetti, “Endangered by Junk Science”, above, at 40-42.

⁷³ [2015] NZFC 11036.

⁷⁴ At [2].

⁷⁵ At [1].

⁷⁶ At [3].

⁷⁷ At [44].

the other” and “kicked her in the shin”.⁷⁸ Mother told Child that she wished that she was dead and was never born.⁷⁹ Child saw a doctor the following day who recorded a large bruise on her shin.⁸⁰ Child’s psychologist also observed the bruise and noted that it was concerningly large.⁸¹ She opined that the impact of Mother’s emotionally abusive statements was more profound than the physical abuse, Child could not stop thinking about her mother’s words and did not want to see her again.⁸² She opined that Mother should not have any contact with Child because of her inability to control her anger or prioritise Child’s needs.⁸³

Child also reported that Mother swore at her and threatened to put her cat to sleep or sell her things on Trade Me if she misbehaved.⁸⁴

Mother failed out of a behaviour management programme because she was hostile and disruptive, belittled the other participants, and raged at programme staff.⁸⁵

Mother denied the abuse and made the self-serving claim that she only placed her hand over Child’s mouth to stop her from yelling.⁸⁶ She claimed that Child’s views were solely the result of the “negative influence” of Father and Stepmother.⁸⁷

The court psychologist opined that Child “was displaying symptoms of parental alienation” by denigrating Mother, having consistently positive views of Father and Stepmother and negative views of Mother, and not being concerned about hurting Mother’s feelings.⁸⁸ The psychologist “attributed” Child’s behaviour to Stepmother.⁸⁹ She opined that Stepmother’s “alienating behaviour, whether intentional or otherwise, if unchecked will cause irreparable harm to [Child’s] relationship with her mother and will in turn cause serious psychological damage.”⁹⁰

The psychologist’s opinion that Stepmother’s protective actions were the primary cause of Child’s rejection of Mother rather than Mother’s violence was not only not based on scientifically valid principles or evaluation techniques that are reliable as applied but also patently preposterous. Her implicit finding that Child faced more risk of long-term psychological damage from losing her relationship with Mother than from Mother’s abuse also lacked any foundational or as-applied validity. The Court did not require the psychologist to

⁷⁸ At [62].

⁷⁹ At [71].

⁸⁰ At [67].

⁸¹ At [68].

⁸² At [72].

⁸³ At [92].

⁸⁴ At [83].

⁸⁵ At [91].

⁸⁶ At [64].

⁸⁷ At [4].

⁸⁸ At [56].

⁸⁹ At [57].

⁹⁰ At [58].

establish the reliability of her opinion evidence or provide any explanation of the basis or methodology by which she reached her conclusion as required by EA s 25.

Judge Moran found that Mother had been physically and psychologically abusive to Child and posed an ongoing safety risk for Child.⁹¹ Inexplicably, however, she also found that Stepmother “alienated” Child from Stepmother.⁹²

The Evidence Act

This evidence should be inadmissible under EA ss 7, 25, and 26. Under s 7, the fact that human behaviour is “consistent with” one cause is logically irrelevant to the cause of the behaviour in a particular case unless alternate causes can be conclusively ruled out.⁹³ Under s 25, opinion evidence offered by an expert must be based on valid scientific principles applied reliably in the case, and the expert must be qualified to render the opinion.

Contrary to the beliefs of some practitioners, the EA applies to Family Court proceedings. While the Court can receive any evidence that it considers would assist in determining the proceeding,⁹⁴ unreliable “expert” opinion evidence, by definition, cannot be helpful.

To establish validity and reliability, the proponent of expert evidence must demonstrate that the theory and techniques underlying the expert’s opinion have standardised protocols and that their results have been tested and validated, were published and subjected to peer review, have a known (and permissibly low) rate of error, and are generally accepted in the relevant scientific community.⁹⁵ Falsifiability is a crucial component of establishing reliability.⁹⁶ As McDonald and Tinsley (2011) note, it is a “truism that expert evidence must be based on reason as opposed to conclusions incapable of being tested in any meaningful manner.”⁹⁷

In the context of scientific evidence, substantial helpfulness requires that three prerequisites be met: (1) the expert offering the opinion must possess sufficient expertise to offer it (qualifications); (2) the opinion being offered must be based on scientifically valid principles (foundational validity); and (3) the opinion being offered must be the result of a reliable application of those principles (as-applied validity).⁹⁸

The psychological opinion evidence derived from theories of parental alienation meets none of these requirements. Court psychologists often claim to be basing their opinions on psychological research, but they lack sufficient knowledge or skill to understand or apply psychological research in a forensic context. Qualifications in this context include peer review,

⁹¹ At [104]-[112].

⁹² At [118].

⁹³ Susan Glazebrook, “Miscarriage by Expert” (2018) 49 VUWLR 245, 250.

⁹⁴ Family Court Act 1980 s 12A (4).

⁹⁵ *Daubert v Merrill Dow Pharmaceuticals*, 509 US 579, 593-94 (1993).

⁹⁶ At 593.

⁹⁷ Elisabeth McDonald & Yvette Tinsley, “Evidence Issues”, (2011) 17 Canterbury LR 123.

⁹⁸ *Daubert*, above, at 590 n9.

validation, and formal qualifications.⁹⁹ Furthermore, the opinions that they offer – that a child’s resistance to contact with one parent is caused by the invisible behaviours of the other parent – is not testable or falsifiable. In other words, if a psychologist falsely identifies a child as alienated when they are not, there is no mechanism to detect that false positive.

The *Daubert* reliability standards become particularly problematic in the context of psychological syndrome evidence. Psychodynamic constructs are generally “resistant to empirical testing”.¹⁰⁰ As Paul Appelbaum (2011) explains: “Questions about testimony based on psychodynamic theory can be raised with regard both to the legitimacy of the underlying constructs . . . and to the techniques by which the examiner can know that such a mechanism came into play in a particular case”.¹⁰¹ He notes:

From the development of Freud’s theories in the late nineteenth and early twentieth centuries until the present, many mental health professionals have based their clinical approaches on psychoanalytically inspired concepts. Some of these concepts have been confirmed scientifically (eg, the existence of unconscious mental states), whereas others have not (eg, dreams always represent the fantasied fulfillment of wishes). Although psychoanalytical theories and the psychodynamic psychotherapies that derive from them have declined in popularity in recent decades, many mental health professionals have received psychodynamic training and use the concepts they have learned to assess and treat their patients. Regardless of the possible utility of these theories from a clinical perspective, which is controversial and may depend on the condition being treated, they are arguably more problematic when they serve as the basis for conclusions offered as part of legal proceedings. Nor are psychoanalytical theories the only ones that mental health professionals use; alternative approaches may be based on theories that have a greater or lesser degree of empirical support.¹⁰²

He concludes: “To the extent that expert opinions are introduced to inform the judgments of legal factfinders, it is important for them to be based, insofar as possible, on empirically validated conclusions rather than on untested or untestable theories.”¹⁰³

The senior courts have been fastidious in trying to eliminate the unreliable application of psychodynamic syndrome reasoning in criminal cases.¹⁰⁴ For example, in *R v Accused*, the

⁹⁹ Glazebrook, above, at 252.

¹⁰⁰ Paul S. Appelbaum, “Reference Guide on Mental Health Evidence” in NRC, above, at 865.

¹⁰¹ At 866.

¹⁰² At 891.

¹⁰³ At 891.

¹⁰⁴ *Ellis v R* [2022] NZSC 115; *R v A* [2009] NZCA 250; *G v R*, CA 414/03, 26 October 2004; *R v B* [2003] 2 NZLR 777 (CA); *R v Crime Appeal*, CA 244/91, 20 December 1991; *R v Accused* (1989) 4 CRNZ 193 (CA); *R v B* (1987) 2 FRNZ 697 (CA).

defendant was convicted of indecent assaulting his fourteen-year-old daughter.¹⁰⁵ His defence was that Daughter was fabricating her claims of abuse to avoid the consequences of disciplinary problems.¹⁰⁶ To rebut this defence, the prosecution offered expert evidence from a child psychologist that Daughter was displaying behavioural characteristics consistent with child sexual abuse, even though the characteristics were also known to occur in children who had not experienced sexual abuse.¹⁰⁷ The Court of Appeal held that the trial court should not have admitted the syndrome evidence.¹⁰⁸ The Court reasoned: "While the characteristics mentioned by the psychologist were said to be consistent with those the witness had come to know as the characteristics of sexually abused children, some at least of those characteristics . . . may very well occur in children who have problems other than sexual abuse."¹⁰⁹

At the same time, the senior courts have permitted fallacious reasoning and unreliable psychological profiling to flourish in the Family Court. This has created a pernicious feedback loop. Alienation-inflected decision making is self-reinforcing. Every time the Court finds that a child's resistance to contact with one parent was caused by the "alienating behaviours" of the other, it reinforces both the existence of the syndrome and the circularity of its underlying assumptions: Parental alienation is rampant and pervasive. How do we know? Look how often the Family Court finds that it has occurred. The feedback loop repeats, the assumptions become more entrenched, and the syndrome reasoning results in less reliable decision making.

This is precisely the type of reasoning that recently led the Supreme Court unanimously (and posthumously) to quash Peter Ellis's conviction for child sexual abuse. The Court noted that the prosecution psychologist "wrongly stated that if a complainant exhibited a cluster of behaviours, this was more likely to indicate abuse than a solitary behaviour".¹¹⁰ The Court noted that the psychologist's evidence suggested that the children's behaviour was "diagnostic", even though she expressly disclaimed that the behaviours "were diagnostic of sexual abuse".¹¹¹ The Court explained that the psychologist was dismissive of and effectively discounted "alternative explanations for the behaviours".¹¹² The Court noted that her evidence "forestalled the consideration of other possible causes of the behaviour."¹¹³

The Court concluded that the psychologist's evidence "lacked balance, did not inform the jury of other possible causes of the behaviours (or, where she did so, discounted or minimised the

¹⁰⁵ *Accused*, above, at 194.

¹⁰⁶ At 195-96.

¹⁰⁷ At 196-97.

¹⁰⁸ At 200.

¹⁰⁹ At 199 (internal citations omitted).

¹¹⁰ *Ellis*, above, at [160].

¹¹¹ At [168].

¹¹² At [172], [196].

¹¹³ At [184].

other causes), and involved circular reasoning”.¹¹⁴ The Court explained: “The reasoning was circular because it suggested that behaviours that could be explained in a number of ways nevertheless corroborated an allegation of sexual abuse on the basis that they were corroborative because the allegation has been made.”¹¹⁵ The Court noted that “to look to the complainants’ behaviours to support an allegation and then reach back to the allegation as a reason to suggest the behaviours are reliable supports for the allegation is to engage in dangerous circular reasoning.”¹¹⁶ The Court explained that the “overall effect” of the evidence “was to incorrectly suggest to the jury that the presence of clusters of behaviours could support a conclusion that sexual abuse had taken place.”¹¹⁷

The Court offered guidance on the role of experts, noting that they were obligated “to take care to ensure that their evidence was appropriately balanced by acknowledging any other possible explanation for the behaviours” and to “be ‘driven by professional skill and experience, not a perceived need to support a preconceived outcome’”.¹¹⁸ The Court explained that “it was important that an expert commenting on that evidence fairly acknowledge other possible explanations for the behaviour”.¹¹⁹

The syndrome reasoning that the Supreme Court criticised in *Ellis*, which now seems anachronistic in retrospect, continues to run amok in cases in the Family Court under the Care of Children Act 2004 (CoCA). Each of the Court’s criticisms of the psychological evidence in *Ellis* applies with equal if not greater force to the alienation evidence still regularly admitted in the Family Court. The purported correlation between a parent’s “alienating” attitudes or behaviours and the child’s behavioural response on which alienation theory relies is established using expert evidence that almost exactly parallels the use of the psychological evidence in *Ellis*.

The behavioural indicators of parental alienation include vague and conclusory “symptoms” like a child resisting or refusing contact with a parent, holding similar opinions or using similar language to the “alienating” parent, exaggerating complaints about the “rejected” parent, eavesdropping on parents, fluctuating between friendly and hostile behaviour, giving “vague reasons” for rejecting a parent, experiencing relationship disturbances, “acting out”, resisting authority, and having a rigid world view.¹²⁰ Experts are allowed to opine that a child’s rejection of contact with a parent – even an abusive one – is caused by the “alienating behaviour” of the other parent by discounting or minimising and ignoring other causes.¹²¹ The psychological evidence suggests to the Family Court that “clusters” of child behaviours can support a

¹¹⁴ At [11].

¹¹⁵ At [11].

¹¹⁶ At [184].

¹¹⁷ At [11].

¹¹⁸ At [125].

¹¹⁹ At [182].

¹²⁰ At 43-44.

¹²¹ Leonetti, “Opposite Sides”, above.

conclusion that alienating behaviour by their preferred parent has occurred.¹²² The alienation evidence is fundamentally circular: a child's expressions of fear or rejection of a parent are not autonomous because the child's views are the result of "alienation"; a child has been "alienated" because they express fear or rejection of a parent.¹²³

The psychologists who offer alienation evidence in Family Court exhibit the same ethically problematic characteristics as the sexual abuse experts criticised by the Supreme Court in *Ellis*. Their evidence constitutes advocacy rather than a balanced approach to causation, fails to acknowledge other possible explanations for a child's rejection of a parent, and is directed at supporting a preconceived outcome: shared care as the only appropriate option.

Tactical Usage

The social-science literature documents not only that there is no scientific validity to alienation theory, but also that the theory is frequently misused by abusive fathers against protective mothers.¹²⁴ It cautions that the concept can be dangerous when misunderstood and misused, particularly when it gives license to the suggestion that the views of the child should be rejected or in support of requests for changes to a child's care schedule.¹²⁵ In Australia, Sandra Berns (2001) has documented how fathers use alienation claims as a tactic to continue coercive control following separation.¹²⁶ In the United States, Drozd and Oleson (2004) note:

As "alienation" has long been misunderstood, so has domestic violence, which was underreported and not identified for many years. We find ourselves greatly concerned that there is a group of colleagues who are engaged in the practice of child custody evaluations who do not understand how to competently assess the dynamics of and the effects upon children of domestic violence. Many of these colleagues are offering opinions to the Court about family functioning without a thorough understanding of the role of domestic violence. This has led, at worst, to the removal of children from mothers who were already

¹²² *ibid*

¹²³ *ibid*

¹²⁴ Michelle Bemiller, "When Battered Mothers Lose Custody: a Qualitative Study of Abuse at Home and in the Courts" (2008) 5 *Jo Child Custody* 228; Joan Meier, "A Historical Perspective on Parental Alienation Syndrome and Parental Alienation" (2009) 6 *J Child Custody* 232; Meier, "US Child Custody Outcomes", above.

¹²⁵ Carol S. Bruch, "Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases" (2001) 25 *FLQ* 527.

¹²⁶ Sandra Berns, "Parents Behaving Badly: Parental Alienation Syndrome in the Family Court — Magic Bullet or Poisoned Chalice", (2001) 15 *Australian J Fam L* 15, 16.

victimized. Efforts to protect children have led to some children being placed in the custody of manipulative and violent parents.¹²⁷

They explain: “[I]t is important for evaluators to distinguish between protective parenting behaviors and alienating parenting behaviors. Too often, we have observed evaluators confusing protective parenting with alienation, resulting in a false conclusion of alienation when, in fact, the parent is engaged in appropriate protection of the child.”¹²⁸

Zoe Rathus (2020) similarly found in Australia: “Notwithstanding fathers’ violence, control and denigration, it was the mothers’ attitudes towards the father-child relationships that came under scrutiny. Again, fathers emerged as victims – and pushed a narrative that required mothers to facilitate contact.”¹²⁹

Vivienne Elizabeth (2020) recently conducted a case study of alienation claims in Aotearoa New Zealand (ANZ) and the way that they prevent women from protecting children from abuse. She found that most mothers who had been governed by ANZ’s alienation-inflected system for care of children were victims of domestic violence and coercive control.¹³⁰

The threat of being labeled “alienating” is omnipresent in the Family Court. Psychologists and lawyers for the child criticise victims for reporting violence to Police, applying for protection orders, making reports of concern to Oranga Tamariki (OT), or taking children to health professionals after they report abuse by fathers.¹³¹ The Court’s punitive responses to mothers who are labelled “alienating” and the resulting heightened danger that their children face coerce them not to raise claims of abuse or seek protection for themselves or their children. Its prevalence discourages some women from leaving violent relationships in the first place.¹³²

Harrison (2008) documents the way that threats of “alienation” operate to coerce protective parents’ “agreement” to placing their children in some risk to avoid greater risk:

¹²⁷ Leslie M. Drozd & Nancy W. Oleson, “Is It Abuse, Alienation, and/or Estrangement? A Decision Tree” (2004) 1 J Child Custody 65, 68.

¹²⁸ At 97.

¹²⁹ Zoe Rathus, “A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences”, (2020) 42 J Soc Welfare & Fam L 5, 9.

¹³⁰ Vivienne Elizabeth, “The Affective Burden of Separated Mothers in PA(S) Inflected Custody Law Systems: a New Zealand Case Study”, (2020) 42 J Soc Welfare & Fam L 118, 122.

¹³¹ [REDACTED] [2018] NZCA 322 at [32]; [REDACTED] [2017] NZHC 1159 at [454].

¹³² Ola W. Barnett & Alyce D. Laviolette, *It Could Happen to Anyone: Why Battered Women Stay* 49-50 (1993); Marsha B. Liss & Geraldine B. Stahly, “Domestic Violence and Child Custody” in Marsali Hansen & Michele Harway (eds), *Battering and Family Therapy: a Feminist Perspective* (1993) at 175-81; Merrit McKeon, “The Impact of Domestic Violence on Child Custody Determination in California: Who Will Understand?” (1998) 19 Whittier LR 459, 459.

In the face of such adverse circumstances and their awareness that they were considered implacably hostile, women had to carefully weigh what protective strategies were available to them. Knowing that there was little chance of complete protection of either themselves or their children, women adopted forms of resistance that afforded them relative safety. In doing so, they frequently jeopardized their own interests to give the most protection they could to their children. They cooperated with supervised or supported contact, not because they believed this to be in their children's best interests, but because they feared that without this minimal level of involvement, their children could be at greater risk.¹³³

Similarly, Elizabeth found:

The majority of mothers with histories of oppressive intimacy whose difficulties with negotiating care arrangements have caused them to interact with New Zealand's family law system, in seeking to advance the complex and contested interests of their children, have simultaneously supported their children's ongoing relationship with their fathers even as they have opposed parenting orders that award often abusive and inexperienced fathers with generous amounts of usually unsupervised time with children. It's a delicate dance in which mothers run the risk of being regarded as obstructive, hostile and alienating if they speak up about violent and/or coercively controlling behaviours directed at them, make claims about violence and abuse against their children or otherwise suggest that fathers are ill-equipped to assume the role of carer for any length of time.

The requirement faced by mothers in contested custody cases in New Zealand (and elsewhere in the West) to participate in a dance of ambivalent support for fathers has been heightened over the last twenty years by the rising prominence of parental alienation (syndrome) in custody law systems, or what I refer to herein as PA(S) inflected custody law systems. Such custody law systems are characterised by the overt and covert use of PA(S) to reinforce the production of fathers as essential to post-separation care arrangements for children. One of the ways this occurs is through using PA(S) to frame mothers' active resistance to fathers' demands for care-time, as well as many ordinary practices of maternal care, in pathological terms as either consciously or unconsciously alienating.¹³⁴

¹³³ Christine Harrison, "Implacably Hostile or Appropriately Protective?", (2008) 14 *Violence Against Women* 381, 396.

¹³⁴ Elizabeth, "Affective Burden", above, at 118-19.

Doughty et al (2020) note: "Some participants reported being advised by lawyers that they would be perceived as alienators if they raised their concerns about their child's safety or did not hide how upset they were in taking a distressed child to a contact visit."¹³⁵

Lapierre et al (2020) document a similar phenomenon in the Quebecois family courts. They note that "a growing number of abused women are being accused, or threatened that they will be accused, of 'parental alienation'. Such accusations had primarily come from the women's former partners and from professionals in family court and child protection services."¹³⁶

Perhaps unsurprisingly considering the effectiveness that tactical claims of alienation have in exonerating abusive fathers, a new study of alienation allegations in England and Wales documents "a recent increase in allegations being made by fathers", which "tended to be made subsequent to the mother raising the issue of abuse as a reason for a child resisting contact".¹³⁷

Terminology

Over time, Family Court professionals have moved away from using the phrase "parental alienation", presumably in recognition of the fact that the concept is controversial and viewed as scientifically invalid, especially in forensic application in cases involving family violence. They nonetheless continue to embrace the concept and have only abandoned the name. Rather than acknowledging the lack of validity of the construct on which they have so long relied, they hide their continued reliance by changing the language that they use to advance the construct – for example, by discussing "subconscious messages",¹³⁸ unwillingness to "support" the child's relationship with the other parent;¹³⁹ "alienating behaviours" or "alienating factors",¹⁴⁰ implacable hostility/antipathy/negativity toward the other parent (even

¹³⁵ Doughty et al, above, at 69.

¹³⁶ Simon Lapierre et al, "The Legitimization and Institutionalization of 'Parental Alienation' in the Province of Quebec" (2020) 42 J Soc Welfare & Fam L 30, 31.

¹³⁷ Doughty et al, above, at 69.

¹³⁸ *Lister v Roberts* [2021] NZHC 2775 at [17], [21 (a)]; [REDACTED] [2016] NZFC 1872 at [80]; [REDACTED], FAM-2010-016-000139 & FAM-2010-016-000140 (FC Rotorua, 15 December 2011) at [146]; [REDACTED], FAM-2005-085-000269 (FC Wellington, 14 November 2011) at [70]; [REDACTED] FAM-2007-009-001679 (FC Christchurch, 11 April 2008) at [142].

¹³⁹ [REDACTED] [2012] NZFC 4070 at [10 (d)]; [REDACTED], above, at [100]; [REDACTED], above, at [124]; [REDACTED], FAM-2004-087-000124 (FC Tauranga, 3 November 2011), at [79].

¹⁴⁰ [REDACTED], above, at [83]; [REDACTED] [2014] NZFC 4530 at [32]; [REDACTED] [2012] NZFC 5119 at [101]-[102]; [REDACTED] [2012] NZFC 4516 at [37]; [REDACTED] above, at [10 (d)]; [REDACTED], above, at [146]; *Andrews v Andrews*, FAM-2008-009-4331 (FC Christchurch, 12 July 2011) at [23]-[24]; [REDACTED], CIV-2010-404-005435 (HC Auckland, 15 December 2010) at [30].

in cases in which the rejected parent inflicted violence on the “hostile” parent),¹⁴¹ the “refuse and resist dynamic”, “loyalty binds”,¹⁴² pathological “enmeshment”,¹⁴³ “gatekeeping”,¹⁴⁴ “cognitive dissonance”,¹⁴⁵ or “manipulation” of children’s views. The Court often finds that these alienation pseudonyms are committed unintentionally by the accused parent.¹⁴⁶ These findings of alienation by another name are rarely accompanied by tangible findings of concrete behaviour by the accused parent. Instead, they are offered as conclusions with no indication of their evidentiary basis. Other times, the “alienating behaviours” identified are so subjective that the designation is meaningless. For example, in [REDACTED], Mother’s “alienating behaviours” were: making a report of concern to CYFS because one child was “pale, gaunt and had lost a lot of weight” and Father yelled at then and left them unsupervised; taking one child to a GP who was so concerned about Child’s reports of Father’s harsh punishments that she made a report of concern to CYFS; allowing Children to meet alone with a pediatrician, which resulted in their making disclosures of Father’s abuse and the pediatrician making a report of concern to CYFS; and failing to inform Father that one child had expressed thoughts of self-harm since the Court ordered him to live with him.¹⁴⁷

Henderson v Morgan is an example of the way that the nature of the syndrome has evolved.¹⁴⁸ Mother had been Children’s primary carer for their entire life.¹⁴⁹ Children, who were thirteen and eight, expressed a clear desire to continue to reside with her.¹⁵⁰ Mother was afraid of Father because of his history of violence against her and did not want Children to have contact with him.¹⁵¹ For two years after their separation, Father voluntarily had no contact with Children.¹⁵² It was uncontested that Children’s primary attachment was to Mother.¹⁵³

¹⁴¹ [REDACTED], above, at [124].

¹⁴² [REDACTED], above, at [89].

¹⁴³ [REDACTED], above, at [83]; [REDACTED], above, at [30].

¹⁴⁴ [REDACTED], above, at [101]-[102].

¹⁴⁵ [REDACTED], above, at [89].

¹⁴⁶ [REDACTED], above, at [83].

¹⁴⁷ [REDACTED], above, at [81].

¹⁴⁸ [2013] NZHC 1010. The case was styled [REDACTED], FAM-2006-005-000004 (FC Dunedin, 17 February 2012) in the Family Court.

¹⁴⁹ At [74].

¹⁵⁰ At [26], [44], [72], [77].

¹⁵¹ At [30], [60], [81].

¹⁵² At [4].

¹⁵³ At [74], [77].

The court psychologist opined that Mother had “begun to engage in alienating behaviour”.¹⁵⁴ She also opined that Mother was placing Children in a “loyalty bind”.¹⁵⁵ She made these findings despite never having observed Children in Mother’s care.¹⁵⁶ Judge Coyle granted day-to-day care of Children to Father, “[n]otwithstanding that their mother has been their primary attachment figure to date, and notwithstanding that they have a strong wish” to reside with Mother.¹⁵⁷ He found that Mother had “shown a total inability to support and promote a relationship between the boys and their father” and was “enmeshed” with them.¹⁵⁸ He acknowledged that he used the term “enmeshment” to mean something different than how Mother’s expert psychologist used it in her report.¹⁵⁹ He found that Mother had “overt antipathy” toward Father and denigrated his relationship with Children.¹⁶⁰ At no point in the decision stripping Children from Mother was a single instance of concrete behaviour by Mother identified. Instead, her “behaviour” was described in vague, conclusory characterisations.

Father, on the other hand, intentionally deceived the High Court, affirming that Children stayed with Mother’s former partner when they explicitly told him that the partner was not present.¹⁶¹ Justice Heath expressed disapproval of Father’s “[l]ack of candour” but ultimately dismissed it as “an understandable response in a human sense” to his lack of trust of Mother.¹⁶² The contrast between the courts’ discussion of Mother’s animosity toward Father because of his history of inflicting family violence as pathological and abusive and Father’s distrust of Mother as natural and understandable is striking, particularly when juxtaposed with the courts’ repeated criticism of Mother for being unwilling to have direct contact with Father because she feared him.

In *Larson v Mosley*,¹⁶³ Mother applied for a parenting order allowing her to relocate to Australia with Children arguing that she would be better able to care and provide financially for them

¹⁵⁴ At [27].

¹⁵⁵ At [48] n 30. Demonstrating the malleable and standardless nature of this “loyalty bind” finding, Dr Smith accused Mother of causing two different “loyalty binds” in two different reports in two different contexts. In her first report, she accused Mother of creating a “loyalty bind” because she believed that her new partner lent value to Children’s lives. At [48] n 30. In her second report, prepared after day-to-day care of Children was transferred to Father, she accused Mother of creating a “loyalty bind” by staying with Children at her new partner’s home when he was not there. At [48] n 30.

¹⁵⁶ At [81].

¹⁵⁷ At [27].

¹⁵⁸ At [27]–[28].

¹⁵⁹ At [84].

¹⁶⁰ At [28].

¹⁶¹ At [82].

¹⁶² At [82].

¹⁶³ [2019] NZFC 386.

and have more support from friends and family there.¹⁶⁴ The court psychologist conceded that both parents discussed the proposed relocation with Children but opined that Mother's discussion was "more of a sell", "could be viewed as alienating behaviour", and could transfer "internal pressure and confusion" to Children.¹⁶⁵ He opined that the Court should not attach weight to Children's views in support of relocation.¹⁶⁶ Based on this evidence, Judge Raumati found that relocation would "result in risk to the children's psychological safety".¹⁶⁷ He also found that Mother "tried to sell the relocation to the children and therefore to influence their views about their father" and that "her negative personal feelings towards the children's father . . . impacted on the children's relationship with their father".¹⁶⁸

This evidence is arguably more concerning than when psychologists rely explicitly on "parental alienation" because it is harder for protective parents to refute. When the parent accused of alienation offers evidence regarding the discrediting of the theory, psychologists, judges, and lawyers respond that they are not using parental alienation, then cite studies that explicitly discuss "alienation" in support of this more elusive testimony. For example, in [REDACTED], the court psychologist testified that she was reluctant to use the phrase "parental alienation", preferring instead "to talk of psychological or pathological alignment".¹⁶⁹ She opined that Mother was engaging in "aligning behaviours" and "was aligning the children to her position".¹⁷⁰ The Court had previously found that Father engaged in "inappropriate treatment of the children", the Court's typical minimising language for child abuse.¹⁷¹ Children did not want contact with Father because of ongoing abuse and consistently expressed a preference to live with Mother.¹⁷² The psychologist opined that Children's views "reflect[ed] the influence of their mother whether overt or covert" and caused the "undermining of their relationship with their father".¹⁷³ In support of her theories of "pathological alignment", she cited writings about parental alienation.¹⁷⁴ This is the equivalent of a flat-earth sceptic finally conceding that the Earth is round only immediately to warn someone to stay away from the Edge lest they fall off.

*Lowe v Way*¹⁷⁵ also exemplifies the shift. Nine-year-old Child was in court-ordered shared care over Mother's objection. Mother claimed that Father had a history of physical and psychological abuse against both her and Child and sought supervised contact. Child repeatedly said that he

¹⁶⁴ At [8], [22].

¹⁶⁵ At [33].

¹⁶⁶ At [72].

¹⁶⁷ At [55].

¹⁶⁸ At [63].

¹⁶⁹ [REDACTED], above, at [37].

¹⁷⁰ At [14]-[15].

¹⁷¹ At [3].

¹⁷² At [52], [60], [63], [67], [68].

¹⁷³ At [16].

¹⁷⁴ At [37], [52].

¹⁷⁵ [2017] NZFC 6365.

was frightened of Father and did not want to be in his care". He expressed suicidal ideation. He ran away from school to avoid being picked up by Father. The school called Police who located Child in the garage of an empty house. They returned Child to Mother's care.

Father claimed that the abuse never happened and Child's fears of his violence were "not based on reality" but rather were "a result of the mother's influence on him". Mother applied for a protection order and variation of the parenting order to suspend Child's contact with Father, citing safety concerns. Child told his lawyer for the child that he wanted to live with Mother, where he felt safe, and be allowed "to get on with his life". Both Father and Judge Manuel scrupulously avoided using the word "alienation" whenever possible, but the construct permeated the proceedings. Father's counsel cited "alienation" writings in support of his position, while characterising his concerns as being merely with Mother's alleged "influence, anxiety and mistaken views" of Father, asserting that Mother's "considerable anxiety had transferred itself to the child".¹⁷⁶ The Court similarly characterised Father's concerns as being that Mother's "influence" was causing Child's "distress".¹⁷⁷

The "research" cited by Father's counsel is a textbook example of failing to understand the difference between correlation and causation, ecological validity and generalisability, and the G2i problem. First, Father cited research that showed that "children of divorce generally do best when they have good relationships with two involved and effective parents" and that "young adults who experienced parental separation wished they had more time with the non-custodial parent".¹⁷⁸ This research establishes a correlation between positive involvement of both parents and wellbeing, a correlation that has been well established for decades. Subsequent, more nuanced studies have shown, however, that the driving force behind this correlation is conflict. Children whose parents have a high level of conflict post-separation fare worse than children whose parents get along. Children whose parents have a high level of conflict are more likely to have one parent disengage. Parental conflict, therefore, is a confounding variable, and it is generally believed to be the primary cause of the differential outcomes.¹⁷⁹ Studies that specifically control for parental conflict show that children are better

¹⁷⁶ At [38]-[39], [47].

¹⁷⁷ At [57].

¹⁷⁸ At [38].

¹⁷⁹ Jan Pryor & Bryan Rodgers, *Children in Changing Families: Life After Parental Separation* (Blackwell 2001); Paul R. Amato, "The Consequences of Divorce for Adults and Children" (200) 62 J Marriage & Fam 1269; Gordon T. Harold & Mervyn A. Murch, "Inter-Parental Conflict and Children's Adaptation to Separation and Divorce: Theory, Research and Implications for Family Law Practice and Policy" (2005) 17 Child & Fam LQ 185; E. Mavis Hetherington, "Social Support and the Adjustment of Children in Divorced and Remarried Families" (2003) 10 *Childhood* 217; Joan B. Kelly, "Legal and Educational Interventions for Families in Residence and Contact Disputes" (2001) 15 Australian J Family L 92; Joan B. Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice" (2002) 10 Virginia J Social Policy & L 131; Joan B. Kelly, "Children's Living

off in the primary care of one parent with minimal contact with the other parent than in shared care in families in which there are high levels of parental conflict. These general separation studies also fail to control for another confounding variable: family violence.¹⁸⁰ They do not compare children with a violent parent who remains involved in their lives with children whose violent parent is not involved. Finally, these studies have a massive ecological-validity problem: they analyse families in which both parents chose to remain involved and cooperate or not. They do not analyse the effect that a court order mandating shared care in cases in which one or more parent opposes shared care has on child outcomes.

Second, Father cited research that indicated that "fathers play an important role in child development and adjustment".¹⁸¹ This research was even less applicable to the case because it does not involve parental separation at all, let alone forced share care arrangements in families that have experienced violence.

Third, Father cited research that purported to document that "alienated children and adults alienated as children report that despite their protests otherwise they secretly longed for more contact with the rejected parent and wished someone would have insisted they have contact".¹⁸² This research is even less methodologically applicable to the case. It purports to be a study of children who were "alienated". The question in *Lowe* was whether there was any reliable expert evidence to establish that Child was "alienated". Applying this (non-peer-reviewed) research would be the equivalent of a physician citing studies regarding the harmful side effects of diabetes in support of a determination that a patient had diabetes.

Even more concerning, Father's lawyer did not reference the studies directly. Instead, he referenced a single family-law article, not a peer-reviewed psychology publication, discussing the studies second hand. The article was Fidler and Bala (2010). In the article, Fidler and Bala note how men who inflict violence "allege attempted alienation by the victim as a smokescreen to their own abusive behavior, or claim that it is the mother's behavior that has alienated the children. Rightly, mothers whose partners are abusive attempt to protect their children."¹⁸³ They also explain:

Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research" (2007) 46 *Family Process* 35; Michael E. Lamb et al, "The Effects of Divorce and Custody Arrangements on Children's Behavior, Development and Adjustment", in Michael E. Lamb (ed), *Parenting and Child Development in "Non-Traditional" Families* (1999); Andrew I. Shepard, "Parental Conflict Prevention Programs and the Unified Family Court: a Public Health Perspective" (1998) 32 FLQ 95.

¹⁸⁰ William V. Fabricius & Sanford L. Braver, "Relocation, Parental Conflict and Domestic Violence: Independent Risk Factors for Children of Divorce:", in Philip Stahl & Leslie Drozd (eds), *Relocation Issues in Child Custody Cases* (2006), at 7.

¹⁸¹ *Lowe*, above, at [38].

¹⁸² At [38].

¹⁸³ Fidler & Bala, above, at 10-11.

"Child alienation" needs to be differentiated from a "realistic estrangement," where the child's resistance or refusal may result from the trauma of witnessing domestic violence or from experiencing physical abuse, sexual abuse, or significantly inept or neglectful parenting by the rejected parent. It is truly abusive behavior or extremely compromised parenting that differentiates alienation from a realistic estrangement.¹⁸⁴

They also note:

In cases where the rejected parent has been abusive or violent with the other parent, or neglectful, abusive or significantly inept with the child, the more correct "diagnosis" is realistic estrangement, justified primarily, though not always exclusively, by the rejected parent's behavior. The child's reaction to the rejected parent is relatively independent and occurs irrespective of the preferred parent's attitudes and behavior.¹⁸⁵

In other words, Fidler and Bala object to the uses of "alienation" like the one that Father was making.

The flaw in Father's use of this research is that none of it has been validated for the particular forensic use to which he was putting it: to support the conclusion that *this* child would be better off having forced contact against his will with this violent Father whom he feared. This is the G2i problem.

This shifting terminology is a global issue. Lapierre, et al (2020) explain:

The research findings revealed a tendency in the documents and amongst the key informants to distance themselves from Gardner's controversial work on "parental alienation syndrome" and make attempts to address the critiques by proposing new approaches and new concepts. This reflects a more general trend in the international literature, as several authors have proposed "new" ways to understand and assess "parental alienation". Nonetheless, the research findings suggest that the terms "parental alienation syndrome", "parental alienation" and "alienating behaviours" are often used interchangeably, and that their assessment tends to rely on similar indicators. Professionals can even use different terms to designate situations that they still see as "parental alienation". Therefore, the "new" approaches and concepts did not lead to fundamental changes in "parental alienation" discourse. In fact, it continues to be a gendered discourse that locates the issue in "high conflict" cases, focusing primarily on women's "alienating" behaviours and the lack of father-child contact, as well as women's and children's false allegations of men's violence.

¹⁸⁴ At 15.

¹⁸⁵ At 16.

Overall, these research findings suggest that drawing attention to the problems associated with Gardner's work on "parental alienation syndrome", opposing the inclusion of "parental alienation" in policies and adopting policies that prohibit its use is not sufficient to eradicate reliance on "parental alienation" in family court and child protection practices. In this context, professionals may use different terms to designate situations that they still understand as "parental alienation" and make exactly the same recommendations, making it even more difficult to document the problem. In this regard, the research findings suggest that the move towards a continuum approach and the focus on "alienating behaviours" may have resulted in a growing number of women being seen as "alienating" parents without even a thorough assessment of the family dynamics.¹⁸⁶

In this way, the Court's application of this theory contains the worst of both worlds – all the danger of deploying a baseless pseudo-scientific theory with none of the limitations of the scope of that invalid theory.

One concerning example of this phenomenon is the increasing reliance by many court psychologists on a bizarre, strained, and untested understanding of the phenomenon of "cognitive dissonance", which seems to exist only among court psychologists and has no counterpart in research psychology or clinical practice. Court psychologists offer evidence that children who are exposed to conflict and hostility between their parents (or between parents and extended family members) "suffer from" cognitive dissonance, which results in some type of dissociative state, which causes massive damage to their long-term psychosocial wellbeing. This understanding of "cognitive dissonance" has no counterpart in psychological research. There has never been a published, peer-reviewed study validating the theory, let alone studies establishing that forensic psychologists could accurately detect this phenomenon if it existed.

The mainstream validated psychological theory of cognitive dissonance means something entirely different to how psychologists describe and employ the concept in the Family Court. The phrase "cognitive dissonance" was coined by Leon Festinger in 1957 in his groundbreaking treatise on social and cognitive psychology.¹⁸⁷ Cognitive dissonance has nothing to do with child development, attachment theory, or psychopathology.¹⁸⁸ Cognitive dissonance refers to the psychological discomfort that all humans experience when there is a discrepancy in a pair of their simultaneously held beliefs.¹⁸⁹ The classic example of the phenomenon used by

¹⁸⁶ Lapierre et al, above, at 42.

¹⁸⁷ Leon Festinger, *A Theory of Cognitive Dissonance* (1957).

¹⁸⁸ Eddie Harmon-Jones (ed), *Cognitive Dissonance: Reexamining a Pivotal Theory in Psychology* (American Psychological Association 2019); Judson Mills & Eddie Harmon-Jones (eds), *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology* (American Psychological Association 1999).

¹⁸⁹ Eddie Harmon-Jones & Judson Mills, "An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory" in Harmon-Jones, above, at 3.

Festinger is when an individual continues to smoke despite knowing that it is unhealthy to do so. Festinger's theory was that such an individual had two options to reduce their cognitive dissonance: either quit smoking or convince themselves that smoking is not really that harmful.

Cognitive dissonance is not pathological. It is an information-processing heuristic that is well-documented across human decisions. It is often referred to in psychological literature as one of the "human factors" that can distort subjective decision making.¹⁹⁰ It typically results in one of two adaptive mechanisms: either holding the contradictory beliefs simultaneously without acknowledging the conflict (denial) or finding a way to synchronise the two beliefs (rationalisation).

Conflicts of Interest

Using court psychologists as de facto forensic investigators creates a moral hazard and, over time, has created a system of financial conflicts of interest for the psychologists. An ethical psychologist would advise the Family Court that they were not qualified as a mind reader or human lie detector and refuse to perform an evaluation for which there are no validated assessments or reach a conclusion with no basis in evidence or reliable methodology. The problem is that a court psychologist who cautions the Court that there is no scientific validity or as-applied reliability to their speculative interpretation of the truth or falsity of a victim's reports of family violence would not be hired by the court to perform an evaluation. By contrast, a psychologist who willingly agrees to engage in subjective, malleable interpretations and offer the Court firm conclusions that lack a sufficient evidence basis becomes highly valuable. Research shows that psychologists who offer expert testimony often operate outside their area of core competence, proffering one-sided evidence, and labour under the irreconcilable conflict between the role of a clinician and a forensic expert.¹⁹¹

Parental alienation has been exploited for profit in the United States for decades.¹⁹² Gardner had a for-profit corporation, Creative Therapeutics.¹⁹³ He derived 99% of his income from forensic consulting and testimony.¹⁹⁴ He testified in hundreds of cases.¹⁹⁵ He self-published forty-two books and sold videotapes and "other aids" through Creative Therapeutics.¹⁹⁶

¹⁹⁰ Gary Edmond, "Fingerprint Evidence in New Zealand Courts: the Oversight of Overstatement" (2020) 29 NZULR 1, 23.

¹⁹¹ Brian R. Clifford, "Expert Testimony" in Graham J. Towl & David A. Crighton (eds), *Forensic Psychology* (2010) at 50.

¹⁹² Leonetti, "Endangered by Junk Science", above.

¹⁹³ *People v Fortin*, 706 NYS2d 611, 612 (NYSC 2000).

¹⁹⁴ At 612.

¹⁹⁵ At 613.

¹⁹⁶ At 612.

One pervasive issue with expert evidence from psychologists relating to parental alienation is that they recommend interventions that they or an associate would benefit financially from providing. Proponents of parental alienation have formed an international advocacy group called "Family Access-Fighting for Children's Rights," which offers presentations by advocates of parental alienation to buttress the legitimacy of the construct.¹⁹⁷

Compounding these financial conflicts of interest around court psychological assessments is the fact that the Court no longer stops simply at contracting assessments from pro-alienation clinicians, they double down by hiring psychologists to "cure" the non-existent disorders that they diagnose in their court evaluations. The result has been the creation of a highly profitable industry centered around diagnosing and curing children of non-existent pathologies and diagnosing and curing women for the disorder of believing their children's reports of abuse.

Importing Junk Science

The construct of parental alienation has been exploited by paid consultants who work exclusively as expert witnesses and paid speakers, and local court psychologists in ANZ have become enamored with their writings and presentations.¹⁹⁸ Since Gardner's death, a new phalanx of paid consultants has stepped up to capitalize on the lucrative nature of alienation evidence in the United States.¹⁹⁹ Many have been discredited in the American courts, but court psychologists in ANZ nonetheless rely on their "research", apparently unaware that their evidence has been rejected by American courts as lacking an evidence base. Court personnel overstate their credentials and standing in the fields of psychology and psychiatry, describing them as "eminent" and citing their proprietary materials as representative "literature."²⁰⁰ They quote uncritically from these hired experts' promotional materials in describing their credentials and experience.²⁰¹

For example, in *Bush v. Johnson*,²⁰² the High Court cited with approval what the Court characterized as "studies" by Amy Baker showing that "adults who were allowed to disown a parent find that they regretted that decision and reported long term problems with guilt and depression that they attributed to having been allowed to reject one of their parents."²⁰³ Baker

¹⁹⁷ American Professional Society on the Abuse of Children, *Position Statement: Assertions of Parental Alienation Syndrome (PAS), Parental [Alienation] Disorder (PAD), or Parental Alienation (PA) When Child Maltreatment Is of Concern*, 22 January 2022 at 2.

¹⁹⁸ Carrie Leonetti, "Combatting a Dangerous American Export: the Need for Professional Regulation of Psychologists in the New Zealand Family Court" UCLA Pacific Basin LJ (forthcoming 2023).

¹⁹⁹ *ibid*

²⁰⁰ *ibid*

²⁰¹ *ibid*

²⁰² [2019] NZHC 186.

²⁰³ At [57].

is not an academic researcher, and her “studies” are not published in peer-reviewed psychology journals. She is a paid consultant and expert witness, and her books are published by popular presses.²⁰⁴ Her testimony has been rejected by American appellate courts because of her lack of forensic credentials and the unreliable methodology underlying her ideological (and profitable) beliefs in parental alienation.²⁰⁵ Even the language with which the High Court described her “studies” demonstrated their lack of research methodology. A methodologically sound study of the statistical association between “disowning” or “rejecting” a parent and “guilt and depression” would describe the variables measured in detail (what constitutes the stimulus of disowning/rejection and how are the response variables of guilt/depression measured), explain how it controlled for confounding variables (e.g., alternate causes of rejection), and document its ecological validity (how the environment in which the study was conducted was sufficiently similar to the context in which it is being applied to allow its results to be generalised). Instead, Baker’s “research” findings are described in the language of pop psychology and vague generalizations.

The Lucrative Industry of Coercive “Deprogramming”

There are several programmes across the United States that claim to address parental alienation through “reunification therapy”.²⁰⁶ These programmes often prohibit contact between the children who are ordered into them and their protective parents.²⁰⁷ The purpose of the reunification programmes is to change the child’s beliefs and attitudes.²⁰⁸

These programs pose significant risks of serious harm to the children subjected to them, including depression, self-harm, and risk taking (including the risk that children will run away to escape the coercive interventions or become more vulnerable to victimisation). Joan Meier (2009) has termed this “threat therapy.”²⁰⁹

Recent research by Andreopoulos and Wexler (2022) examines reunification programmes that are held out as “solutions” to parental alienation.²¹⁰ They note that advocates of parental alienation believe that its dynamics and symptoms can be resolved through psycho-

²⁰⁴ At [57] n 49.

²⁰⁵ Eg, *JF v DF*, 112 NYS3d 438 (NYSC 2018).

²⁰⁶ Elena Andreopoulos & Alison Wexler, “The ‘Solution’ to Parental Alienation: a Critique of the Turning Points and Overcoming Barriers Reunification Programs”, *J Family Trauma, Child Custody & Child Dvpt*, 15 March 2022, at 2.

²⁰⁷ Hannah Dreyfus, “Colorado Lawmakers Consider Reforms to the Way Family Courts Handle Abuse Allegations”, *ProPublica*, 2 March 2023, at <www.propublica.org/article/colorado-family-court-custody-kilmer-lawsuit>.

²⁰⁸ Andreopoulos & Wexler, above, at 2.

²⁰⁹ Joan S. Meier, “The Misuse of Parental Alienation Syndrome in Custody Suits”, in Eve S. Buzawa (ed), *Violence Against Women in Families and Relationships* (2009) at 149.

²¹⁰ Andreopoulos & Wexler, above.

educational interventions for alienated children and reunification therapy for alienated children and rejected parents.²¹¹ They note that studies that purport to validate these programmes “acknowledge that they did not control for any outside factors that could impact the results of the study, which is a basic component of any reliable scientific research.”²¹² They explain that there is “a persistent lack of reliable research” to substantiate the methods and practices of reunification programmes and that they pose the potential for traumatising individuals who participate in them.²¹³ They note how the professionals who operate reunification programmes also offer training to mental health professionals, lawyers, and judges and publish books promoting their programs.²¹⁴ They conclude: “Although each [reunification] program discussed has its limitations, programs which focus on parental alienation are limited in terms of research foundation. The lack of research in the field of parental alienation makes it challenging to establish programs supported by scientific evidence.”²¹⁵

Young adults who, as children, were labelled “alienated” and forced into “deprogramming” to force them to have relationships with abusive parents have formed survivor groups and report harrowing and disturbing stories of their experiences in these programmes.²¹⁶ In the United States, they have filed class-action lawsuits against custody evaluators and reunification providers.²¹⁷

Attempts at Reform

In *In Re: Head*,²¹⁸ the Oregon Board of Psychology initiated disciplinary action against Jacqueline Head, a registered psychologist, for unprofessional conduct.²¹⁹ The disciplinary action arose out of Dr Head’s conduct as a psychologist in proceedings in the family court. Dr Head was retained to provide reunification therapy and written reports to the court on its

²¹¹ At 2.

²¹² At 15.

²¹³ At 2.

²¹⁴ At 13.

²¹⁵ At 18.

²¹⁶ Robert J. Hansen, “Reunification Camp Survivors Expose For-Profit Industry’s Relationship with Family Courts”, *Newsbreak*, 27 November 2022, at <original.newsbreak.com/@robert-j-hansen-1587368/2838569822850-reunification-camp-survivors-expose-for-profit-industry-s-relationship-with-family-courts>.

²¹⁷ Carrie Leonetti, “Pedaling Snake Oil and Profiting from Pain: the Monetization of the Junk Science of “Parental Alienation” in the California Family Law Courts”, 27 *Quinnipiac Health LJ* (forthcoming 2023).

²¹⁸ Oregon Board of Psychology, Agency Case No 2020-035.

²¹⁹ Stipulated Order, *In Re: Jacqueline J. Head*, Oregon Board of Psychology, Agency Case No 2020-035, 8 July 2022, at 1.

progress.²²⁰ In 2020, Dr Head sent a letter to Father's lawyer indicating that Children suffered from "parental alienation".²²¹ Dr Head recommended to the court that Father and Children attend an alienation reunification workshop and that Children be placed in Father's custody for six months after the workshop to remedy their "alienation".²²²

The Board of Psychology found that Dr Head's conduct violated four ethical standards for psychologists – the duty to avoid harm, cooperation with other professionals, having an adequate basis for scientific and professional judgments, and having an adequate basis for assessment – and imposed discipline.²²³ The Board found that Dr Head violated the duty to have an adequate basis for her scientific and professional judgments by referring to "parental alienation" as if it were a diagnosis, "a representation which is not established scientific or professional knowledge within the field of psychology" because the *DSM-5* did not recognise parental alienation.²²⁴ The Board found that Dr Head violated her duty to have an adequate basis for her assessment of Children when she made evaluations and recommendations to the court because she had insufficient information to substantiate her representation that Children suffered from "parental alienation" when parental alienation was not listed in the *DSM-5* "and it is therefore not possible to diagnose individuals with that condition".²²⁵ The Board concluded that Dr Head's failures constituted unprofessional conduct because her recommendation that the family attend the alienation workshop "constituted a danger to the children's emotional health or safety because it would have resulted in them being forced to attend a four-day workshop held at a distance location where they would experience pressure to retract, give up, or overcome their emotional experiences of distance, anger or hurt regarding [Father], which could result in emotional harm to them".²²⁶

The program at issue in Head was the notorious, controversial, and highly profitable "Family Bridges" "reunification" programme, developed by discredited California psychologist Randy Rand.²²⁷ In 2009, the California Board of Psychology took disciplinary action against Dr Rand for "extreme departure from the standard of practice" in two different court proceedings after he testified in family court that a child was severely alienated and should attend his

²²⁰ At 2.

²²¹ At 3.

²²² At 3.

²²³ At 4-6.

²²⁴ At 4.

²²⁵ At 4-5.

²²⁶ At 5.

²²⁷ Barbara Bradley Hagerty, "Can Children Be Persuaded to Love a Parent They Hate?", *Atlantic*, December 2020, at <www.theatlantic.com/magazine/archive/2020/12/when-a-child-is-a-weapon/616931/>; Hansen, above.

programme without ever having met them.²²⁸ The Board of Psychology placed Rand on probation and prohibited him from practicing psychology.²²⁹ In 2019, the Board issued a citation to Rand for violating the conditions of his probation and permanently suspended him from practicing psychology.²³⁰

In April 2023, the California Senate Judiciary Committee passed the Safe Child Act, known colloquially as “Piqui’s Law.”²³¹ In support of the bill, ten-year-old Zoe Winenger testified about the trauma that she endured in a court-ordered reunification camp.²³² Piqui’s Law will amend the California Family Code to prohibit court-ordered family reunification services as part of child custody or visitation proceedings, including reunification programmes that are predicated on cutting off a child from a parent with whom the child is bonded or to whom the child is attached.²³³ It will also require that custody evaluators who testify as experts in child custody proceedings in which a parent is alleged to have committed family violence have sufficient special knowledge, skill, experience, training, or education relating to their testimony.²³⁴ The bill will now move onto the Senate Appropriations Committee.²³⁵

Importing Coercion

Court psychologists in ANZ have recommended that children be ordered into American “deprogramming” camps run by Family Bridges. For example, in [REDACTED],²³⁶ a senior court psychologist assured the Court that the “most effective ‘deprogramming’ treatment” for parental alienation was Family Bridges and claimed that it was successful “even with severely

²²⁸ *In Re: Randy Rand*, Board of Psychology, Department of Consumer Affairs, State of California, Case No 1F 2004 158933, at search.dca.ca.gov/details/6001/PSY/12137/b7399ba7a92fa0255639bb6c945e07cc.

²²⁹ *ibid*

²³⁰ California Board of Psychology, Citation Order, Citation No 600 2019 000149, Order of Abatement, at search.dca.ca.gov/details/6001/PSY/12137/b7399ba7a92fa0255639bb6c945e07cc.

²³¹ Cal Senate Bill 331.

²³² “Piqui’s Law by California State Senator Susan Rubio Passes Key Senate Committee - Mandates Courts Put Child Safety First in Custody Disputes”, *Sierra Sun Times*, 26 April 2023, at goldrushcam.com/sierrasuntimes/index.php/news/local-news/45581-piqui-s-law-by-california-state-senator-susan-rubio-passes-key-senate-committee-mandates-courts-put-child-safety-first-in-custody-disputes.

²³³ Cal. Senate Bill 331 at s 4.

²³⁴ At s 5.

²³⁵ “Piqui’s Law by California State Senator Susan Rubio Passes”, above.

²³⁶ [2020] NZHC 1340.

alienated children".²³⁷ In support of these claims, the psychologist cited an article by Warshak, the co-owner of Family Bridges, which claimed, based on twelve children who had gone through his programme, that many "showed considerable, but not universal, success". In the tradition of alienation "literature", the article did not involve a controlled, methodologically sound research study but rather involved amorphous, untested claims advanced by an author with a financial conflict of interest.²³⁸ It was published in the *Family Court Review*, a student-run law review published by the Association of Family and Conciliation Courts. It is not a peer-reviewed psychology publication. The "data" on which the Article was based were surveys given to children at the end of the Family Bridges programme, while they were still under court order to participate. The article would be more aptly described as marketing materials than a psychology publication. Because Warshak is not an academic, he did not seek ethics approval for his "study", but there is no chance that approval for a study involving participants under coercion, let alone children under coercion, would have been granted by an ethics board, nor would a legitimate science publication have published his "results".

Family Bridges' practices include private "transport agents" forcibly transporting children to them, keeping children out of school, repeatedly telling children that their experiences of abuse did not occur, requiring children to admit that their "alienating" parent brainwashed them before they can leave the programme, encouraging children to reject a relationship with their "alienating" parent, requiring that children have no contact with their "alienating" parent for at least ninety days of "aftercare" after "deprogramming", and threatening children that, if they attempt to contact their "alienating" parent, that parent will be arrested and jailed. A four-day Family Bridges program costs \$40,000. This cost includes the hotels that the programme uses because it cannot get a license for a treatment facility, since it is an "educational program" rather than a form of therapeutic treatment and its director is legally prohibited from practicing psychology.²³⁹

Family Bridges was recently the subject of an intensive investigation by the Center for Investigative Reporting into the "cottage industry of so-called family reunification camps that

²³⁷ At [55].

²³⁸ Richard A. Warshak, "Family Bridges: Using Insights From Social Science to Reconnect Parents and Alienated Children" (2010) 48 FCR 48.

²³⁹ Pei-Sze Cheng, "NJ Brother, Sister Rip 'Alienating' Divorce Program That Tore Them From Father for Years", *NBC New York*, 26 December 2018, at <www.nbcnewyork.com/news/local/divorce-camp-new-jersey-investigation/1585403/>; Vicky Nguyen et al, "No Oversight for Programs Advertising They Reconnect Children with 'Alienated' Parents", *NBC Bay Area*, 2 November 2018, at <www.nbcbayarea.com/news/local/no-oversight-for-programs-advertising-they-reconnect-children-with-alienated-parents/64105/>; Lisa Roose-Church, "Taken From Mom, Teen Flees Dad and Waits for 18th Birthday", *Livingston Daily*, 4 September 2017, at <www.livingstondaily.com/story/news/local/community/livingston-county/2017/09/04/parent-alienation-bill/589157001/>.

are making big profits from broken families”.²⁴⁰ The investigation noted that the allure of parental alienation is that “it offers judges a solution to a complicated problem. When they can’t decide who’s telling the truth about child abuse, a psychologist comes in and offers them a blueprint. Judges sometimes take the word of the psychologist over other evidence, like the testimony of children.”²⁴¹ It documented how family court judges attended “seminars” where psychologists with financial stakes in the alienation industry “encouraged” them “to consider parental alienation as a valid argument in court”.²⁴²

In ■■■, the court psychologist ultimately concluded that Child would be among the cases for which the programme would not work, but she gave no indication of the basis for her opinion, particularly given her prior extolling of its virtues.²⁴³ The High Court accepted her testimony on the basis that she “personally had considerable experience and expertise in the area of family dysfunction and alienation”.²⁴⁴ Personal experience is not the equivalent of expertise and does not qualify an expert to offer evidence relating to “reunification therapy”.

Unfortunately, courts in ANZ appear to be particularly enamored with Warshak, overstating his credentials and standing in the field of psychology. For example, in *Palmer v. Holm*,²⁴⁵ the High Court, while upholding the Family Court’s refusal to order Child into the Family Bridges “camp”, described Warshak as an “eminent psychologist” and a “professor of psychology at the University of Texas Southwest Medical Center” (“UTSMC”).²⁴⁶ The basis for the High Court’s belief that Warshak was “eminent” was unclear, although presumably that representation came from some combination of a court psychologist and Warshak’s impressive marketing regime. Warshak was briefly an adjunct clinical professor of psychiatry at UTSMC. He was never a member of the full-time faculty. He is no longer affiliated with any academic institution. Instead, he runs a for-profit consultancy in the United States.²⁴⁷ Warshak’s books have not been published by academic presses or subject to peer review.²⁴⁸ The High Court referred to Warshak’s “involvement” with the Family Bridges programme in discussing his proposal that Child be required to attend his four-day deprogramming camp and his representations of the programme’s “successes” without acknowledging the conflict of interest posed by his co-ownership of the programme.²⁴⁹

²⁴⁰ Center for Investigative Reporting, “Bitter Custody”, 8 March 2019, at <revealnews.org/podcast/bitter-custody/>.

²⁴¹ *ibid*

²⁴² *ibid*

²⁴³ ■■■, above, at [155].

²⁴⁴ At [58].

²⁴⁵ [2014] NZHC 2268.

²⁴⁶ At [40].

²⁴⁷ “Dr Richard Warshak”, at <www.warshak.com/author/index.html>.

²⁴⁸ *ibid*

²⁴⁹ *Palmer*, above, at [51]-[52].

Court psychologists extolling a for-profit programme, which has been discredited in the country from which it originated, is the type of professional conduct that begs for regulation of expert evidence in the Family Court.

Homegrown Interventions

When the COVID-19 pandemic effectively closed the borders in 2020, American psychologists could no longer travel to ANZ to “deprogramme” Kiwi kids. Domestic psychologists have apparently stepped into this breach. In a recent training for lawyers for the child, sponsored by the New Zealand Law Society in June 2022, senior court psychologist April Trenberth gave a presentation about her (for-profit) “family therapy intervention” for children who “resist” or “refuse” contact with one parent due to the actions of their other parent, whom she terms the “alienator”.²⁵⁰ The “resist and refuse dynamic” is the Family Court’s current preferred terminology for parental alienation syndrome.²⁵¹ She insisted that the only remedy for alienation was reunification “therapy” provided by “those specifically trained with working with these resist-refuse dynamics (currently in short supply in New Zealand)”.²⁵² The reason that there are few psychologists in ANZ “specifically trained” in “treating” parental alienation is because the mainstream fields of psychiatry and psychology do not recognize alienation as an evidence-based phenomenon.

Trenberth recommends that the Court order her intervention as a condition of an interim parenting order, that the order include “expectations for care arrangements to progress” and “consequences for non-compliance,” and that the Court “review” the “progress” of the coercive intervention “to determine whether there is a need to vary the original order”.²⁵³ In other words, the “therapist” intervenes with the child after the Court has ordered the child into the care arrangements that the child is resisting and recommends that the Court back up its order that the child be forced into the unwanted care of a feared parent with draconian sanctions, which in ANZ regularly include “care reversals” (forcing the child into the sole care of the feared parent) and arrest warrants for the child’s forcible delivery to the feared parent by Police.²⁵⁴

In December 2021, the Government announced *Te Aorerekura*, its new national strategy to respond to family violence and sexual violence.²⁵⁵ The strategy calls for victims to be “heard,

²⁵⁰ April Trenberth, “A Brief Overview: Family Therapy Interventions for Court-Involved Families”, in NZLS CLE Ltd (ed), *Advanced Lawyer for Child 2022* (June 2022) at 31-32.

²⁵¹ Carrie Leonetti, “Sub Silentio Alienation: Deceptive Language, Implicit Associations, Cognitive Biases, and Barriers to Reform”, 63 Washburn LJ (forthcoming 2023).

²⁵² Trenberth, above, at 32.

²⁵³ At 33-34.

²⁵⁴ Leonetti, “Endangered by Junk Science”, above.

²⁵⁵ *Te Aorerekura: the National Strategy to Eliminate Family Violence and Sexual Violence* (New Zealand Government 2021), at <tepunaaonui.govt.nz/assets/National-strategy/Finals-translations-alt-formats/Te-Aorerekura-National-Strategy-final.pdf>.

valued, and know that their experiences are taken seriously.”²⁵⁶ It calls for children who have experienced violence to be listened to and believed.²⁵⁷ It explains how not listening to children and not valuing their views increases the harm to them from family violence.²⁵⁸ It calls for victims to access “the right kind of strengthening, healing or response services.”²⁵⁹ It calls for healing for victims that is “based on an understanding of violence and trauma.”²⁶⁰ It calls for trauma to be “recognised whenever it occurs.”²⁶¹

In 2022, the Family Justice Council, an interdisciplinary advisory board appointed by the British Secretary of State for Justice (the Lord Chancellor) to monitor family justice in the United Kingdom, issued Interim Guidance relating to conflicts of interest by expert witnesses in cases involving care of children in which there are allegations of alienating behaviour.²⁶² In the Interim Guidance, the Council admonished that a court evaluator recommending an intervention “deliverable only by the [court-appointed] expert or their associates” constituted a conflict of interest and was inconsistent with high-quality forensic evaluations.²⁶³ The Council explained: “The court should be extremely cautious when asked to consider assessment and treatment packages offered by the same or linked providers. It should be noted that differentiation of roles between assessor and intervention is consistent with therapeutic practice outside of the family court arena.”²⁶⁴ Unfortunately, these types of self-serving recommendations for lucrative interventions that lack scientific validity are not regulated in ANZ, and judges seem unconcerned by the obvious conflict of interests that they raise.

Need for Reform

Unfortunately, the Family Court continues to embrace invalid alienation evidence being given by experts who are not qualified to offer reliable opinions about how academic research should be used in court decision making. Despite the consensus of psychologists generally opposing the way that this construct is used in Family Court, court psychologists regularly cherry pick the handful of “studies” that they claim support the construct while ignoring the weight of the evidence in the field. They support their conclusions with reference to psychological literature

²⁵⁶ At 28.

²⁵⁷ At 18.

²⁵⁸ At 11.

²⁵⁹ At 28.

²⁶⁰ At 34.

²⁶¹ At 28.

²⁶² Family Justice Council, *Interim Guidance in Relation to Expert Witnesses in Cases Where There Are Allegations of Alienating Behaviours – Conflicts of Interest*, May 2022, at <www.judiciary.uk/family-justice-council/working-groups-3/responding-to-allegations-of-alienating-behaviour/>.

²⁶³ At 1-2.

²⁶⁴ At 2.

that is not generalisable to decisions involving care of children, demonstrating a lack of understanding of basic concepts in the forensic application of aggregate studies like ecological validity, the difference between correlation and causation, controlling for confounding variables, and the G2i problem. One concerning aspect of the psychological evidence offered in the Family Court is that these purported experts cite psychological research to support their conclusions but never discuss these basic forensic concepts – the difference between correlation and causation, the limitations on generalisability, and the epistemological problem with applying group data to individual situations.

The result is that the pseudo-science of parental alienation has achieved a status of unassailability in the courts of ANZ. Judges and lawyers have stamped their imprimatur of legitimacy on this unreliable construct without engaging with its foundations. At no time in the more than twenty years that this unscientific construct has dominated expert evidence in the Family Court did a judge ever lean over and simply ask a court psychologist: “How can you tell this child has been ‘alienated’ and how do you know that the estrangement does not have another cause? Where is the proof that you (or any court psychologist) can distinguish an ‘alienated’ child from a child who rejects a parent for some other reason with accuracy? How can you demonstrate the reliability of your conclusion? Where are the validation studies that demonstrate that this type of assessment reaches an accurate result with a known and acceptably low rate of error? Were they published and peer reviewed?” This is particularly troubling given that the answers to these questions are: speculation; I have none; I cannot; they do not exist; and no, because they do not exist.

These failures are not limited to the Family Court. The High Court has also embraced this pseudo-scientific construct. For example, *Finn v Poole* involved a dispute between parents over care arrangements for Children, Daughter and Son, who were ten and twelve at the time of the High Court judgment.²⁶⁵ From 2014, Children had been subject to a court order for equal shared care issued by consent of their parents.²⁶⁶ Eight months later, Son refused to go to Father’s home, and Daughter began to resist contact.²⁶⁷ Mother filed a complaint with Police after Father assaulted Son.²⁶⁸

Father sought to vary the parenting order so that Children were placed in his day-to-day care. Father claimed that they were “alienated from him” because of Mother’s “hostility” and “antipathy” toward him and the only way to “reverse the alienation” was for the Court to force Children into his care.²⁶⁹ Father sought a guardianship order placing Son at boarding school – in other words, Father did not want Son to live with him; he just wanted Son not to live with

²⁶⁵ *Finn v Poole* [2015] NZHC 1362 at [1]-[2].

²⁶⁶ At [5].

²⁶⁷ At [7].

²⁶⁸ At [97].

²⁶⁹ At [6].

Mother.²⁷⁰ Mother shared Father's concern about his deteriorating relationship with Children but believed that it was the result of Father's aggression (a plausible explanation).²⁷¹

Son was adamantly opposed to either a change in care or being sent to boarding school.²⁷² Although the courts appear to give it shockingly little importance, Son expressed that one reason that he did not like being at Father's was because Father "hurt" him and Police got involved – an obvious alternate explanation for his resistance to staying at Father's, which inured strongly in favour of protecting him from Father.²⁷³ Daughter stated that she wanted the shared-care arrangements to continue.²⁷⁴

The court psychologist opined that Children were "exhibiting behaviour consistent with parental alienation".²⁷⁵ Father offered "expert" testimony from a second psychologist who opined, based on her anecdotal experience, that "she had never seen a more obvious or blatant example of alienation".²⁷⁶

Father offered no direct evidence that Mother had done anything to undermine his relationship with Children – for example, witnesses who observed Mother denigrating Father or encouraging them not to have a relationship with him. Instead, the "evidence" of Mother's "alienating behaviours" was derived entirely from the syndrome construct: because Children were rejecting contact with Father, it was deduced that Mother *must have been* doing something to cause the rejection. Judge de Jong noted that Mother "appeared to be supportive of the children's relationship with their father".²⁷⁷ The claim of invisible "alienating behaviours" was supported entirely by speculation.

When Judge de Long declined to make a finding of parental alienation and left shared care in place, Father appealed to the High Court, arguing that the Family Court failed to give sufficient weight to the psychological evidence relating to "alienation".²⁷⁸

Son continued to express hostility toward Father, refusing to get into Father's car at changeovers and walking along the State Highway to get away from him.²⁷⁹ When Father called Police, they returned Son to Mother's care.²⁸⁰

On appeal, Justice Moore canvassed what he characterised as "the psychological indicia of alienation" derived from "various academic literature dealing with the phenomenon known as

²⁷⁰ At [10].

²⁷¹ At [23].

²⁷² At [71].

²⁷³ At [71].

²⁷⁴ At [72].

²⁷⁵ At [24].

²⁷⁶ At [24].

²⁷⁷ At [22].

²⁷⁸ At [33].

²⁷⁹ At [84].

²⁸⁰ At [84].

parental alienation”.²⁸¹ This is the first asserted correlation that underlies the alienation theory: that Mother’s “alienating behaviour” was causing Children’s rejection of contact with Father. All the indicia were subjective, and no standardised protocols for identifying them or testing the accuracy of those identifications were offered. The indicia included a “child’s strident rejection of a parent, usually accompanied by resistance or refusal to visit that parent”; “fusion of thinking in which the child and the aligned parent think alike”; “[s]uperficial or trumped up or exaggerated complaints about the rejected parent with little or no substance”; a “strong tendency to become over-involved in the adult issues of divorce”, including “go[ing] out of their way to look at court papers” and “listen[ing] in on phone conversations between adults”; giving “vague reasons” for rejecting a parent and staying “focused” on their exaggerated complaints about the parent; using “the same phrases or expressions as the aligned parent”; and seeing the world “in rigid and all-or-nothing ways”.²⁸² There was no basis offered for how a psychologist applying these factors would distinguish between “strident” and less-than-strident rejection, identify “resistance” to visitation that fell short of “refusal to visit”; distinguish “thinking fusion” from a parent and child simultaneously but independently reaching the same opinion; distinguish a “superficial” or fabricated or “exaggerated” complaint about another parent’s parenting from a genuine one; distinguish a “strong” tendency to become in adult issues from a weak tendency; distinguish over-involvement in adult issues from typical or under-involvement in them; or distinguish a child “going out of their way” to gain information about adult issues from ordinary childhood curiosity. The indicia also included factors that one would expect any child to exhibit to some extent, with no indication of how to distinguish typical behaviour from pathological behaviours, such as identifying abnormal “inconsistent and contradictory statements and behaviours” like rejecting a parent sometimes but being “friendly and positive” at others; distinguishing a “vague” reason for rejecting a parent from a sufficiently specific one; distinguishing “focusing” on complaints about a parent from having complaints about a parent; distinguishing “exaggerated” complaints from reasonable complaints; determining the threshold for “sameness” of language between the child and the accused parent, particularly given that children learn language from adults in their life and mirror their language frequently; or distinguishing pathologically rigid thinking from having a strong opinion based on sufficient grounds, particularly when children engage in black-or-white thinking as an ordinary characteristic of immaturity. The absence of standardised protocols or even meaningful definitions for making these determinations is precisely why this evidence should never be admitted in a judicial proceeding. These determinations are licence for rampant speculation and jumping to conclusions. The ability of “expert” psychologists to make accurate determinations has never been tested because the accuracy of the determinations is untestable. On cross-examination, both experts conceded that “alienation” could be “caused by multiple factors” – in other words, that children reject relationships with parents due to multiple causes.²⁸³ Unfortunately, however, these psychologists did not offer any foundation for their belief that they could rule out those other causes and determine that Mother’s invisible thoughts and behaviours had to be the primary cause in the case. The *Finn* case

²⁸¹ At [35].

²⁸² At [35].

²⁸³ At [42].

demonstrates the danger of this hubristic exercise. The case included evidence that Father had poor parenting skills, expressed animosity to Children about Mother (their primary carer), and had a history of fraught interactions with Son since before the parties' separation,²⁸⁴ but the psychologists gave no indication of how they ruled out this behaviour as the primary cause of the estrangement, let alone that the process of differentiation was reliable.

Justice Moore claimed that "the literature" established that: when children become "alienated", the "emotional response can be devastating" and "the impact is never benign"; the distortion to the child's relationship with the rejected parent is "potentially the most damaging effect on children"; "[a]lienated children are at risk of developing disturbances in many of their relationships"; alienated children "often become manipulative and feel overly powerful" and "may be resistant to authority and act out at school"; and "there is a strong likelihood they will develop a disturbance in their growing identity".²⁸⁵ He claimed that there was "a consensus" that it was "central to every child's well-being and development that they have a positive paternal relationship" with both parents.²⁸⁶ He also claimed that "[e]veryone agrees" that respecting [Son]'s request not to have forced contact with Father was "[p]lainly undesirable".²⁸⁷ This is the second purported correlation that underlies the alienation theory: that a child's rejection of one parent will cause long-term psychological damage to the child. The language that Justice Moore used in describing the correlations evidences its lack of scientific validity. Scientifically valid research would establish precise correlations between two variables. It would define and measure "alienation". It would define and quantify the "emotional damage". It would precisely state the statistical relationship between the two variables. The language of "can be", "never", "potentially the most", "many", "often", "may be", "strong likelihood", and "every" is not the language of science. It is the language of speculation and generalisation. Once again, the variables to which this non-statistical language applies are unmeasurable and untestable. There is no indication that psychological researchers have (or could have): defined "relationship disturbances" and distinguished them from non-pathological relationship developments; defined "manipulation" and distinguished pathological manipulation from ordinary attempts to manipulate by children; distinguished pathological "resistance to authority" to typical resistance to authority that is a normal (and even desirable) part of child development; or defined "acting out" and distinguished it from any non-alienation-based unwanted behaviour. The High Court decision contained no references to the psychological literature on which it relied, let alone a description of the design, methodology, or results of those alleged studies.

Justice Moore stated that he had "no hesitation in concluding that [Son] is alienated from his father."²⁸⁸ He acknowledged: "It cannot be assumed that [Mother] or the maternal environment is necessarily the sole or even the primary cause."²⁸⁹ He noted that Son had a

²⁸⁴ At [44]-[45].

²⁸⁵ At [36].

²⁸⁶ At [102].

²⁸⁷ At [104].

²⁸⁸ At [85].

²⁸⁹ At [99].

difficult relationship with Father since before the parties' separation and Daughter did not reject a relationship with Father.²⁹⁰ Inexplicably, however, he concluded: "Despite these reservations I am satisfied there are aspects of the maternal domestic environment which have in the past and continue to contribute to [Son]'s alienation from his father and despite past warnings and advice the conduct has continued."²⁹¹ Justice Moore never acknowledged, let alone considered, Father's history of child abuse against Son in reaching this conclusion, other than a passing finding that Son "falsely alleges assault" against Father,²⁹² offering no basis for his finding that Son's claims of assault were "false" (other than the theory of parental alienation, which is premised on the belief that almost all disclosures of child abuse by children are false).

Justice Moore ordered that Son be removed from Mother's care and forced into boarding school against his will.²⁹³ In support of that order, he cited writings that expressly conceded that there was no empirical support for a recommendation of reversing care or placing a child in the care of a third party as a remedy for alienation.²⁹⁴ He claimed that "research has indicated that many children secretly wish that someone would call their bluff and insist they have a relationship with the parent they claim to fear or hate."²⁹⁵ Once again, "many" is not the language of science, and this vague claim contains no indication that a psychologist could reliably identify a child harbouring such a "secret" wish.

Human Rights Implications

Not only can lack of expertise create a vacuum into which folklore and mythology flood, but it creates a breeding ground for unconscious biases and gender stereotypes. A recent study funded by the United States Department of Justice noted that "bias in the courts, as revealed by many gender-bias commissions, almost always finds greater bias against women, which often increases risks to battered women and their children in the context of custody determinations".²⁹⁶ It notes:

Battered women are at higher risk of negative custody-visitation outcomes due to gender bias by courts, as documented by many federal, state, and local commissions that have studied such bias since the 1980s. Negative stereotypes about women seem to encourage judges to disbelieve women's allegations about child abuse. A lack of understanding about domestic violence also leads judges to accuse

²⁹⁰ At [99].

²⁹¹ At [100].

²⁹² At [120].

²⁹³ At [116].

²⁹⁴ At [109].

²⁹⁵ At [108].

²⁹⁶ Saunders et al, above, at 18.

victims of lying, blaming victims for the violence, and trivializing the violence.²⁹⁷

The pseudo-science of parental alienation is one mechanism by which this gender bias flourishes. There are two striking aspects to the alienation phenomenon. First, in most cases in which the Court has made findings of “alienation”, the allegedly alienating parent is a woman. Judges refer to “**maternal** gatekeeping”, explicitly defining parental alienation as a female phenomenon.²⁹⁸ This is particularly surprising given that social-science evidence suggests the opposite: that attempts to undermine the parenting of mothers is a common tactic of abusive fathers.²⁹⁹ The fact that the courts find behaviours that have been demonstrated to be committed predominantly by men to be committed predominantly by women should be a red flag that they are over-identifying alleged abuse by mothers and under-identifying actual abuse by fathers.

Numerous studies have documented the gendered nature of alienation findings.³⁰⁰ As Margaret Drew (2017) explains:

"Parental alienation" is a term that describes one parent's attempts to undermine the relationship between the children and the other parent. While the term sounds neutral on its face, the application has a disparate impact on women. Partners who abuse claim alienation on the part of the mother as a way to discredit her allegations that the abusive partner poses a risk for the children.³⁰¹

Second, the invisible “alienating behaviours” that court psychologists determine to be causing children’s rejection of relationships with fathers align with prevalent stereotypes about women. The psychologists in these cases offer evidence that these women are emotionally unstable, vindictive, and narcissistic, while characterising men, most of whom have documented

²⁹⁷ At 18.

²⁹⁸ [REDACTED] [2013] NZFC 489 at [50]; [REDACTED] [2012] NZFC 4922 at [28].

²⁹⁹ Lundy Bancroft et al, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2d ed, Berkeley Books 2012); Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP 2007); M.K. Ehrensaft et al, “Intergenerational Transmission of Partner Violence: a 20 Year Prospective Study” (2003) 71 J Consulting & Clin Psychol 741.

³⁰⁰ Fidler & Bala, above, at 10; Rae Kaspiew, “Violence in Contested Children’s Cases: an Empirical Exploration” (2005) 19 Australian J Fam L 112, 145; Simon Lapierre & Isabel Côté, “Abused Women and the Threat of Parental Alienation: Shelter Workers’ Perspectives” (2016) 65 Child & Youth Services Rev 120; Madelyn Milchman, “Misogyny in New York Custody Decisions with Parental Alienation and Child Sexual Abuse Allegation” (2017) 14 J Child Custody 234; Saunders et al, above, at 23.

³⁰¹ Margaret Drew, “Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)” (2017) 32 Ohio St J Dispute Res 373, 394 n 79.

histories of family violence, as stoic, loving, stable victims. When “syndrome” evidence corresponds neatly with societal stereotypes around gender, it should caution against reliance on a construct that appears to be a pseudo-psychological stand-in for more blatant gender discrimination. For these reasons, several human rights entities have recently criticised the use of the construct of “parental alienation” in the Family Court as dangerous, unreliable, and pseudo-scientific.

United Nations Special Rapporteur

In April 2023, the United Nations Special Rapporteur on Violence Against Women and Girls issued a report entitled *Custody, Violence Against Women and Violence Against Children*.³⁰² The report examined the ways in which family courts globally referred to “parental alienation” or similar pseudo-concepts in child custody cases, ignoring histories of domestic violence, leading to the double victimisation of victims of such violence. The report also offered recommendations for States to address the problems identified in the report.

Introduction

The introduction to the report noted:

The tendency to dismiss the history of domestic violence and abuse in custody cases extends to cases where mothers and/or children themselves have brought forward credible allegations of physical or sexual abuse. In several countries, family courts have tended to judge such allegations as deliberate efforts by mothers to manipulate their children and to separate them from their fathers. This supposed effort by a parent alleging abuse is often termed “parental alienation”.³⁰³

The report noted: “There is no commonly accepted clinical or scientific definition of ‘parental alienation’. Broadly speaking, parental alienation is understood to refer to deliberate or unintentional acts that cause unwarranted rejection by the child towards one of the parents, usually the father.”³⁰⁴ It also noted that the construct of parental alienation “has been dismissed by medical, psychiatric and psychological associations, and in 2020 it was removed from the International Classification of Diseases by the World Health Organization. Nevertheless, it has gained considerable traction and has been widely used to negate

³⁰² Reem Alsalem, United Nations Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences, *Custody, Violence Against Women and Violence Against Children*, UN Doc No A/HRC/53/36, 13 April 2023.

³⁰³ At [1].

³⁰⁴ At [9].

allegations of domestic and sexual abuse within family court systems on a global scale.”³⁰⁵ It explained that “parental alienation” has “its origins as a pseudo-concept”.³⁰⁶

Relationship to Family Violence and Child Sexual Abuse

The report noted:

The consequences of domestic violence and its effects on children are also misunderstood and underestimated by judges, who tend to prioritize and grant contact with fathers. In doing so, judges fail in their duty to protect children from harm, giving abusive fathers unsupervised access to their children, including in cases where judges have found that physical and/or sexual violence has occurred.³⁰⁷

It noted that “perpetrators of domestic violence can also misuse family law proceedings to continue to perpetrate violence against their victims, resulting in secondary traumatization. In this context, parental alienation may be employed as a useful tactic.”³⁰⁸ It explained:

Common to the gendered use of parental alienation is the depiction of mothers as vengeful and delusional by their partners, courts and expert witnesses. Mothers who oppose or seek to restrict contact or raise concerns are widely regarded by evaluators as obstructive or malicious, reflecting the pervasive pattern of blaming the mother.

Allegations of the mother alienating the child are often used to demonstrate that awarding custody to the mother is not in the best interest of the child as she will not facilitate contact with the father.³⁰⁹

It also explained: “Protective mothers are placed in an invidious position, in which insisting on presenting evidence of domestic violence or child abuse may be seen as attempts to alienate children from the other parent, which could result in the loss of primary care or contact with their children.”³¹⁰ The report noted:

The use of parental alienation tends to become a self-fulfilling prophecy. As soon as parents are judged as being “alienating,” “implacable” or “failing to listen”, their actions or inaction can be prejudiced. As a result, allegations of domestic violence remain side-lined as a one-off occurrence. This reduces domestic violence to a minor conflict and stigmatizes and pathologizes women and children.

³⁰⁵ At [11].

³⁰⁶ At [40].

³⁰⁷ At [12].

³⁰⁸ At [13].

³⁰⁹ At [15]-[16].

³¹⁰ At [16].

It explained: "By ignoring or undermining domestic violence in a family, courts fail to acknowledge the issue in their decisions, thereby presenting domestic violence as an exception rather than the norm in cases of parental alienation."³¹¹ It observed: "By reframing a mother as a liar who 'emotionally abuses' her children, the parental alienation label diverts the attention of courts away from the question as to whether a father is abusive and replaces it with a focus on a supposedly lying or deluded mother or child."³¹² It noted: "Child sexual offenders have invoked parental alienation to limit, obstruct or delegitimize the progress in protecting the rights of child victims."³¹³

The Best Interests of the Child

The report explained:

When custody decisions are made in favour of the parent who claims to be alienated without sufficiently considering the views of the child, the child's resilience is undermined and the child continues to be exposed to lasting harm. It may also sever the stable and safe bond with the non-abusive primary caretaker.

Widespread Adoption and Changing Terminology

The report noted that family courts "use iterations of parental alienation, such as 'high conflict disputes', 'parental manipulation' 'attachment intolerance' or 'parent-child relational problem'".³¹⁴

Role of Court Personnel

The report noted: "Parental alienation and related pseudo-concepts are embedded in the legal system, including amongst evaluators tasked with reporting to the family courts on the best interest of the child (psychiatrists, psychoanalysts, psychologists and social workers)."³¹⁵ It explained: "The application of parental alienation has also been exacerbated by the lack of formal training for justice system professionals and the relationship between allegations of parental alienation and the dynamics of domestic violence."³¹⁶ It noted: "Public officials and institutions involved in the evaluation of children's best interests may be trained or lobbied by promoters of parental alienation."³¹⁷ It explains:

³¹¹ At [21].

³¹² At [40].

³¹³ At [42].

³¹⁴ At [46].

³¹⁵ At [58].

³¹⁶ At [58].

³¹⁷ At [60].

Such experts subject both adults and children to intrusive, inappropriate and retraumatizing psychological assessments and employ judgmental and dismissive attitudes towards victims of domestic violence. Experts also recommended solutions to alienation, which may not be compatible with the welfare and rights of the child, including the transfer of custody, and the use of “reunification camps and therapies”, where children are held against their will and pressured to reject the influence of the parent with whom they are most bonded.³¹⁸

It notes: “Victims of violence have reported feeling belittled by judges and legal professionals and of being revictimized by professionals who lack an understanding of the impact and dynamics of domestic violence.”³¹⁹ The report concludes that “the discredited and unscientific pseudo-concept of parental alienation is used in family law proceedings by abusers as a tool to continue their abuse and coercion and to undermine and discredit allegations of domestic violence made by mothers who are trying to keep their children safe.”³²⁰ It also concludes: “Judges and evaluators need to move away from focusing on the identification of behaviours that are contested within the discipline of psychology and towards a focus on the specific facts and contexts of each case.”³²¹

ANZ

The report focused specifically on ANZ, noting: “In New Zealand, a survey demonstrated that 55 to 62 per cent of mothers reported being accused of parental alienation, often diverting the attention courts from legitimate allegations of abuse.”³²² It also noted: “In New Zealand, different terms are used as ‘a strategy of plausible deniability’ to effectively introduce the pseudo-concept of parental alienation, such as ‘resist-refuse’, ‘enmeshment’, coaching or poisoning a child, gatekeeping or over-anxious mothering.”³²³

Recommendations

The report recommends that “***States legislate to prohibit the use of parental alienation or related pseudo-concepts in family law cases and the use of so-called experts in parental alienation and related pseudo-concepts***”.³²⁴

³¹⁸ At [61].

³¹⁹ At [64].

³²⁰ At [73].

³²¹ At [73].

³²² At [19].

³²³ At [47].

³²⁴ At [74 (a)].

UN CEDAW

The findings of the Special Rapporteur are consistent with the findings that the United Nations Committee on the Elimination of Discrimination Against Women has previously made about ANZ. In 2018, the CEDAW Committee considered the eighth periodic report of ANZ. The Committee observed that it was “concerned about the apparent crisis within the family court system, reflected in the mistreatment of women, in particular women who are victims of domestic violence.”³²⁵ The Committee specifically noted: “Courts, lawyers for children and social workers routinely resort to the parental alienation syndrome theory, despite the fact that it has been refuted internationally.”³²⁶ The Committee recommended that ANZ “[r]eview the **reliance on the parental alienation syndrome theory, with a view to limiting its usage in child custody disputes**”.³²⁷

ANZ’s Ninth Periodic Report on its implementation of the CEDAW Convention is due in July 2023. The CEDAW Committee has asked ANZ specifically to “[r]ecall[] the Committee’s previous concluding observations (para. 48)” and “describe the measures taken to . . . **[r]eview the reliance on the parental alienation syndrome theory, with a view to limiting its usage in child custody disputes**”.³²⁸

Inability to Self-Regulate

The New Zealand Psychologists Board has been unable to regulate and address the pseudo-science of parental alienation because the courts insist that they possess a de facto monopoly on determining the qualifications, ethics, and reliability of their expert psychologists.

Haye and [REDACTED]

For several decades, the courts have stymied attempts by the Psychologists Board to address professional misconduct by psychologists who offer unreliable evidence in the Family Court. Instead, the courts insist that they are competent to regulate the practice of court psychologists and that the Board should not step in when the courts fail to do so. In the

³²⁵ United Nations Committee on the Elimination of Discrimination against Women (UN CEDAW), *Concluding Observations on the Eighth Periodic Report of New Zealand*, UN Doc No CEDAW/C/NZL/CO/8, 25 July 2018, at [47].

³²⁶ At [47 (d)].

³²⁷ At [48 (d)].

³²⁸ UN CEDAW, *List of Issues and Questions Prior to the Submission of the Ninth Periodic Report of New Zealand*, UN Doc No CEDAW/C/NZL/QPR/9, 8 July 2022, at [24 (c)].

related cases of *Haye v Psychologists Board*³²⁹ and [REDACTED],³³⁰ the Board sought to discipline two psychologists, Dr Haye and Dr [REDACTED], for their dueling expert evidence in the Family Court.

Family Court Proceedings

Mother alleged that Father sexually abused Child. The Family Court requested a report from Dr [REDACTED] regarding Child's best interests. Dr [REDACTED] opined that Mother did a better job of fostering Child's independence and expressiveness than Father.³³¹ Dr [REDACTED] reached this conclusion without observing Child interacting with Mother or Father in a structured way.³³²

The Family Court did not address Dr [REDACTED]'s methodology, complaining instead that he had not answered all the questions directed to him in the Court's brief of instructions and instructing him to do so.³³³ Dr [REDACTED] expressed concern that answering all the questions in the brief might heighten the conflict between the parents and demanded additional payment for the supplemental report.³³⁴ In the supplementary report, he opined that Child had a stronger attachment to Mother than to Father, that Father had a compulsive personality style that made a less healthy home environment, and that shared care was not working because of the acrimony between Mother and Father.³³⁵

Father filed a complaint with the Board under the now-repealed Psychologists Act alleging that Dr [REDACTED] committed professional misconduct by failing to use professional objectivity and integrity, failing to support his judgments with clinical data, failing to guard against misuse or bias in his assessment process, and failing to justify his interpretation of his assessment procedures with current scientific literature.³³⁶

Dr Haye was facing a series of complaints in the Board arising out of both court-appointed and privately retained evaluations in the Family Court, including a report prepared for Father in the same case.³³⁷ Dr Haye had a history of minimising reports of family violence and finding that mothers were fabricating the claims even when there was significant evidence supporting the allegations – a core feature of the alienation construct.

In one case in which there were allegations that Father was sexually abusing Child, Dr Haye recommended a reversal of care from Mother to Father, despite substantial corroboration of

³²⁹ [1998] 1 NZLR 591.

³³⁰ [REDACTED].

³³¹ At 22.

³³² At 21.

³³³ At 23.

³³⁴ At 23-24.

³³⁵ At 25.

³³⁶ At 25-26.

³³⁷ *Haye*, above, at 591.

the sexual abuse.³³⁸ The Family Court followed Dr Haye's advice, ordered Child into Father's unsupervised care, and he continued to sexually abuse her and to allow a friend to do so.³³⁹ Father was later convicted of indecent assault and imprisoned. Mother complained to the Board that Dr Haye "dismissed" her concerns about sexual abuse from the outset.³⁴⁰

In another case, Dr Haye opined that, despite Father's documented history of family violence, Mother's fears for Children's safety in his care were "not reality-based", another core feature of the construct of parental alienation.³⁴¹

Psychologists Board Proceedings

Before the Board, Dr [REDACTED] conceded that the psychometric measures that he used in his evaluation "had questionable validity for use in these circumstances" and that he did not acknowledge their lack of as-applied validity in his court reports.³⁴² The Board found Dr [REDACTED] guilty of professional misconduct.³⁴³ They found that he failed to adopt an appropriate methodology for his investigations, provide supporting clinical data for his assessment procedures, base his conclusions on adequate evidence, and lay out appropriate qualifications for his opinions.³⁴⁴ Specifically, they found that Dr [REDACTED] engaged in inadequate sampling, used psychometric measures with questionable as-applied validity in a forensic context, and overstated his data-collection measures to inflate their validity.³⁴⁵ They also found that Dr [REDACTED] failed to indicate clearly how he gathered his information or the strategies he used or to provide objective referents by which his conclusions could be judged.³⁴⁶ They noted that the result of Dr [REDACTED]'s failures was that anyone seeking to assess the strength of his conclusions would have to "make a leap of faith (which is not appropriate in our profession) of expecting that the report writer 'knows best' and has done things properly".³⁴⁷ The Board also found that Dr [REDACTED] had been biased toward Mother and against Father in his assessment processes and resulting conclusions and that his lack of a standardised assessment procedure facilitated biased decision making.³⁴⁸ They noted that he made conclusions about the parties' home

³³⁸ At 597.

³³⁹ At 597.

³⁴⁰ At 605.

³⁴¹ At 597.

³⁴² [REDACTED], above, at 38.

³⁴³ At 29.

³⁴⁴ At 32.

³⁴⁵ At 35-36.

³⁴⁶ At 37.

³⁴⁷ At 37.

³⁴⁸ At 39.

environments that were “essentially unsupported” and “not based on standardized evaluations”.³⁴⁹

In the first case in *Haye*, the Board found Dr Haye guilty of professional misconduct and conduct unbecoming for failing to detect Father’s abuse of Daughter, despite the volume of evidence indicating the likelihood of abuse, and failing to recognise and state the limits of her competence.³⁵⁰ The Board also found that Dr Haye was selective in weighing clinical material and dismissive of Mother’s allegations of sexual abuse and found Dr Haye’s claim that there was no evidence of sexual abuse “disturbing”.³⁵¹

In the second case in *Haye*, the Board found that Dr Haye gave significant time and weight to Father’s claims that he would discontinue his use of family violence but did not give corresponding time and weight to Mother’s fears that he would commit violence again.³⁵² The Board concluded that Dr Haye failed in her obligation to secure training and supervision to be competent in assessing claims of child abuse.³⁵³

The lack of foundational and as-applied validity to the methodology employed by the psychologists in [REDACTED] and *Haye* are the precise failures that continue in the Family Court today and have led to the entrenchment of the pseudo-science of parental alienation in the Court’s decision making.

High Court Proceedings

Both Haye and [REDACTED] appealed the Board’s findings. The High Court allowed both appeals, even though, in [REDACTED], Justice Young upheld most of the Board’s findings.³⁵⁴ Both Justices were highly critical of the Board’s perceived “interference” into Family Court’s processes in attempting to regulate the ethics and professionalism of forensic members of the profession.

In [REDACTED], Justice Young admonished the Board that it should “act with caution” in disciplining court report writers.³⁵⁵ He found that “one would expect Family Court Judges to become aware, very quickly, of psychologists whose reports are not of a high standard and to ensure that such psychologists are not invited on subsequent occasions to provide reports.”³⁵⁶

In *Haye*, Justice Chisholm similarly found that Family Court Judges were “in a good position” to assess claims of misconduct against court psychologists because they possessed “a comprehensive knowledge of the particular proceeding” and “a full knowledge of the rules,

³⁴⁹ At 39.

³⁵⁰ *Haye*, above, at 591-96.

³⁵¹ At 591-92, 598.

³⁵² At 598.

³⁵³ At 597.

³⁵⁴ [REDACTED], above, at 41; *Haye*, above, at 606-07.

³⁵⁵ [REDACTED], above, at 20.

³⁵⁶ At 20.

practices and procedures of the Family Court.”³⁵⁷ In an even more shocking passage, he admonished that the “psychologists code of ethics” had to give way when the ethical rules for psychologists were “incompatible with Family Court practice”.³⁵⁸ He insisted: “A psychologist filling a Family Court role is entitled to be judged against a code of ethics which is compatible with Family Court practice, not vice versa.”³⁵⁹ He also insisted that “it was not for the board to tell Dr Haye how she should have discharged her duties to the Court. It was for the Court to respond to the information provided in Dr Haye’s report.”³⁶⁰

These claims are surprising and dubious. The whole point of expert evidence is that the expert witness possesses expertise in a field in which the judges and lawyers do not. If Judges possessed sufficient expertise in forensic psychology, they would not require expert evidence from psychologists. While Judges might be competent to determine whether a psychologist complied with, for example, the court’s instructions for the report, judges and lawyers cannot sufficiently regulate the validity and reliability of a psychologist’s forensic methodology. On the contrary, decades of admitting and relying on junk psychology clearly establishes that they cannot. In fact, in his rejection of the Board’s findings about Dr [REDACTED], Justice Young often candidly acknowledged that he did not understand the Board’s concerns, and his discussions of Dr [REDACTED]’s use of psychometric measures corroborates this lack of understanding.³⁶¹

Not only are the High Court’s claims that Family Court Judges are able to appropriately regulate bad psychological evidence dubious, under the facts of [REDACTED] and *Haye*, they are demonstrably false. In both cases, the psychologist gave the unreliable evidence, and the Family Court relied on it – in the second case in *Haye*, by awarding primary care of a child to a father who sexually abused her and continued to do so. So, not only was the Family Court not *able* to identify this evidence as unreliable, the Court *did not* do so.

The High Court found that, while the Board had jurisdiction to regulate the practice of psychologists in the Family Court, the jurisdiction was “qualified” by the “Family Court’s comprehensive control” over the forensic reports that it requested.³⁶² The High Court’s reasoning was labyrinthine, basing its finding on the statutory requirement that the physical reports prepared by court evaluators remain in the custody of the Family Court, the Family Court’s inherent authority to exercise its statutory jurisdiction, and what it described as the special relationship between the Family Court and its psychologists, which extended to the Court the right to determine their qualifications.³⁶³ In *Haye*, the Court concluded that the Board was “out of bounds” in finding that Dr Haye committed professional misconduct.³⁶⁴ The Court found that because section 29A of the Guardianship Act (the predecessor of CoCA s 133)

³⁵⁷ *Haye*, above, at 602.

³⁵⁸ At 603.

³⁵⁹ At 604.

³⁶⁰ At 606.

³⁶¹ [REDACTED], above, at 36.

³⁶² *Haye*, above, at 600.

³⁶³ At 601-02.

³⁶⁴ At 606.

authorised the Court to request a report from a psychologist whom they “considered qualified”, the Board finding that a court psychologist had committed professional misconduct was “interfering” with and “questioning” the Court’s exercise of its powers to request reports.³⁶⁵

Both Justices adopted an agency view of the relationship between forensic psychologists and the parties who retain them, essentially finding that the test of professional ethics should be customer satisfaction. Justice Young held that Dr [REDACTED] owed no duty of care to the parties or Child.³⁶⁶ He also found that the requirement that an evaluator provide reasons for their conclusions was not a matter of professional ethics but rather “a matter to be determined primarily by client and psychologist”.³⁶⁷ Justice Chisholm reached a similar conclusion, suggesting that, when privately retained, a forensic psychologist owed a duty only to the party who retained them and, therefore, could not commit misconduct regarding the other party in the proceedings.³⁶⁸ This reasoning may be true in the context of malpractice, but it is not true in the context of evidentiary admissibility. EA s 26 incorporates the Code of Ethics for Experts in Schedule 4 of the High Court Rules, which requires all experts to act impartially and not as advocates for one party. It is also disastrous public policy. Adversarial adjudication is not enhanced by parties retaining partisan experts beholden to one side. This is the whole purpose behind HCR Schedule 4 and EA s 26. The party on whose behalf an expert offers a one-sided opinion will not complain to the Board about their conduct. This is not evidence that the expert has provided reliable opinion evidence. On the contrary, the existence of a “satisfied customer” in an adversarial process is likely evidence of the opposite. *Haye* is a perfect example of the non-sensical nature of this claim. Dr Haye ignored Mother’s and Daughter’s reports of Father’s sexual abuse and recommended that he be given day-to-day care of Daughter. Of course, Father is not going to complain about that recommendation. He was a sexual predator who engineered a care reversal to have unfettered access to his victim. It is extraordinary to suggest that, after Dr Haye’s recommendation, which was adopted by the Family Court, resulted in Daughter enduring years of additional sexual abuse, Mother and Daughter essentially had no standing to complain about Dr Haye’s bias and lack of professionalism because she was Father’s expert.

When Daughter began engaging in self-harm, acting out violently, and running away from Father’s home, she was admitted to Christchurch Hospital.³⁶⁹ Mother asked staff to evaluate Daughter for sexual abuse, but Father provided the hospital a copy of Dr Haye’s Family Court evaluation finding Mother’s claims unsubstantiated.³⁷⁰ The hospital then disregarded Mother’s concerns.³⁷¹ Justice Chisholm found that, because the hospital also disbelieved Mother, Dr

³⁶⁵ At 606.

³⁶⁶ [REDACTED], above, at 31.

³⁶⁷ At 38.

³⁶⁸ *Haye*, above, at 604.

³⁶⁹ At 605.

³⁷⁰ At 605.

³⁷¹ At 605.

Haye could not be faulted for doing so, ignoring that it was Dr Haye's prior discrediting of Mother's concerns that led the second set of psychologists to do so.³⁷²

The results in [REDACTED] and Haye were simply wrong. The psychologists whose conduct was under review engaged in breaches of professionalism that not only involved their professional ethics, but also the reliability of the evidence that they offered (and on which the Family Court ultimately relied, in at least one case to the terrible detriment of a child that it failed to protect from ongoing sexual abuse). A forensic psychologist who has a methodologically insufficient basis for reaching conclusions, fails to provide supporting clinical data for assessment procedures, fails to adopt an appropriate methodology for investigations, fails to base conclusions on adequate evidence, fails to acknowledge the limitations of opinions or the data that support them, uses techniques that lack as-applied validity in a forensic context, overstates data-collection measures to inflate their validity, fails to indicate clearly the evidence bases for conclusions by reference to objective measures by which their conclusions can be judged, and uses a standardless assessment procedure that opens the door to biased decision making demonstrates a lack of qualifications to render an expert opinion and fails to demonstrate that their evidence is based on valid methods reliably applied. Professional ethics aside, the courts should care about these methodological failures and refuse to admit or consider expert evidence demonstrating these flaws. A psychologist who disregards substantial evidence of child abuse and recommends custody to an abuse perpetrator, particularly when she does so because she lacks basic competency in issues relating to child abuse and has not sought out appropriate training and supervision in a subject matter that forms the core of the best-interests assessment in most cases, is dangerous and should never be allowed to mislead the Court regarding the welfare and best interests of a child. While the High Court cases addressed the administrative proceedings between the psychologists and Board, they failed to notice or take issue with what the Family Court's allowance of, and reliance upon, this junk science says about its competency to screen expert evidence.

Current Practice

While psychologists who practice in the criminal system tend to be relatively proficient at self-regulation because they are often trained and employed institutionally (for example, by Forensic Mental Health Services or the Department of Corrections), psychologists who practice in the Family Court have no standards or regulation as forensic practitioners. They work in private practice and are responsible for securing their own training and supervision; most are sole practitioners.

The only guideline governing psychologists who provide expert evidence is a Practice Note for Specialist Report Writers promulgated by the Principal Family Court Judge.³⁷³ While the Practice Note is not legally binding, it indicates the Court's practice. The Court maintains a list of report writers, which is composed by court personnel (a case-flow manager, a judge, and two "experienced report writers"). To be eligible to write court reports, psychologists are only

³⁷² At 605.

³⁷³ New Zealand Family Court Practice Note, *Specialist Report Writers*, at <psychologistsboard.org.nz/wp-content/uploads/2021/06/FC-Practice-Note-090718.pdf>.

required to have five years' clinical experience, including three years "in child and family work."³⁷⁴ There is no requirement that they have training, experience, or credentials in forensic psychology or specialised expertise in family violence or child abuse. Psychologists must demonstrate evidence of competency in a list of knowledge and skills, but **none** of the required skills involve the forensic application of psychology to legal determinations. The word "forensic" does not appear in the sixteen-page Practice Note.

Under the Practice Note, the Court "should deal with most complaints involving psychologists as part of its jurisdiction to regulate its own processes and exercise the powers and functions conferred upon the Court by statute."³⁷⁵ The Practice Note indicates, specifically, that the Court will "deal with" matters relating to allegations of bias or discrimination by a report writer, the "methodology used," or any "matter relating to the content of the report."³⁷⁶ The Principal Judge did not identify which statutory powers he believed conferred upon the Court the jurisdiction to deal with complaints involving testifying psychologists, but presumably this is a reference to CoCA s 133. If so, it is an extreme reading of s 133, which is a funding mechanism to allow the Court to contract with psychologists when it needs expert evidence. It is a particularly incredible claim given Parliament's explicit grant of the statutory authority to regulate the practice of psychologists to the Psychologists Board in the Health Practitioners Competence Assurance Act 2003. Even in cases involving breaches of ethics or professional competence, the Practice Note dictates that the Family Court must "formally refer" such complaints to the Board and that the Court does not need to refer complaints to the Board unless it appears to the Judge there are issues "best dealt with by the Board."³⁷⁷ This is an incredible reservation of discretion for the Court. Psychologists are regulated by the Board because it has the institutional competency to assess their professional conduct

The Practice Note dictates that only the child is the "consumer of the health service provided" by a court psychologist's evaluation and the "parents and other parties are not deemed to be health consumers in this context."³⁷⁸ The Practice Note gives no indication of the Principal Judge's legal authority for such a declaration. The Practice Note also dictates that complaints about court psychologists will be dealt with by the presiding judge when proceedings are in progress and the Administrative Judge after proceedings have concluded.³⁷⁹

This lack of meaningful professional regulation by a psychology board with the competency to assess the quality of forensic practice is concerning. "Experience" cannot substitute for expertise, which is lacking in this community of practitioners. Forensic psychology as a sub-specialty has a history of insularity, poor quality of professional practice, and failure to acknowledge and respect the rights of individuals who are subject to court evaluations. The

³⁷⁴ At [13.1 (c)].

³⁷⁵ At [16.3].

³⁷⁶ At [16.4].

³⁷⁷ At [16.3], [16.8].

³⁷⁸ At [16.3].

³⁷⁹ At [16.6].

circular nature of the selection and regulation of court report writers has created a situation in which the fox is watching the methodology of the hen house.

Despite claiming it as their own, the courts have simultaneously disavowed any “jurisdiction” to regulate the methodology of psychological report writers in the Family Court. For example, in [REDACTED],³⁸⁰ the High Court found that the Family Court lacked the jurisdiction to determine “how the expert elects to prepare a report.”³⁸¹ This is despite the fact that less than a decade earlier, in [REDACTED] and *Haye*, the High Court found that the Family Court’s jurisdiction to appoint psychologists under CoCA overrode the Psychologists Board’s ability to regulate members of its professional ranks.³⁸² This simultaneous insistence that the Family Court is the primary regulator of the professional conduct of court psychologists and refusal to regulate their methodology has created an “anything goes” vacuum in which no one is regulating poor forensic practice.

Instead, the courts largely rely on HCR Schedule 4. These obligations for expert witnesses generally are not specific to psychologists and do not include considerations of methodology. Methodological failures should be subject of judicial gatekeeping under EA s 25, ***but there has never been a reported judgment in which a Family Court Judge engaged in screening under s 25***, let alone found the purported evidence to be too lacking in reliability to be helpful.

Screening Failures

The Family Court’s ability to recognise its own failings is hampered further by the personal relationships between Judges and court psychologists. Family Court Judges do not just credit and rely on evidence from court psychologists, they positively fawn over the psychologists themselves.

For example, in [REDACTED],³⁸³ Father sought shared care of fourteen-year-old Child over Child’s objection. Mother opposed Father’s application on the ground that, given her maturity, Child should not be forced into unwanted contact. Father hired Sarah Calvert, a senior court psychologist as a private expert witness, likely because of her reputation as a strongly pro-alienation evaluator.³⁸⁴ Dr Calvert prepared an expert report without meeting with either party or Child or reviewing any evidence, a breach of best practices for forensic evaluations.³⁸⁵ Judge Mather praised Dr Calvert as “a very experienced and well respected psychologist who has written reports for the Family Court for many years”.³⁸⁶ He acknowledged that she had not been cross-examined about her report due to “time constraints” but nonetheless concluded

³⁸⁰ [REDACTED] (HC).

³⁸¹ At [72].

³⁸² *Haye*, above; [REDACTED], above.

³⁸³ FAM-2008-090-001901 (FC Waitakere, 22 November 2010).

³⁸⁴ At [25].

³⁸⁵ At [25].

³⁸⁶ At [26].

that “her evidence is entitled to considerable respect, drawing as it does not only on her own expertise and experience but also the research and literature on the topics addressed by her”.³⁸⁷

There are cases in which Judges have penalised mothers for objecting to evidence offered by its psychologists. For example, in [REDACTED],³⁸⁸ discussed below, Judge Pidwell scolded Mother for being “critical” of Dr Calvert, its “Court appointed expert”, and for believing Child’s reports of abuse instead of adopting Dr Calvert’s belief that Child’s reports should be disbelieved because she “was a child caught in the middle of her parents’ dispute”.³⁸⁹ He also found that the fact that Mother’s domestic-violence advocate filed a complaint with the Psychologists Board against Dr Calvert because of her sloppy methodology was evidence that Mother was “alienating” Child.³⁹⁰ He scolded her for her “lack of insight” for failing to see the wisdom of Dr Calvert’s flawed and scientifically invalid opinions.³⁹¹

Similarly, in [REDACTED], Judge McKeekan scolded Mother for subjecting the court psychologist to a lengthy, “rigorous and, at times, discourteous, cross-examination”.³⁹² This is an unusual complaint in an adversarial judicial system and particularly in a court that permits brutalising cross-examinations of women who have experienced violence by their abusers.³⁹³ Together, these examples demonstrate a level of personal favoritism that is inconsistent with an objective evaluation of expert evidence and the Court’s gatekeeping function.

Examples

The following case examples demonstrate the way that expert evidence based on the theory of parental alienation causes the courts to disbelieve victims, minimise the impact of abuse on children, and punish disclosures of abuse.

[REDACTED] (2020)

[REDACTED]

³⁸⁷ At [26].

³⁸⁸ [2015] NZFC 7922.

³⁸⁹ At [64].

³⁹⁰ At [148].

³⁹¹ At [66].

³⁹² [REDACTED], above, at [71].

³⁹³ Ruth Herbert, Systemic Abuse by the NZ Family Court: a Major Violation of Women and Children’s Human Rights (Backbone Collective 2018) at 1

<static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5bd64565eef1a139a20ef91b/1540769127140/Backbone+Collective+Fact+Sheet+UPR+.pdf>.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁹⁴ [REDACTED], above, at [90].

³⁹⁵ At [5]-[6].

³⁹⁶ At [51].

³⁹⁷ At [69].

³⁹⁸ At [77].

³⁹⁹ At [77].

⁴⁰⁰ At [78].

⁴⁰¹ At [82].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁰² At [83].

⁴⁰³ At [83].

⁴⁰⁴ At [86].

⁴⁰⁵ At [87].

⁴⁰⁶ At [92].

⁴⁰⁷ At [96].

⁴⁰⁸ At [93].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁰⁹ At [158].

⁴¹⁰ At [158].

⁴¹¹ At [95].

⁴¹² At [95].

⁴¹³ At [157].

⁴¹⁴ At [94].

⁴¹⁵ At [94].

⁴¹⁶ At [96].

⁴¹⁷ At [145].

⁴¹⁸ At [146].

⁴¹⁹ At [146].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴²⁰ At [102].

⁴²¹ At [109].

⁴²² At [141]-[142].

⁴²³ At [149].

⁴²⁴ At [154].

⁴²⁵ At [150].

⁴²⁶ At [150].

⁴²⁷ At [150].

⁴²⁸ At [150].

[REDACTED]

[REDACTED] (2020)

The recent Court of Appeal case of [REDACTED] is a concerning example of the courts' ongoing use of unlabeled concepts of alienation. The parties separated in 2010.⁴²⁹ They had two children, [REDACTED] and [REDACTED], who were aged three and one.⁴³⁰ Mother filed a without-notice application for an interim parenting order giving her day-to-day care of Children and restricting Father to supervised contact.⁴³¹

In 2011, Mother sought a modification of the parenting order, alleging that Father had been abusive toward Children.⁴³² Instead, the Family Court modified the interim parenting order to provide for equal shared care.⁴³³ The Court found that Mother was an "an excellent mother with an unrivalled capacity to parent her children" but expressed concern that she was unable to "support the children's relationship with their father".⁴³⁴ This language about the "inability to support the children's relationship with their father" was a *sub silentio* finding of parental alienation without the transparency of alienation terminology. It conflated Mother's support for a "relationship" between Children and Father with support for unsupervised contact with an abuse perpetrator. The Court ignored the source of Mother's resistance to unsupervised contact – her belief that Father abused Children and would do so again if given the opportunity.

In 2012, [REDACTED] disclosed that Father sexually abused him not only to Mother, but also to a church counsellor and a teacher.⁴³⁵ The teacher reported [REDACTED]'s disclosure to OT. Mother applied to vary the new parenting order.⁴³⁶ The Court initially issued interim orders restricting Father's contact with [REDACTED] to supervision but later found that the allegation of sexual abuse was "unproven" and that "there was no real risk to the children's safety" in Father's unsupervised care.⁴³⁷ Judge MacKenzie found that Mother was sending "unspoken messages" to Children about Father. She reinstated shared care and threatened Mother in none-to-subtle terms, noting: "The critical issue is whether the point had been reached where a change in care for the children is necessary in their welfare and best interests, so that they can have a meaningful relationship with their father untrammelled by [Mother]'s view of [Father] as a person and a parent."⁴³⁸

⁴²⁹ [REDACTED] above, at [9].

⁴³⁰ At [9].

⁴³¹ At [9].

⁴³² At [9].

⁴³³ At [9].

⁴³⁴ At [19].

⁴³⁵ At [32].

⁴³⁶ At [9].

⁴³⁷ At [9].

⁴³⁸ At [9].

The Court's factual finding – that Mother was telegraphing unconscious messages of disapproval of Father to her children – was once again an alienation finding masked by ambiguous language. The Judge offered no evidential basis for this finding but merely described it as if it were a matter of logical inference, intuition, or common sense.

In 2016, Mother again sought day-to-day care of Children with supervised contact for Father, claiming that Father was continuing to abuse Children physically and sexually.⁴³⁹ Father responded by denying the allegations and seeking full-time care of Children on the ground that Mother was emotionally abusing them by continuing to raise abuse allegations.⁴⁴⁰

Judge Munro again found that Mother's allegations of physical and sexual abuse were "not proved."⁴⁴¹ She found that both parents emotionally abused the children and the primary cause of the abuse was Mother's "attitude and actions toward" Father.⁴⁴² She further found that Mother was "psychologically and emotionally" abusing the children by continuing to believe that Father was abusing them and by her "negativity" toward him.⁴⁴³ She made these findings –blaming Mother for harming Children – even though she simultaneously found that Father's response to the abuse allegations had been "forceful and somewhat intimidating".⁴⁴⁴ The Court scolded Mother for getting counselling for ■, apparently in violation of a court order.⁴⁴⁵ The Court noted: "In taking [■] to Family Works she has provided an opportunity for [■] to repeat his disclosure, in [Mother]'s presence."⁴⁴⁶ The Court offered no explanation for why it would prohibit Mother from getting counselling for a child about whose psychological and emotional wellbeing the Judge repeatedly expressed concern or why she deemed Mother taking ■ to a reputable counselling service where he might repeat his claims to a neutral third party inappropriate. This criticism is particularly baffling given that the Court previously chastised Mother for having insufficient evidence of abuse – presumably because, at the time, she was the only witness to the children's disclosures. When Mother attempted to address the Court's concern about her putatively insufficient evidence, the Court scolded her as if she were circumventing its findings rather than trying to gather more evidence to meet the Court's evidentiary concerns.

Judge Munro made good on the earlier threat and granted day-to-day care of Children to Father and restricted Mother's contact to alternating weekends, finding that Children had to be

⁴³⁹ At [9].

⁴⁴⁰ At [9].

⁴⁴¹ At [22].

⁴⁴² At [9].

⁴⁴³ At [23].

⁴⁴⁴ At [23].

⁴⁴⁵ At [32].

⁴⁴⁶ At [32].

“removed” from “the conflict which is emotionally abusive of them”.⁴⁴⁷ ■■■, who was seven at the time, became distraught at having her contact with Mother so severely limited.⁴⁴⁸

One concerning aspect of the decision is the disconnect between the identified problem (children caught in parental conflict) and the remedy crafted in response (“removing” the children from the conflict by stripping them from the care of their protective parent and sending them into the care of the allegedly abusive one). The Judge described her order in neutral terms – characterising the decision as removing Children from conflict – when, even on her interpretation, she removed Children from the care of one combatant and handed them to another. This is a partisan and adversarial solution to what the Court describes as mutual conflict. The only explanation for such a one-sided solution to purportedly mutual conflict is the specter of parental alienation. The Judge’s order can only be understood if she is implicitly finding that the conflict is Mother’s “fault” – in other words, that she was “alienating” Children.

In 2017, the Court made final orders that Children reside in Father’s care and severely limiting Mother’s contact.⁴⁴⁹ Judge Munro found:

I cannot be satisfied that the alleged disclosures by the children to [Mother] are reliable evidence. I am satisfied that the children continue to be safe in the care of [Father] and I acknowledge that they would like to have more contact with their mother. I am concerned that the children are put in a position of telling their mother what she wants to hear. I do not accept [Mother]’s assertion that the children feel that they cannot tell anyone about their concerns or that nobody is listening to them.⁴⁵⁰

Unfortunately, ■■■ not only exemplifies the failures of the Family Court’s reliance on unreliable pseudo-psychology but also demonstrates why appeals to senior courts cannot correct these failures. Mother appealed to the High Court, and Justice Jagose found no error in the Family Court’s legal or factual findings and dismissed her appeal.⁴⁵¹

Shortly after the High Court decision, Mother refused to return Children to Father after they disclosed additional episodes of physical and sexual violence.⁴⁵² Following its standard practice, the Family Court issued a warrant authorising the arrest of Children to effectuate their “return” to Father.⁴⁵³ The Court also modified its parenting order to permit Mother only supervised contact.⁴⁵⁴

⁴⁴⁷ At [9], [23].

⁴⁴⁸ At [9].

⁴⁴⁹ At [2].

⁴⁵⁰ At [9].

⁴⁵¹ At [10].

⁴⁵² At [12].

⁴⁵³ At [12].

⁴⁵⁴ At [13].

Mother applied to vary the orders and advised the Court that ■ told friends that Father hit her and ■ told friends that Father touched him inappropriately and he felt unsafe in his care.⁴⁵⁵ The Court referred the new allegations to OT.⁴⁵⁶ Staff at OT decided, without interviewing Children, that their reports of physical and sexual abuse were unreliable.⁴⁵⁷ The Court denied Mother's application to vary the parenting orders, finding that the "further alleged disclosure of abuse by the father is a continuation of the matters that have previously been investigated and determined by the Court."⁴⁵⁸

One concerning aspect of the Court's final decision is how it found that Mother's claims that Father committed *additional* violence against the children were foreclosed by its previous rejection of her claims of *past* violence. This is nonsensical – the fact that the Court found that evidence of violence that allegedly occurred in 2012 and 2016 was insufficient is irrelevant to the question of whether violence occurred in 2018.

In 2018, Mother applied for leave to appeal to the Court of Appeal.⁴⁵⁹ She argued that the Family Court was "punishing" her for good-faith attempts to protect Children from what she believed to be child abuse.⁴⁶⁰ As Mother's submission eloquently argued:

It is my submission that the definition of abuse in the Domestic Violence Act was never meant to be used against parents who are acting protectively for their children, and that decisions such as in this case, have in fact gone against both the wording and intent of the definition in the Domestic Violence Act, and set a dangerous precedent by its inappropriate use in the Family Court. It is my submission that the Family Court has inappropriately apportioned the "emotional/psychological abuse" label on protective parents to punish them for bringing proceedings before the court, and to prevent further proceedings from being brought before the family court.⁴⁶¹

Dismissing Mother's appeal, the Court of Appeal characterised the Family Court's decisions as stemming primarily from concern about "the impact on the children of their exposure to their parents' conflict" and not whether "that conflict constituted emotional or psychological abuse by the parents of each other".⁴⁶² The Court described it as a finding that "conflict *as played out by both the parents* had resulted in emotional and psychological abuse of the children".⁴⁶³ This characterisation is hard to fathom. It portrays the Family Court's decision making as neutral –

⁴⁵⁵ At [14].

⁴⁵⁶ At [14].

⁴⁵⁷ At [15].

⁴⁵⁸ At [16].

⁴⁵⁹ At [3].

⁴⁶⁰ At [28].

⁴⁶¹ At [26].

⁴⁶² At [18], [31].

⁴⁶³ At [38] (emphasis added).

as if the Court was concerned with the “parents’ conflict” – when the Court’s orders evidence only disapproval of Mother. The orders were clearly not neutral – they resulted in Father having exclusive care of Children and Mother being stripped of any unsupervised contact. A court concerned with mutual conflict would issue a mutually binding order, not orders that increasingly privileged one parent’s contact while restricting the other’s. The final parenting order was a punishment of Mother and a reward of Father.

There is ultimately no way to know with certainty whether ■ and ■ were physically and sexually abused, partly because private conduct is rarely perfectly knowable and partly because the factfinding was hopelessly contaminated by the Family Court’s unreliable evidentiary and inferential processes. In a way, however, that proves the dangerous risk that the alienation construct creates. The basis for the Court’s initial finding morphed over time from a failure of proof to evidence of Mother’s pathology. The unspoken mechanism for this morphing is the alienation concept, even though there was no basis for finding that Mother was alienating her children other than the mere fact that she held a belief (that Children were being abused), which judges rejected.

The Court of Appeal’s decision revealed the Court’s true reasoning when it concluded that evidence of “[Mother]’s attitude to [Father]” was her “ongoing allegations of sexual abuse”.⁴⁶⁴ This is a classic articulation of parental alienation syndrome, with the words “parental alienation” excised. The only way that the remainder of the Court’s findings make sense is if the “attitude” that the Court referenced was “alienation”. The clear implication is that the lesson that the courts have learned from the debunking of the pseudo-science of parental alienation is not that it is junk science but rather that alienation concepts should be hidden while followed strictly in secret application.

■ (2017)

The recent High Court case of ■ is another disturbing example of these phenomena. ■ involved protracted litigation regarding contact between Father and Child.⁴⁶⁵ Mother and her family offered substantial evidence that Father physically and sexually abused both her and Child and posed a risk of future abuse to Child.⁴⁶⁶ Child made consistent, explicit disclosures to several people, including family members, a teacher, a CYFS caseworker, the lawyer for the child, a neighbour, and the Family Court Judge.⁴⁶⁷ Nonetheless, two separate Judges rejected Mother’s concerns and made adverse findings about her credibility.⁴⁶⁸

In May 2011, a pretrial conference and a three-day defended hearing were held before Judge Walsh.⁴⁶⁹ In September 2011, Judge Walsh found that Mother had a “pernicious attitude

⁴⁶⁴ At [38].

⁴⁶⁵ ■, [2017] NZHC 1159, at [2].

⁴⁶⁶ At [3]-[5].

⁴⁶⁷ At [228], [234].

⁴⁶⁸ At [3]-[5].

⁴⁶⁹ At [15].

towards the father” and a “woeful inability to promote the father in [Child]’s life”.⁴⁷⁰ He found that the risk to Child was Mother’s steadfast belief in Father’s abuse and the “pervasive influence” that it would have on Child.⁴⁷¹

In April 2014, Child told Mother while getting out of the bath: “Daddy put his finger up my bottom.”⁴⁷² Mother and Maternal Grandmother took Child to her GP, where she spontaneously repeated her disclosure of sexual abuse, telling her that Father touched her bottom with his finger while she was at his house and it was sore.⁴⁷³ Mother reported finding blood in Child’s stool.⁴⁷⁴

The doctor made a report of concern to CYFS.⁴⁷⁵ CYFS advised Mother to apply to have contact between Father and Child suspended and Child removed from Father’s care.⁴⁷⁶ Mother made a without-notice application to vary the parenting order and suspend unsupervised contact between Father and Child.⁴⁷⁷

Father responded by applying for a parenting order seeking day-to-day care of Child with limited contact to Mother.⁴⁷⁸ He argued that Mother’s “unshakeable view” that he abused Child warranted a change in care.⁴⁷⁹

In February 2015, Child told a second teacher that she had to wear long clothes to supervised contact with Father or he would put his finger in her bottom and other places.⁴⁸⁰

In March 2015, the CYFS caseworker assigned to Child’s case concluded that “there was no evidence the father had sexually abused [Child], and that the mother had a vendetta against the father.”⁴⁸¹ There was no indication in CYFS records of the basis for these conclusions, which defy logic, given that Child’s reports of abuse were “evidence”.

In September 2015, Judge McKeekan presided over Mother’s application to vary Judge Walsh’s parenting order.⁴⁸² Father alleged that Mother’s concerns about his abuse were “alienating” Child.⁴⁸³

⁴⁷⁰ At [284].

⁴⁷¹ At [141].

⁴⁷² At [234].

⁴⁷³ At [213], [236]; [REDACTED] at [64]-[65].

⁴⁷⁴ [REDACTED], [2017] NZHC 1159, at Schedule B.

⁴⁷⁵ At [269].

⁴⁷⁶ At [269].

⁴⁷⁷ At Schedule A, Schedule B.

⁴⁷⁸ At [59].

⁴⁷⁹ At [59].

⁴⁸⁰ At Schedule B.

⁴⁸¹ At [252].

⁴⁸² At Schedule A.

⁴⁸³ At [68].

A psychiatrist offered evidence on Mother's behalf. He deposed that Mother "experienced no serious impairment" and "was psychiatrically well", "there was no evidence of personality disorder or of psychopathy", Mother's "view that the father posed a serious risk was not delusional", and her concerns "were reasonable and logical".⁴⁸⁴

A CYFS social worker testified in favour of Father expressing concern at the "frequent notifications made by the mother and maternal family".⁴⁸⁵ The social worker had not met Mother or Father or conducted any investigation into Mother's reports of concern, and the Police had not completed their investigation.⁴⁸⁶

The court psychologist mistakenly believed that Child made her reports of abuse in response to questioning by the maternal family rather than spontaneously to a teacher.⁴⁸⁷ She opined that "the mother's allegations that [Child] had been assaulted by the father" resulted in Child believing them and that Child's belief that Father assaulted her undermined her "feelings of safety with him".⁴⁸⁸ She claimed that she relied upon a "triangulation" of information to conclude that Child "might make implicating statements about her father because she picked something up from her maternal family."⁴⁸⁹

These conclusions are deeply concerning. The psychologist was essentially engaging in a process of differential diagnosis but one that was unreliable and ill-informed. She admitted that she could not reliably determine whether Child had been sexually abused by Father because there was insufficient information to rule abuse in or out. Unfortunately, the psychologist was not so careful in determining the cause of Child's fear. If Child felt unsafe with Father, there were at least three plausible explanations: (1) Father was not safe; (2) Father was safe, but Child nonetheless felt unsafe with him for rational reasons (eg, bizarre behaviours related to his obsessive/compulsive disorder); or (3) Father was safe and Mother "planted" fear in Child. Of course, the third scenario was possible but so were the first two, and the psychologist offered no basis for why she found Mother's behaviour to be the cause of Child's fear or how she ruled out child abuse or poor parenting by Father as equally likely causes, particularly when she could not rule out sexual abuse. The psychologist opined that continuing supervised contact was ill-advised because it would "likely confirm for [Child]" that Mother believed that Father was "violent and sexually deviant".⁴⁹⁰

In November 2015, Judge McKeekan disbelieved Child's disclosures, finding that "there was no indication of sexual abuse" and Mother had not "factually proved that the father sexually abused" Child.⁴⁹¹ She explained: "The reports from [Child] about touching were not *necessarily*

⁴⁸⁴ At [66].

⁴⁸⁵ At [64].

⁴⁸⁶ At [64].

⁴⁸⁷ At [256].

⁴⁸⁸ At [72].

⁴⁸⁹ At [254].

⁴⁹⁰ At [72].

⁴⁹¹ At [90], [95].

indicative of abuse, but the maternal family treated them as such.”⁴⁹² She expressed “concern” that Child was telling Mother what she wanted to hear, with no explanation as to why any parent would “want” to hear that their child was sexually abused.⁴⁹³

Judge McKeekan relied on the alienation construct, deploying the Court’s preferred obfuscating language relating to “subconscious messaging”, “influence”, and “indoctrination”, noting: “I am concerned that the strength with which the mother, aunt and [maternal Grandmother] hold their views, and their desire to protect [Child] has, possibly, subconsciously, led to each of them at times to be less than accurate in their recall or to misinterpret actions and words”.⁴⁹⁴ She made these findings despite expert testimony from a psychiatrist indicating the opposite. She found that Mother “inadvertently influenced” Child.⁴⁹⁵ She found that, during the one time that Mother admitted, years earlier, she told Child that Father hit her, her internal motivation “was to diminish the father in [Child]’s eyes”.⁴⁹⁶ She found that “the mother’s views of the father have influenced her to create an atmosphere of fear, suspicion and distrust around the father” and “mother had encouraged [Child] to complain about the father, and to believe he is capable of bad things”.⁴⁹⁷

Judge McKeekan found that, by believing Child’s reports and acting on her concerns, Mother abused Child because it was “abusive to act in such a way as to cause a child to fear and distrust the other parent”.⁴⁹⁸ She made these findings even though it was uncontested that “the relationship between [Child] and the mother was warm, supportive and loving”, Child was “settled and happy at home”, and she was “well provided for and nurtured”.⁴⁹⁹

Unfortunately, the High Court upheld these findings, reasoning:

Such conviction by the maternal family that the father was a sexual abuser, and the allegations of physical abuse, **must** in my view have been known to [A]. They **must** have been discussed within the maternal family as the concerns are so deeply held, and expressed. It is an insidious and powerful influence, and **likely** not to be recognised as such by the maternal family. Beyond that, it is clear that there was a degree of consensus among the experts that [A] has been influenced by the comments made about her father. It is **inevitable** that [A] will have been affected by the extreme negativity towards the prospect of any

⁴⁹² At [96].

⁴⁹³ At [79].

⁴⁹⁴ [REDACTED] at [214].

⁴⁹⁵ [REDACTED], [2017] NZHC 1159 at [98].

⁴⁹⁶ At [84].

⁴⁹⁷ At [104].

⁴⁹⁸ At [454].

⁴⁹⁹ At [107].

unsupervised contact between [A] and her father. It **could not have** escaped her notice.⁵⁰⁰

Once again, “must”, “likely”, and “inevitable” are not scientific terminology. They are the terminology of speculation and “intuition” masquerading as a study of family dynamics and child development.

(2015)

In [REDACTED], the parties separated after a serious incident of intimate partner violence that resulted in Father’s conviction for assault (which was subsequently discharged), a protection order for Mother, and an interim parenting order granting Mother day-to-day care of seven-year-old Child, who witnessed the violence, and restricting Father to supervised contact.⁵⁰¹ While this initial outcome seems appropriate in light of the case history, further proceedings in the case took the unfortunately typical alienation turn.

The incident that resulted in the parties’ separation involved Father spitting at Mother, dumping the contents of a glass over her head, and restraining her by grabbing her arms.⁵⁰² During the hearing on Mother’s application for a final protection order, Judge Fleming expressed “alarm” at the “deterioration of the relationship” between Child and Father since the parties’ separation but not at Father’s violence.⁵⁰³

Father sought day-to-day care of Child and asked the Court to prohibit Mother from having any contact until her “alienation” was “addressed”.⁵⁰⁴ When Mother continued to advocate for her and Child’s safety from further violence from Father, the Court, relying on the evidence of its appointed psychologist, pathologised Mother and forced Child into Father’s care.

In addition to the assault that resulted in criminal charges against Father, Mother offered evidence about prior assaults that Father committed. The assaults involved repeated episodes of Father spitting on Mother, pulling her hair, and strangling her.⁵⁰⁵ Child’s grandmother witnessed several assaults.⁵⁰⁶ Child’s maternal aunt and grandmother together witnessed another. All three witnesses agreed about the essence of the attack – that Father beat Mother, pulled her hair, and attempted to strangle her.⁵⁰⁷ Mother’s sister also testified that Father was attempting to push Mother’s head into the toilet when he grabbed her hair, but Mother’s evidence did not include this detail.⁵⁰⁸ Judge Pidwell found that Father physically grabbed

⁵⁰⁰ At [295].

⁵⁰¹ [REDACTED], above, at [1], [13], [79].

⁵⁰² At [90].

⁵⁰³ At [14].

⁵⁰⁴ At [16].

⁵⁰⁵ At [100].

⁵⁰⁶ At [100].

⁵⁰⁷ At [83]-[86].

⁵⁰⁸ At [83].

Mother “around the neck” and that the parties had a history of “physical altercations” but did not accept that Father’s actions of grabbing Mother by the neck constituted strangulation attempts because Mother “did not give any evidence of the pressure or force used”.⁵⁰⁹ Judge Pidwell discounted the seriousness of the assault, insisting that Mother and her witnesses were exaggerating because none called Police and Mother remained in a relationship with Father, inferring as a result that Mother’s “view” of the incident must have become “more inflated since the separation”.⁵¹⁰ She found the grandmother’s testimony “unreliable” because there were pictures of the family enjoying their holidays.⁵¹¹ She found several of Mother’s other allegations of violence unfounded because of the timing of her disclosures (after separation) and the lack of Police action.⁵¹² She concluded that Father’s violence against Mother was not “serious” and “situational”.⁵¹³

Mother offered evidence that Child witnessed Father inflict violence on her and that Father inflicted violence on Child directly,⁵¹⁴ but the court personnel focused on Mother’s alleged “alienating behaviour” instead of Father’s history of violence.⁵¹⁵ Father admitted to smacking Child five or six times but minimised it as “light smacking for discipline”.⁵¹⁶ He also admitted to slapping Mother one time (in addition to the assault that led to the parties’ separation).⁵¹⁷

Child expressed that she only wanted limited contact with Father.⁵¹⁸ Mother argued that Child’s resistance to contact with Father was the result of years of exposure to his violence.⁵¹⁹ Mother’s evidence was supported by evidence from Child’s SHINE advocate, who testified that Child told her that she did not want to see Father because she was afraid of him.⁵²⁰ Child had recounted episodes of violence against both herself and Mother to her advocate.⁵²¹ Mother’s evidence was also supported by Child’s evidential interview with Police, in which she recounted Father “hitting” both her and Mother.⁵²² Despite all this evidence, and despite Father’s

⁵⁰⁹ At [86].

⁵¹⁰ At [86], [100].

⁵¹¹ At [101].

⁵¹² At [90]-[92].

⁵¹³ At [81].

⁵¹⁴ At [4].

⁵¹⁵ At [15].

⁵¹⁶ At [103].

⁵¹⁷ At [123].

⁵¹⁸ At [50].

⁵¹⁹ At [16], [58], [103].

⁵²⁰ At [103].

⁵²¹ At [105].

⁵²² At [108].

admission that he “smacked” Child as a form of discipline, Judge Pidwell found that there was “no reliable evidence” that Father harmed Child.⁵²³

After a supervised visit, Child reported to Mother that Father “grabbed her arm and twisted it”.⁵²⁴ Mother took Child to the doctor, who documented that she had a “deep red bruise” on her forearm, which was “exquisitely tender” to the touch.⁵²⁵ Judge Pidwell found that the bruise could not have been caused by Father because the contact supervisor did not see him harm Child and because Mother did not take Child to the doctor until several days after the visit.

Father, who admitted committing violence against Mother at the hearing on her application for a protection order, denied at the care proceedings that he inflicted any “serious” violence and insisted that his relationship with Child needed to be “normalised”. “Normalised” is a code word in the Family Court for extensive, overnight unsupervised contact. Its use derives from the construct of parental alienation, which posits that protecting children from extensive unsupervised contact with violent parents is abnormal and harmful. This suggestion derives in large part from the ideological evidence that psychologists give that awarding exclusive care to one parent is always profoundly damaging to children, a claim that is not supported by validated scientific research.

The court psychologist simultaneously failed to acknowledge the large body of peer-reviewed psychological research demonstrating the long-term harm to children from exposure to family violence and undermining their relationships with protective parents.⁵²⁶ Physical discipline, even when it falls short of abuse, causes long-term harm to children.⁵²⁷ Children who are exposed to violence in childhood suffer from a host of adverse physical, psychological, and cognitive impacts later in life.⁵²⁸ These symptoms include recurrent and intrusive memories

⁵²³ At [110].

⁵²⁴ At [111].

⁵²⁵ At [111].

⁵²⁶ Danuta Rode et al, “The Impact of Physical Abuse and Exposure to Parental IPV on Young Adolescents in Poland: a Clinical Assessment and Comparison of Psychological Outcomes” (2019) 34 J Family Violence 435.

⁵²⁷ Heilmann, et al, above.

⁵²⁸ B.B.R. Rossman, “Longer Term Effects of Children's Exposure to Domestic Violence, in S. A. Graham- Bermann & J. L. Edleson (eds), *Domestic Violence in the Lives of Children: The Future of Research, Intervention, and Social Policy* (American Psychological Association 2001) at 35; J. Fantuzzo et al, “Domestic Violence and Children: Prevalence and Risk in Five Major US Cities (1997) 36 J Amer Acad Child & Adolescent Psychiatry 116; S. Hamby et al, “Recognizing the Cumulative Burden of Childhood Adversities Transforms Science and Practice for Trauma and Resilience” (2021) 76 Amer Psychologist 230; J.K. Kolbo et al, “Children Who Witness Domestic Violence: A Review of Empirical Literature” (1996) 11 J Interpersonal Violence 281; Einat Peled, “The Experience of Living with Violence for Preadolescent Children

(flashbacks), nightmares, hyper-reactivity, arousal, vigilance, aggression, and irritability, social withdrawal, and behavioural issues.⁵²⁹ Children who are exposed to violence and other forms of traumatic experiences accumulate trauma over the course of childhood and early adulthood, so its impact is cumulative and dose specific.⁵³⁰

The court psychologist opined that Child was “profoundly alienated from her father”.⁵³¹ She opined that Child’s disclosures to Police about Father hitting her and Mother were false memories rather than actual events.⁵³² Because of the psychologist’s evidence, Judge Pidwell placed “no weight” on Child’s disclosures of violence to her SHINE advocate.⁵³³ The psychologist opined that Child’s description of showering with Father and him putting his “willy” behind her described innocent conduct.⁵³⁴ Judge Pidwell adopted the psychologist’s analysis.⁵³⁵

The psychologist based her opinion evidence in part on her tortured understanding of cognitive dissonance. She offered “expert” evidence that “the fluctuation of contact between positive times and disastrous times as an example of the cognitive dissonance [Child] is experiencing, in that when she has a positive experience with her father, the only way her brain is able to process that, in light of her view that her father is a ‘monster’, is to ensure that the next experience is negative.”⁵³⁶ She concluded that the “level of cognitive dissonance” being experienced by Child was “severely detrimental” to her “long term welfare”.⁵³⁷

The psychologist did not offer any foundational evidence to demonstrate the scientific reliability of her opinions relating to parental alienation, false memories, innocent naked contact, or her idiosyncratic application of the concept of cognitive dissonance to the question of care arrangements for a child, despite the requirement of EA s 25 that she do so prior to offering these opinions. Instead, the Court simply swallowed the testimony whole without requiring its “expert” psychologist to establish her qualifications for rendering her opinions or a valid and reliable basis for them.

of Battered Women” (1998) 29 Youth & Society 395; M. Sudermann & P. Jaffe, “Children and Youth Who Witness Violence” in D.A. Wolfe et al (eds), *Child Abuse: New Directions in Prevention and Treatment Across the Lifespan* (1997).

⁵²⁹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013) (*DSM-5*), at 271; Ehrensaft et al, above.

⁵³⁰ Hamby et al, above.

⁵³¹ [REDACTED] above, at [4].

⁵³² At [109].

⁵³³ At [107].

⁵³⁴ At [115].

⁵³⁵ At [117].

⁵³⁶ At [140].

⁵³⁷ At [140].

Concerningly, Mother's lawyer did not challenge the psychologist's qualifications or expertise, even though she offered no foundational evidence to demonstrate that she was qualified to offer the "expert" opinions that she gave, including "the reliability of the child's account of past events" – qualifications required by EA s 25.⁵³⁸ Judge Pidwell found that Mother's failure to challenge the psychologist's qualifications was "appropriate" because her evidence complied with HCR Schedule 4 and CoCA s 133.⁵³⁹ This analysis is concerning. The qualifications and expertise of experts are not governed by CoCA s 133 or HCR Schedule 4.⁵⁴⁰ They are governed by EA ss 25 and 26 and the caselaw interpreting them, including *Daubert*, none of which Judge Pidwell considered before finding the psychologist was unquestionably qualified to render an opinion with no forensic qualifications and no showing of validity or reliability.

Judge Pidwell extolled the psychologist's extensive "experience" as a court report writer and the high number of interviews that she conducted in connection with the case.⁵⁴¹ She insisted: "Dr Calvert's expert opinion that [Child] is an alienated child is based on years of experience, and a significant amount of data".⁵⁴² None of these factors establish qualifications or reliability under EA s 25. Court psychologists may be very experienced, but experience is not synonymous with, and cannot substitute for, expertise. *Daubert* is about scientific methodology, not volume. It requires that an expert's conclusions be based on tested and testable, peer-reviewed, generally accepted methodology with demonstrated (and acceptably low) rates of error. According to the American President's Council of Advisers on Science and Technology (PCAST), "neither experience, nor judgment, nor good professional practices . . . can substitute for actual evidence of foundational validity and reliability".⁵⁴³ As Paul Appelbaum explains:

Although experience, including ongoing experience, with the condition at issue is important in establishing expertise for the purpose of providing

⁵³⁸ At [149].

⁵³⁹ At [149].

⁵⁴⁰ It is not clear that the psychologist's evidence complied with Schedule 4. Under section 3, experts are not supposed to give expert evidence outside of their area of expertise, and the psychologist did not appear to have specialised expertise in forensic psychology. As James Ogloff (2013) explains: "When psychologists are ignorant of current research and standard of practice in the profession, they run the risk of acting unethically. Relevant ethical guidelines mandate psychologists to obtain – and maintain – knowledge, skill, education, and experience in their areas of work." James R.P. Ogloff, "Jingoism, Dogmatism and Other Evils in Legal Psychology: Lessons Learned in the 20th Century", in Ronald Roesch et al (eds), *Psychology in the Courts* (Routledge 2013) at 9.

⁵⁴¹ [REDACTED], above, at [150].

⁵⁴² At [154].

⁵⁴³ PCAST, *Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016) at 6.

evidence in a case, there is a danger that experience can be overemphasized as a criterion of expertise as well. Assuming a baseline degree of adequate training and some ongoing experience in a field or with a condition, it is not clear that additional experience necessarily enhances an expert's authoritativeness. Experts will sometimes boast of the number of evaluations they have performed of a particular type of evaluatee (e.g., alleged or convicted murderers) or of a given kind (eg, assessments of competence to stand trial). However, if evaluations are performed inadequately or used as the basis for invalid conclusions, especially if there is no feedback loop to correct the expert's errors, mere experience may only have the effect of reinforcing bad clinical habits.⁵⁴⁴

Judge Pidwell referred to "the recent literature and research on parental alienation", but the only "literature and research" that she cited was (1) an unpublished paper presented at a regional family law conference and (2) the Fidler and Bala (2010) article, discussed above, which cautions *against* the use of evidence like that offered by Dr Calvert.⁵⁴⁵ Warshak has explicitly cautioned about this phenomenon, noting: "Some zealous [parental alienation] advocates overtly bias their analyses, conclusions, and testimony by cherry-picking case evidence and literature, glossing over limitations in the data and evidence that supports opposing views."⁵⁴⁶

Based on the psychologist's alienation evidence, which contradicted the one article on which she apparently relied, Judge Pidwell criticised Mother for "accepting without question" Child's reports of abuse and found that Mother's belief in Child's reports of abuse "reinforced" in Child "that her mother will fully support anything she says without question and has been part of the process in the formation of the negative relationship."⁵⁴⁷ It is hard to imagine any court other than the Family Court in which a judge, trained as a lawyer, would engage in armchair psychoanalysis of relationship dynamics.

Mother sought to challenge the factual basis for the psychologist's opinion evidence, but the Court refused to entertain her evidence on procedural grounds.⁵⁴⁸ One affidavit that Mother sought to introduce was from a witness who affirmed that the psychologist mischaracterised their interview in her report.⁵⁴⁹ Judge Pidwell found that Mother could put the claim to the psychologist in cross examination "without the need for evidence to be filed".⁵⁵⁰

This ruling turned the onus of proof for the introduction of expert evidence on its head. The proponent of expert evidence carries the burden to demonstrate that the factual assumptions

⁵⁴⁴ Appelbaum, above, at 872.

⁵⁴⁵ [REDACTED], above, at [146] n 5, [155] & n 6.

⁵⁴⁶ Warshak, "False Positive IDs", above, at 63.

⁵⁴⁷ [REDACTED], above, at [143].

⁵⁴⁸ At [25]-[30].

⁵⁴⁹ At [31].

⁵⁵⁰ At [31].

on which it is based are sound. Mother did not have an obligation to establish that the psychologist's factual assumptions were incorrect. The expert had the burden to demonstrate that her methodology – including factual investigation – was valid and reliable.

Judge Pidwell ultimately found that the psychologist's evidence regarding Mother's and Child's statements to her were accurate without indicating why she credited her disputed testimony.⁵⁵¹ Despite Father's history of family violence, suicide attempts committed in Child's presence, need to be "in control", and total inability to say anything positive about Mother,⁵⁵² Judge Pidwell defined the "central issue" in the case as being "whether [Child] has become alienated from her father as a result of the influence of her mother and other persons and factors".⁵⁵³ She did not identify whether Father had inflicted violence on Child or whether Child was safe having unsupervised contact with him, let alone being in his day-to-day care, as central issues in need of resolution. She indicated that she did not have to place due weight on Child's views if "there is evidence of alienation, or where there is a state of cognitive dissonance – where a child's expressed view does not accord with their 'real' view".⁵⁵⁴

Judge Pidwell recognised that Child was present during Father's attacks on Mother but found that the cause of her resistance to contact with Father was not witnessing his violence but rather discussing it afterwards with Mother.⁵⁵⁵ She reasoned:

That forms one of the bases for her resistance to her father. This incident has been inflated to the point where she now feels she can rely on it to justify her "fear" of her father. The fact that she has now been told that her father is unsafe and requires supervision further fuels that fear and her understanding of the incident.⁵⁵⁶

This is an example of the problematic causal reasoning behind the construct of alienation. The Court found that the primary cause of Child's fear of Father was Mother's discussion of Father's violence with her rather than Father's violence toward Mother and abuse of Child. This is the causal reasoning that has never been tested or validated – the idea that the behaviour of the protective parent, rather than the violence of the abusive one, is the cause of children's rejection of abusive parents.

Judge Pidwell summarily concluded: "I do not accept . . . that [Child]'s resistance to contact and negative relationship with her father is as a result of her realistic estrangement from him. Her current negative view is not a result of her own experiences of her father."⁵⁵⁷ Considering the extensive history of family violence, this conclusion is startling. Judge Pidwell ultimately

⁵⁵¹ At [107].

⁵⁵² At [74]-[76], [93]-[94].

⁵⁵³ At [49].

⁵⁵⁴ At [50].

⁵⁵⁵ At [82].

⁵⁵⁶ At [82].

⁵⁵⁷ At [125].

concluded, based on the psychologist's alienation evidence, that Child was safe with Father (the violence perpetrator) but "psychologically" unsafe with Mother (the violence victim).⁵⁵⁸

Accepting the psychologist's opinion that Child had been "alienated" from Father by Mother, Judge Pidwell identified a series of what she called "alienating factors relating to the mother".⁵⁵⁹ They included: Mother's "belief" that Father inflicted serious domestic violence on her (which he had); the "support" that Mother received from family violence agencies in her belief that she was a victim of domestic violence (which she was); Child's "exposure" to Mother's beliefs; Child undergoing interviews after her reports of child abuse; Child's "alignment" with Mother; the supervised nature of Child's contact with Father (which the Court ordered); that Mother's support person made a complaint to the Psychologist's Board "about Dr Calvert's bias and methodology"; and, of course, Child's "cognitive dissonance". In her list of "alienating factors relating to the father", Judge Pidwell failed to list Father's admitted episodes of violence against Child (smacking) and Mother in Child's presence (slapping, spitting, and hair pulling).

This list of allegedly "alienating" behaviours by Mother is concerning for two reasons. First, it demonstrates the malleable, untestable, and reductionist nature of the alienation finding. Child is alienated because she shares Mother's views about Father's history of violence. Child is alienated because Mother believed her reports of abuse. Child is alienated because Mother's advocate filed a complaint with the Board about methodologically indefensible "expert" evidence by the court psychologist. Child is alienated because her favourite colour is Father's least favourite colour.

Second, many of these alleged "alienation" factors are not only unsupported by social science (or even basic logic) but are the opposite of what validated social-science evidence and evidence law dictates. Father did inflict domestic violence on Mother – even by his own admissions. Father admitted to "smacking" Child as discipline and slapping Mother in her presence, acts that unquestionably constituted family violence under the FVA.⁵⁶⁰

Victims should seek support from domestic violence support agencies, and those agencies should support them when they do. The Government's "It's Not Ok" campaign advises people who have experienced violence: "Reach out to someone you can trust. Tell them about your situation. Ask them if they can help. Whether you want to leave or stay, find someone who can support you – this might be a support service, friend, colleague, or family member."⁵⁶¹

Adults to whom children make reports of child abuse should take those reports seriously and make reports of concern to OT and/or Police. OT urges adults who are concerned about a child to make a report of concern if they think a child is unsafe or in danger of harm or suffering

⁵⁵⁸ At [161].

⁵⁵⁹ At [148].

⁵⁶⁰ FVA ss 9-11.

⁵⁶¹ "Practical Steps to Safety" at <www.areyouok.org.nz/support-available/practical-steps-to-safety/>.

from abuse, ill treatment, or neglect.⁵⁶² They insist: "Don't be afraid of discussing a worry you're having about a child."⁵⁶³ The Oranga Tamariki Act 1989 grants civil, criminal, and disciplinary immunity to individuals who make reports of concern to unless the report was made in bad faith.⁵⁶⁴ This immunity is intended to encourage people with genuine but possibly mistaken concerns nonetheless to come forward.

Someone with concern about bias and methodology by a psychologist – particularly in a case in which a child's safety is at issue – should report their concerns to the Board. The court psychologist's methodology was concerning and suggestive of gender bias. There was no basis for the Court, or its "expert" psychologist, to pathologise these actions as "alienation factors".

(2013)

Even when a Family Court Judge declines to make a finding of parental alienation, they still do so after the same subjective, standardless analysis that they apply when they find alienation. For example, in [REDACTED], Mother had day-to-day care of Children, and Father had supervised contact progressing to unsupervised contact on alternating weekends. Children expressed that they wanted to spend less time with Father.⁵⁶⁵ Father claimed that Mother "actively alienated the children from him".⁵⁶⁶ The court psychologist testified that alienation was "represented by a spectrum of behaviours, ranging from a deliberate cynical campaign of alienation, through a pattern of behaviours by one or both parents which contribute to the weakening of a relationship between the children and a parent."⁵⁶⁷ Judge Murfitt found that Mother's "behaviour lacks the intensity or 'campaign' style which arises in many cases where alienating behaviours arise" because she kept photos of Father in her home and referred to him as "Daddy".⁵⁶⁸ He concluded:

Although both parents have made mistakes in the way they have dealt with parental mistrust and disagreement, insofar as the children's lives are concerned, I do not find evidence of deliberate or sustained behaviours by [Mother] aimed at sabotaging the girls' relationship with their father. Rather, the girls' affiliation to their mother is a consequence of her better attunement to their emotional needs, largely due to their

⁵⁶² Oranga Tamariki (OT), "Worried About a Child?" at <www.orangatamariki.govt.nz/worried-about-a-child-tell-us/>.

⁵⁶³ OT, "Identify Abuse" at <www.orangatamariki.govt.nz/worried-about-a-child-tell-us/identify-abuse/>.

⁵⁶⁴ OT Act 1989 s 16.

⁵⁶⁵ [REDACTED], above, at [48].

⁵⁶⁶ At [44].

⁵⁶⁷ At [52].

⁵⁶⁸ At [59].

stage of development, as they emerge into or toward puberty and the wondrous turmoil of teenage.⁵⁶⁹

While it is reassuring to see Mother dodge the fatal bullet of the Court finding that she “alienated” Children, it is disconcerting that Judge Murfitt rejected Father’s allegations not because they were amorphous, conclusory, and derived from no objective, testable evaluative standards but rather because he felt that the amorphous, conclusory, and subjective “evidence” happened to tip toward a lack of alienation in this one case.

Proposal

What is problematic about alienation evidence is not the recognition that one parent *intentionally* obstructing or undermining a child’s relationship with their other parent can be abusive. If it is repetitive and harmful, this behaviour could and often would constitute psychological abuse under the FVA. What is problematic is its nature and use as syndrome evidence – the premise that an expert witness can *detect* one parent’s “alienating behaviours” from the behaviour of the child *in the absence of* direct evidence of the behaviours by the “alienating parent”. Even Warshak acknowledges that parental alienation should never be used this way, noting: “In some instances, parents, child representatives . . . and expert witnesses incorrectly label a child as alienated based on the child’s negative behavior toward a parent.”⁵⁷⁰

It is this aspect of alienation evidence that lacks foundational or as-applied validity, and it is this aspect of alienation evidence that has run amok in the Family Court and caused harm to victims of family violence. In *JF*, Father argued that Mother’s “alienation” was inferable primarily from Children’s behaviour in his care. In *Finn*, Father’s evidence of Mother’s “alienation” was that Children were “exhibiting behaviour consistent with alienating behaviour”. In *Lowe*, the evidence of Mother’s “alienation” was that Child expressed fear of Father and said that he did not want to be in his care. In [REDACTED], the evidence of Mother’s “alienation” was that Child said that she only wanted limited contact with Father because of his history of family violence. In [REDACTED], the evidence of Mother’s alienation was that Child kept making reports of sexual abuse when she was in Father’s care. None of the fathers in these cases offered direct evidence that the mothers were engaging in *conduct* that obstructed their relationship with their children. Instead, they relied on the pseudo-science of parental alienation as circumstantial evidence that such conduct occurred, and the inferred conduct was often as amorphous and undefined as “anxiety”, “fear”, “attitudes”, “influence”, or “unwillingness to support” their children’s relationship with their fathers. These nouns were often modified by adjectives like “unconscious” or “unintentional”. For example, in [REDACTED] the Court inferred that Mother was sending “unspoken messages” of “negativity” and “disapproval” of Father to Child. In [REDACTED] the Court found that Mother had a “pernicious attitude” and created an “atmosphere of distrust” toward Father because she believed Child’s reports of Father’s

⁵⁶⁹ At [62].

⁵⁷⁰ Warshak, “False Positive IDs”, above, at 58.

abuse. In these cases, the behaviour that was inferred circumstantially, even if it could be established reliably, would not constitute psychological abuse. It is these inferences that should be prohibited by EA s 25 but which are routinely admitted and relied upon in the Family Court.

Parliament can regulate this syndrome inference in the same way that it has regulated inferences drawn about the veracity and propensities of parties and witnesses and the inferences that can and cannot be drawn from evidence of a complainant's sexual history in sexual cases in the EA. For example, the propensity rule contained in s 40 generally prohibits using evidence of a criminal defendant's prior acts, omissions, events, or circumstances to demonstrate that the individual has a propensity to act in a particular way or has a particular state of mind. The propensity rule in s 44, which applies specifically to complainants in sexual cases, generally prohibits evidence of the complainant's sexual experience or sexual disposition unless it is directly relevant to the facts at issue in the proceedings – for example, evidence that the complainant had made a prior false complaint of sexual abuse, which could bear directly on the credibility of the complainant's current complaint under EA s 37⁵⁷¹ or evidence of a prior true complaint of sexual abuse to support a defence of transference or attribution.⁵⁷²

The legislative history of s 44 is particularly relevant to the issue of alienation evidence in the Family Court. Section 44 was enacted to prevent sexual-history evidence from being used to support erroneous assumptions about complainants.⁵⁷³ Those erroneous assumptions stemmed from longstanding folkloric gender biases and "rape myths" about women's sexuality and credibility, which were contrary to social-science evidence – for example, that women with particular sexual histories were more likely to have consented to sexual activity on a particular occasion or were less worthy of belief.⁵⁷⁴ The evidence of sexual history was used to demonstrate that complainants belonged to a class of complainants thought to be more likely to consent or make false allegations of rape (sex workers, promiscuous women) without requiring evidence of consent or false allegations in the particular case. This history bears obvious parallels to the use of alienation evidence in the Family Court today.

Section 44 arose from social-science evidence that showed that admission of evidence concerning a complainants' sexual histories was historically not appropriately controlled in the absence of a specific rule.⁵⁷⁵ Similar rationales exist for regulating alienation evidence, given the demonstrated problems with the Family Court blaming women for father/child estrangements that are more likely the result of poor paternal parenting, deploying gender

⁵⁷¹ *R v C* [2007] NZCA 439.

⁵⁷² *[REDACTED] v R* [2010] NZCA 291; *R v Morrice* [2008] NZCA 261.

⁵⁷³ Ministry of Justice, *Government Response to Law Commission Report: "The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006"*, 27 November 2019, at [25].

⁵⁷⁴ At [25].

⁵⁷⁵ T. Brett Dawson "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: the Construction of Relevance" (1987) 2 Canadian J Women & L 313, 328.

stereotypes and misconceptions about women's character and behaviour, and failing appropriately to regulate unreliable opinion evidence under the existing general rule of EA s 25.

The EA should be amended to prohibit the introduction of evidence that a child is alienated or estranged from one parent as proof that the other parent is engaging in alienating behaviours. It should permit the Family Court to consider direct evidence by firsthand witnesses of disparaging or obstructing behaviour by a parent, but it should not permit the Court to hear or consider "expert" evidence in which the expert offers an opinion that a parent is "alienating" a child. It should also clarify that, Family Court Act 1980 s 12A notwithstanding, EA s 25 applies to evidence offered by psychologists in the Family Court and the Court must not hear evidence that is offered by health professionals who have not demonstrated both the foundational validity and as-applied reliability of any opinions that they offer.

The EA should also explicitly prohibit the use of evidence of reports of concern to the Police or OT as evidence that a parent is attempting to undermine a child's relationship with another parent. Police and OT are competent to handle unsupported claims of abuse, and drawing an inference that making a report of concern about a child's welfare is child abuse is contrary to the policy of Police and OT regarding reporting suspected child abuse.

A proposed new EA s 25A is attached to this submission.⁵⁷⁶

Conclusion

Family Court Judges often view themselves as experts in assessing parenting and family dynamics. The problem with viewpoints derived from intuition and experience, however, is that the Court does not stop at accepting scientific observations noted generally in human behaviour, but, over time, elevates these observations to the stature of inevitable truisms. When expert testimony is consistent with judges' natural instincts, they are more likely to accord weight to the testimony, and the expert evidence reinforces the resulting judgments that are based on these intuitions.

⁵⁷⁶ This section would also fit into the EA as s 44B.

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THE UNIVERSITY OF
AUCKLAND
Te Whare Wānanga o Tāmaki Makaurau
NEW ZEALAND

Department/School/Section

Building Name,
Floor, Number, Street,
Auckland, New Zealand

T +64 9 123 4567

W auckland.ac.nz

The University of Auckland

Private Bag 92019, Auckland 1142
New Zealand

APPENDIX A:

Proposed Amendments to the Evidence Act 2006

25A Children's Behaviour and Demeanour

The following provisions shall apply to proceedings under the Care of Children Act 2004 and the Family Violence Act 2018 relating to care of or contact with a child or young person and apply to evidence from all witnesses, including expert opinion evidence:

- (a) Direct evidence that a person has sought intentionally to undermine or interfere with a child's or young person's relationship with a parent or guardian by denigrating the parent or guardian to the child or refusing the child contact with the parent or guardian shall be admissible when relevant to a determination of the child's or young person's safety, welfare, or best interests.
- (b) Evidence containing the opinion, conclusion, or interpretation that a child is "alienated" shall be inadmissible.
- (c) Evidence of a child's or young person's behaviour, demeanour, or attitude toward one person shall not be admissible as evidence of the behaviour, demeanour, or attitude of another person. This includes evidence that the child fears, is angry at, or resists or refuses contact with the person.
- (d) Evidence of a child's or young person's behaviour, demeanour, or attitude toward a person shall not be admissible as evidence that the child or young person is "alienated". This includes evidence that the child fears, is angry at, or resists or refuses contact with the person. It does not include a child's disclosure of the conduct described in subsection (a).
- (e) Evidence that a person has advocated for a child's or young person's views to be ascertained and given weight in a proceeding shall not be admissible as evidence that the person is "alienating" or attempting to "alienate" the child or young person.
- (f) Evidence that a protective person has concerns for a child's or young person's safety in the care of or contact with another person or evidence that a protective person has taken action to prevent a child or young person from experiencing family violence shall not be admissible as evidence that the protective person has "alienated" or attempted to "alienate" the child or young person.

(g) Evidence that a person has made reports of concern to Oranga Tamariki, filed a complaint with police, or taken a child or young person for medical or psychological treatment shall not be admissible as evidence that the person is "alienating" or attempting to "alienate" the child or young person unless there are reasonable grounds to believe that the action was taken without protective intent.

(h) Under no circumstances should a child or young person be found to be "alienated" from a person who has inflicted family violence, including psychological abuse, on the child or young person or a member of the child's or young person's family.

44BB Interpretation

In this subpart, --

alienate means to manipulate, persuade, or encourage a child or young person to become estranged from or resist contact with a person with whom the child or young person has a family relationship, regardless of whether the term "alienate" is employed

alienated means to have been manipulated, persuaded, or encouraged to become estranged from or resist contact with a person with whom the child or young person has a family relationship, regardless of whether the term "alienated" is employed

direct evidence means evidence that directly proves a fact, without an inference or presumption, and which, if true, conclusively establishes that fact

evidence containing the opinion, conclusion, or interpretation that a child is "alienated" includes evidence expressing the opinion that a child is pathologically "enmeshed" or "aligned" with any person; evidence expressing the opinion that a child is experiencing a "loyalty conflict", "loyalty bind", or "cognitive dissonance" due to the demeanor, behavior, or attitude of any person; or evidence expressing the opinion that one parent has failed sufficiently to "support" a child's relationship with their other parent

family violence and **abuse** have the meanings set out in section 9 through 11 of the Family Violence Act 2018

intent, behaviour, demeanor, or attitude of the person other than a child or young person includes "unconscious" or "subconscious messages", "alienating behaviours", hostility or antipathy toward an individual, unwillingness to support the child's or young person's relationship with another person, or "gatekeeping"

protective intent means a genuine, subjective concern for the child's safety, regardless of whether the court, lawyer for the child, psychologist, or other court professional shares the person's concern

protective person means a person who has a protective intent toward a child or young person