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**DOES DOMESTIC VIOLENCE DISAPPEAR
FROM PARENTAL ALIENATION CASES?
FIVE LESSONS FROM QUEBEC FOR
JUDGES, SCHOLARS, AND
POLICYMAKERS**

Suzanne Zaccour*

The theory of parental alienation—which asserts that children who reject one parent are brainwashed by the other parent—has often been used to punish caring mothers and grant custody to dangerous fathers. The legal community’s quick infatuation with this concept has sparked fiery debates between its proponents and domestic violence scholars. **My research contributes to this urgent conversation by shedding new light on the role of domestic violence in parental alienation cases.**

I observe how series of cases involving the same family deal with the issue of domestic violence. This method reveals a worrisome “disappearing act”: **as families repeatedly interact with the justice system, domestic violence tends to leave the picture.** The result? A distortion: most women accused of parental alienation are victims of conjugal violence, yet the jurisprudence barely addresses this issue. The disappearance of domestic violence creates the impression that it is the exception, rather than the norm, in parental alienation cases.

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I draw **five lessons** from the Quebec jurisprudence:

- 1) The prevalence of domestic violence in parental alienation cases is higher than we think;
- 2) This is because domestic violence, alleged or proven at first instance, is often ignored on appeal;
- 3) Domestic violence should instead be given centre stage in parental alienation cases;
- 4) Considering parental alienation while ignoring domestic violence is a form of bias against women;
- 5) Stating that the parental alienation framework applies *unless* there is domestic violence does not protect victims of undisclosed violence.

The concept of parental alienation is dangerous for victims of family violence; thus, scholars suggest that when intimate partner violence is proven, the parental alienation framework should not apply. This caveat is not enough. **My study challenges the conventional belief that domestic violence can be treated as a mere exception to parental alienation**, calling for legal actors to reconsider the role of parental alienation in custody disputes.

INTRODUCTION

When a child says, “I don’t want to see Daddy,” should we blame Mommy? Parental alienation answers “yes” but is often oblivious to the elephant in the room: family violence.

In recent decades, the new theory of “parental alienation syndrome” or “parental alienation” has captivated courts, lawyers, and custody evaluators across the world. This craze has troubled feminists, as the theory attributes a child’s rejection of a parent (often the father) to manipulation and brainwashing by the other parent (often the mother). Today, many parental alienation scholars acknowledge domestic violence as a caveat to the parental alienation framework, a compromise that has not soothed the concerns of domestic violence scholars.

Family law is not exactly the poster child for consensus. Yet, “[n]othing is more polarized in the family law field than the debate over domestic abuse and parental alienation.”¹ At one end of the spectrum are feminists who state that the parental alienation belief system uses pseudoscience to conceal men’s violence and further victimize women and children. At the other end, fathers’ rights militants paint alienation as child abuse inflicted by mothers to rob fathers of their children. In between these extremes lie researchers who propose to recognize parental alienation while also ensuring that violent fathers cannot use it to their advantage. They propose that when domestic

¹ Joan S Meier, “Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen’s Decision Tree” (2010) 7:4 J Child Custody 219 at 220 [Meier, “Getting Real About Abuse and Alienation”].

violence or child abuse is proven, the parental alienation framework does not apply—a family-violence exception, if you will.

But can parental alienation really be recognized without endangering victims of domestic violence? To answer this question, we must look at how alienation and violence interact in custody cases. While new research has started to uncover Canadian courts' responses to parental alienation,² the interaction between this concept and domestic violence remains elusive, in part because allegations of domestic violence are often left unresolved in parental alienation cases.³

Enter this study. By examining all appellate cases mentioning parental alienation in Quebec between 2010 and 2020 and, for each appeal, looking back to earlier decisions involving the same family, I pursue the inquiry into the interaction of domestic violence and parental alienation.

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- ² See Suzanne Zaccour, "Parental Alienation in Quebec Custody Litigation" (2018) 59:4 C de D 1073; Linda C Neilson, *Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?* (Frederickton & Vancouver: Muriel McQueen Fergusson Centre for Family Violence Research & FREDA Centre for Research on Violence Against Women and Children, 2018) [Neilson, *Parental Alienation Empirical Analysis*]; John-Paul Boyd, *Alienated Children in Family Law Disputes in British Columbia* (Calgary: Canadian Research Institute for Law and the Family, 2015); Nicholas Bala, Suzanne Hunt & Carolyn McCarney, "Parental Alienation: Canadian Court Cases 1989–2008" (2010) 48:1 Fam Ct Rev 164.
- ³ See Elizabeth Sheehy & Susan B Boyd, "Penalizing Women's Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases" (2020) 42:1 J Soc Welfare & Fam L 80.

I show that **domestic violence is more prevalent than it appears in parental alienation cases**. It is the norm rather than the exception. We do not see it as such because, in cases where domestic violence was alleged at first instance, this context is often nowhere to be found in appellate decisions. In other words, **domestic violence tends to disappear from parental alienation cases**.

This finding calls into question the proposition that courts should apply parental alienation concepts to custody cases in the absence of domestic violence. If domestic violence disappears, how are courts to protect mothers from false allegations of parental alienation by violent fathers? **Domestic violence cannot be treated as a mere exception to the parental alienation framework**.

My study has important implications for parental alienation research and its use in legal cases. It confirms a gender bias in the way that a family's history is carried through judicial decisions and sends a serious warning to judges, legislators, evaluators, and scholars who believe that we can think about parental alienation independently of domestic violence.

CONTEXT: A PRIMER ON PARENTAL ALIENATION AND PARENTAL ALIENATION SYNDROME

GARDNER'S PARENTAL ALIENATION SYNDROME

Parental alienation syndrome is a disorder invented by psychiatrist Richard Gardner in the 1980s. He observed that children increasingly rejected their father during custody disputes, and he attributed this phenomenon to

brainwashing by mothers.⁴ He defined parental alienation syndrome as the programming of a child by the preferred parent (the “alienator” or “alienating parent”), coupled with the child’s own vilification of the rejected (or “alienated”) parent.⁵ He listed eight symptoms of parental alienation syndrome:

- 1) the child denigrates the alienated parent;
- 2) the child has no reasonable explanation for rejecting the alienated parent;
- 3) “[t]he hated parent is viewed as ‘all bad’ and the loved parent is ‘all good;’”⁶
- 4) the child insists that they are not influenced by the alienating parent;
- 5) the child constantly sides with the alienating parent;
- 6) the child feels no guilt for rejecting or being cruel towards the alienated parent;

⁴ See Richard A Gardner, “Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?” (2002) 30:2 Am J Fam Therapy 93 [Gardner, “Parental Alienation Syndrome”].

⁵ See *ibid* at 95.

⁶ Richard A Gardner, “Recent Trends in Divorce and Custody Litigation” (1985) 29:2 Academy Forum 3, online: <www.fact.on.ca/Info/pas/gardnr85.htm>.

- 7) the child's grievances towards the alienated parent mirror the alienator's discourse and borrow adult vocabulary;
- 8) the child rejects the alienated parent's extended family, friends, and even pets.⁷

In the blink of an eye, courts across the world embraced Gardner's parental alienation syndrome. Used to explain a child's refusal to see a parent (often the father), this theory has led courts to order sometimes drastic custody transfers and prevent any contact with the child's preferred parent. Children have been sent to residential therapeutic programs to be deprogrammed,⁸ and courts have even intervened punitively to jail recalcitrant alienators and alienated children.⁹

At the same time, Gardner's theory also attracted considerable critique, specifically regarding its lack of scientific validity and blatant sexist bias.¹⁰ Some

⁷ See *ibid*; Gardner, "Parental Alienation Syndrome", *supra* note 4 at 97. See also Richard A Gardner, *The Parental Alienation Syndrome: Second Edition: A Guide for Mental Health and Legal Professionals* (Cresskill, NJ: Creative Therapeutics, 1998).

⁸ See Richard A Gardner, *Therapeutic Interventions for Children with Parental Alienation Syndrome* (Cresskill, NJ: Creative Therapeutics, 2001).

⁹ Joan B Kelly & Janet R Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39:3 Fam Ct Rev 249 at 250.

¹⁰ See Richard Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003) 37:2 Fam LQ 273; Janet R Johnston & Joan B Kelly, "Commentary on Walker, Brantley, and

commentators have thus suggested that parental alienation syndrome is “junk science”¹¹ that should not be admissible in court.¹²

FROM PARENTAL ALIENATION SYNDROME TO PARENTAL ALIENATION

Researchers transformed and reformulated parental alienation syndrome to make it more scientific and less

Rigsbee’s (2004) ‘A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court’ (2004) 1:4 J Child Custody 77 [Johnston & Kelly, “Commentary on Walker et al”]; Carol S Bruch, “Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases” (2001) 35:3 Fam LQ 527 [Bruch, “Getting It Wrong”]; Carol S Bruch, “Parental Alienation Syndrome: Junk Science in Child Custody Determinations” (2001) 3:3 Eur JL Ref 383; Richard Bond, “The Lingering Debate Over the Parental Alienation Syndrome Phenomenon” (2008) 4:1/2 J Child Custody 37; Lenore EA Walker, Kristi L Brantley & Justin A Rigsbee, “A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court” (2004) 1:2 J Child Custody 47; Lenore E Walker & David L Shapiro, “Parental Alienation Disorder: Why Label Children with a Mental Diagnosis?” (2010) 7:4 J Child Custody 266; Joan S Meier, “A Historical Perspective on Parental Alienation Syndrome and Parental Alienation” (2009) 6:3/4 J Child Custody 232 [Meier, “A Historical Perspective”]; Janet R Johnston & Joan B Kelly, “Rejoinder to Gardner’s ‘Commentary on Kelly and Johnston’s “The Alienated Child: A Reformulation of Parental Alienation Syndrome”’” (2004) 42:4 Fam Ct Rev 622; Michele A Adams, “Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers’ Rights” (2006) 40:2 Fam LQ 315.

¹¹ See Bruch, “Parental Alienation Syndrome: Junk Science in Child Custody Determinations”, *supra* note 10.

¹² See James Williams, “Should Judges Close the Gate on PAS and PA?” (2001) 39:3 Fam Ct Rev 267.

gender-biased. Most famously, Joan Kelly and Janet Johnston proposed the new theory of “parental alienation,” abandoning its qualification as a “syndrome.”¹³ They defined the alienated child as one who “expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child’s actual experience with that parent.”¹⁴

Rejecting Gardner’s single focus on the evil alienator, Kelly and Johnston emphasized that “[t]here are multiple reasons that children resist visitation, and only in very specific circumstances does this behaviour qualify as alienation.”¹⁵ While indoctrinating behaviours are the norm in high-conflict custody-litigating families, only a small proportion of children actually become alienated.¹⁶ Thus, “alienating behaviour by a parent is neither a sufficient nor a necessary condition for a child to become alienated.”¹⁷ Kelly and Johnston also acknowledged that evidence on long-term effects of parental alienation is weak¹⁸ and rejected the automatic custody transfers proposed by Gardner. For them, a custody transfer would only be warranted in the rare cases where the alienating

¹³ See Kelly & Johnston, *supra* note 9.

¹⁴ *Ibid* at 251.

¹⁵ *Ibid*.

¹⁶ Janet R Johnston, “Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child” (2005) 38:4 Fam LQ 757 at 765.

¹⁷ Kelly & Johnston, *supra* note 9 at 249.

¹⁸ See Johnston & Kelly, “Commentary on Walker et al”, *supra* note 10 at 86–87.

parent has serious parental deficits and the rejected parent provides a better alternative.¹⁹

PARENTAL ALIENATION AND DOMESTIC VIOLENCE

Many domestic and family violence scholars are skeptical of the parental alienation belief system. They have described it as “simply one more attempt to blame mothers without considering fathers’ abuse of power and control.”²⁰ Why this mistrust?

One major problem lies in plain sight in the origins of parental alienation syndrome. Not only is Gardner infamous for his misogynistic and pro-pedophilia takes,²¹ he also emphasized false allegations of sexual violence as a common alienating tactic,²² making parental alienation syndrome a ready tool to disprove allegations of family or domestic violence.²³ The idea that mothers program children to fear their fathers reinforces myths regarding

¹⁹ See *ibid* at 87.

²⁰ Walker & Shapiro, *supra* note 10 at 275.

²¹ See Jennifer Houlton, “The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy” (2006) 26:1 Child Legal Rts J 1 at 18ff.

²² Gardner, “Recent Trends in Divorce and Custody Litigation”, *supra* note 6; Gardner, *The Parental Alienation Syndrome*, *supra* note 7; Richard A Gardner, “Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse-Neglect” (1999) 27:2 Am J Fam Therapy 97; Richard A Gardner, *True and False Accusations of Child Sex Abuse* (Cresskill, NJ: Creative Therapeutics, 1992); Gardner, “Parental Alienation Syndrome”, *supra* note 4.

²³ See Meier, “A Historical Perspective”, *supra* note 10.

family violence, marginalizes concerns for children's safety, and puts women who denounce domestic violence at risk of losing custody.²⁴

The shift to parental alienation has not soothed all concerns: for some commentators, parental alienation and parental alienation syndrome remain “more similar than different.”²⁵ Researchers have noted that in Quebec, professionals often use “parental alienation” and “parental alienation syndrome” interchangeably,²⁶ and that professional publications “identif[y] domestic violence as a context that fosters the emergence of ‘alienating behaviours’ and increases the risk of ‘parental alienation.’”²⁷ They also noted “evidence that post-separation violence [is] generally ignored in the

²⁴ See e.g. Simon Lapierre & Isabelle Côté, “Abused Women and the Threat of Parental Alienation: Shelter Workers’ Perspectives” (2016) 65 *Child Youth Services Rev* 120; Amy Neustein & Michael Leshner, *From Madness to Mutiny: Why Mothers Are Running From the Family Courts—And What Can Be Done About It* (Lebanon, NH: University Press of New England, 2005); Walker, Brantley & Rigsbee, *supra* note 10.

²⁵ Meier, “A Historical Perspective”, *supra* note 10 at 246. The author qualifies parental alienation as “old wine in new bottles.” Newer models of parental alienation are also described as “improved science but more bad policy” (Bruch, “Getting It Wrong”, *supra* note 10 at 541) or as successive heads of the parental alienation syndrome hydra that keep spouting up every time one is chopped (Amy Neustein & Michael Leshner, “Evaluating PAS: A Critique of Elizabeth Ellis’s ‘A Stepwise Approach to Evaluating Children for PAS’” (2009) 6:3/4 *J Child Custody* 322 at 322).

²⁶ Simon Lapierre et al, “The Legitimization and Institutionalization of ‘Parental Alienation’ in the Province of Quebec” (2020) 42:1 *J Soc Welfare & Fam L* 30 at 42.

²⁷ *Ibid* at 40.

[professionals'] understanding of 'parental alienation' and in their promotion of father-child contact."²⁸

Thus, despite the shift to a new paradigm, an "abuse victim who attempts to limit contact to an abuser may [still] be deemed hostile and unfriendly and punished for her protestations and vigilance."²⁹ As Linda Neilson explains in the Canadian context, there are systemic biases "against mothers/primary care givers and against domestic violence evidence in the cases that endorse parental alienation theory."³⁰ Protective mothers, she explains, are placed in a "horrifying double bind":

if the parent insists on presenting evidence of domestic violence or child abuse in order to protect the children she risks her efforts being categorized as attempts to alienate the children from the other parent. She may even face loss of primary care or even contact with her children. She thereby places her children at risk. If the protecting parent fails to present such evidence to the court, she also places the children at risk because the court making the custody and access order will have no knowledge of potential risks to children.³¹

²⁸ *Ibid.*

²⁹ Peter G Jaffe & Claire V Crooks, "Understanding Women's Experiences Parenting in the Context of Domestic Violence: Implications for Community and Court-Related Service Providers" (St. Paul, MN: Violence Against Women Online Resources, 2005) at 4.

³⁰ Neilson, *Parental Alienation Empirical Analysis*, *supra* note 2 at 46.

³¹ *Ibid* at 35.

Courts' obsession with parental alienation also remains problematic due to the lack of scientific evidence on alienation's long-term harm to children.³² By contrast, there is considerable evidence that children suffer from being exposed to domestic violence.³³ Yet some courts view alienation as trumping violence and remove custody from the child's preferred parent—the mother—even when they believe her claim that the father was violent towards her.³⁴

Parental alienation thus equips violent fathers with a blame-deflecting tool: often, “once alienation is alleged, abuse allegations become merely a reason to explore alienation, and the focus on safety concerns is lost.”³⁵

The problems raised by reciprocal allegations of domestic violence and parental alienation (“cross-claim” cases) are not marginal, although they remain understudied in Canada. In a study of 250 Quebec family cases involving domestic violence allegations, 15.6 percent mentioned

³² See Johnston & Kelly, “Commentary on Walker et al”, *supra* note 10 at 84.

³³ See Evan Stark, “Rethinking Custody Evaluation in Cases Involving Domestic Violence” (2009) 6:3/4 J Child Custody 287 at 289.

³⁴ See Joan S Meier, “US Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?” (2020) 42:1 J Soc Welfare & Fam L 92 at 99 [Meier, “US Child Custody Outcomes”].

³⁵ Meier, “Getting Real About Abuse and Alienation”, *supra* note 1 at 225.

parental alienation.³⁶ In another Canadian study, Susan Boyd and Elizabeth Sheehy found that intimate partner violence was alleged in a third of alienation cases. Only in 10 percent of those cases was intimate partner violence articulated as relevant to the child's best interests. Most of the time, the allegation of intimate partner violence was instead mentioned but not resolved, or intimate partner violence was deemed irrelevant, characterized as a one-off occurrence, or mutualized as simple "conflict."³⁷ There are real concerns that the parental alienation belief system exacerbates the already problematic attitudes of the legal system towards domestic violence. In fact, feminist researchers and practitioners have documented countless horror stories where an accusation of parental alienation led to unfair, dangerous, and frankly shocking results.³⁸

Against this background, my study purports to further explain the relationship between parental alienation and domestic violence by interrogating the "disappearance" of domestic violence in alienation cases.

³⁶ See Dominique Bernier & Catherine Gagnon, *Violence conjugale devant les tribunaux de la famille: enjeux et pistes de solution* (Fédération des maisons d'hébergement pour femmes, 2019) at 25.

³⁷ See Sheehy & Boyd, *supra* note 3 at 83–87.

³⁸ See e.g. Meier, "Getting Real About Abuse and Alienation", *supra* note 1 at 228–229.

**THE STUDY: EXAMINING APPELLATE AND
FIRST-INSTANCE CASES OF PARENTAL
ALIENATION**

Studies on parental alienation cases in Canada often either explicitly exclude Quebec³⁹ or use English search terms and common law databases,⁴⁰ even though parental alienation seems to be particularly popular in Quebec.⁴¹ My recent paper on all parental alienation decisions rendered in Quebec in 2016⁴² is still, to my knowledge, the only study of the jurisprudence in that province. There I observed that:

- 1) parental alienation is frequently used in Quebec custody decisions;
- 2) mothers were more than twice as likely as fathers to be accused of alienation;
- 3) judges appear unaware of the concurrent models and controversies regarding parental alienation;
- 4) the jurisprudence is highly inconsistent and unscientific; and
- 5) the behaviours considered to be alienating are not the same across genders.

³⁹ See e.g. Sheehy & Boyd, *supra* note 3.

⁴⁰ See e.g. Bala, Hunt & McCarney, *supra* note 2.

⁴¹ See Lapierre et al, *supra* note 26; Lapierre & Côté, *supra* note 24.

⁴² See Zaccour, “Parental Alienation in Quebec Custody Litigation”, *supra* note 2.

In the face of all these problems, there is still a lot to uncover, especially as the interaction of domestic violence with parental alienation claims in Quebec jurisprudence has not yet been closely examined.⁴³

This study is thus positioned directly at the intersection of parental alienation and domestic violence (assuming they are distinct streets to begin with). It stems from the observation that the prevalence and meaning of domestic violence in parental alienation cases are hard to ascertain.⁴⁴ While parental alienation theorists may see domestic violence as an exception—a reason, perhaps, to exclude a finding of alienation—most domestic violence scholars see the two issues as closely interrelated. In fact, shelter workers in Quebec report that the threat of parental alienation accusations is one of their main concerns!⁴⁵

Existing literature demonstrates that allegations of intimate partner violence tend to receive insufficient scrutiny⁴⁶ and trigger problematic assumptions about patriarchal violence, such as the myths that domestic violence causes little harm to the mother or child, that shared parenting is an appropriate goal in situations of family violence, and that domestic violence ceases with

⁴³ But see Lapierre & Côté, *supra* note 24.

⁴⁴ See for instance Zaccour, “Parental Alienation in Quebec Custody Litigation”, *supra* note 2 at 1103; Neilson, *Parental Alienation Empirical Analysis*, *supra* note 2 at 46.

⁴⁵ See Lapierre & Côté, *supra* note 24.

⁴⁶ See e.g. Linda C Neilson, “Spousal Abuse, Children and the Legal System”, Final Report for Canadian Bar Association, Law for the Futures Fund (March 2001).

separation.⁴⁷ Others have noted that mediators, evaluators, and judges do not grant domestic violence the attention that it deserves and that they may even conceal it.⁴⁸ Looking through series of cases involving the same family, I add to the argument that domestic violence is obscured in family law cases.

I decided to test whether domestic violence risked disappearing in parental alienation cases—that is, not being carried forward in family law decisions. This could help explain why advocates who examine the legal system’s response to alienation from the perspective of accused mothers see domestic violence as the major issue, while some researchers, who read reported cases in isolation and especially appellate cases, see domestic violence as a secondary concern.

To find out whether domestic violence disappears from alienation cases, I studied all decisions about parental alienation rendered by the Quebec Court of Appeal between 2010 and 2020.⁴⁹ Then, using CanLII’s case-history feature, as well as hints found in the decisions, I

⁴⁷ See Susan B Boyd & Ruben Lindy, “Violence Against Women and the BC *Family Law Act*: Early Jurisprudence” (2016) 35:2 Can Fam LQ 101 at 136–137.

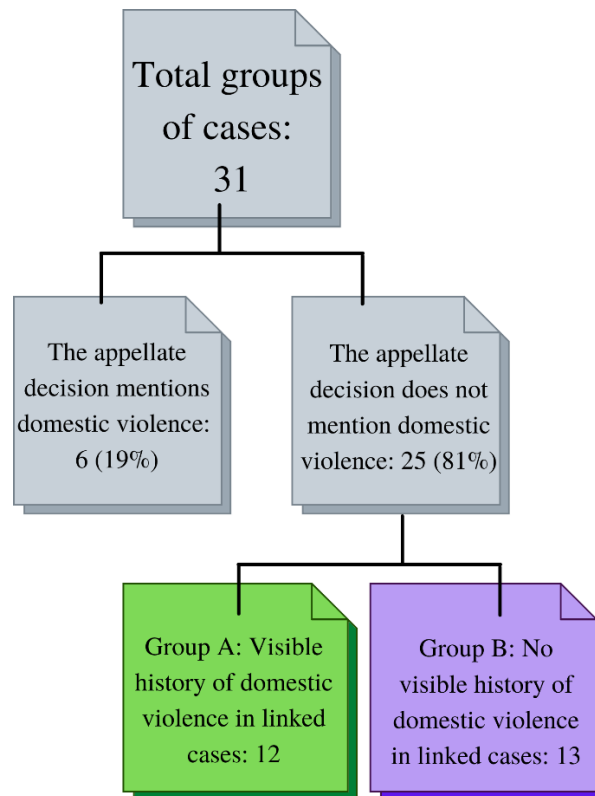
⁴⁸ See *ibid*; Mariachiara Feresin et al, “Family Mediation in Child Custody Cases and the Concealment of Domestic Violence” (2018) 33:4 *Affilia* 509; Sheehy & Boyd, *supra* note 3.

⁴⁹ I searched on SOQUIJ with the following terms: alienation OU aliéné OU aliénant OU alienated OU alienating. Cases had to be from the Quebec Court of Appeal and be labelled as “family” or “child protection.” Dates: between January 1, 2010 and March 31, 2020. I excluded instances where parental alienation was mentioned but not in relation to that case.

tried to find all previous cases involving the same family. For example, an appellate decision could lead me to seven first instance decisions involving the same family, constituting one group of cases. I then separated the groups of cases based on whether there was a history or allegation of domestic violence in any of the linked cases.⁵⁰

⁵⁰ I looked for mentions as well as cues of domestic violence, as it is not always mentioned explicitly. Occasionally, a judgment call had to be made, for example, coding one case as “no domestic violence” even though it included the father recording conversations between the mother and the child.

I arrived at the following distribution:



In the Group A cases (green box, 39 percent of the total selection), there is a history of domestic violence, or at least alleged domestic violence, but the appellate decision makes no mention of it. This is what I call the disappearance of domestic violence.

I note that within the Group A cases (green box), appellate decisions are more recent than within the Group B cases (purple box). In the first group, two thirds of the appellate cases were decided in 2018 or 2020; in the second

group, ten out of the thirteen are dated 2014 or earlier. This may well be due to chance, but it could also be that more violent fathers are gaining access to appellate courts, which is concerning. It may also be that there are many victims of domestic violence in both groups, but that abusers have become somewhat easier to denounce in recent years.

The rest of this article draws conclusions from the cases studied, focusing mostly on what the Group A cases—cases in which domestic violence disappeared at the appellate level—can teach scholars, practitioners, judges, custody evaluators, and other experts intervening in parental alienation cases. In my view, the disappearance of domestic violence in parental alienation is a serious cause for concern and reveals five major lessons:

- 1) Domestic violence is more prevalent than we think in parental alienation cases;
- 2) Domestic violence, alleged or proven at first instance, is often concealed on appeal;
- 3) Domestic violence should be properly identified in parental alienation cases;
- 4) Considering parental alienation while ignoring domestic violence is a form of gender bias; and
- 5) We cannot rely on a “domestic violence exception” to the parental alienation belief system.

**LESSON 1: DOMESTIC VIOLENCE IS MORE
PREVALENT THAN WE THINK IN PARENTAL
ALIENATION CASES**

An important debate among scholars who study parental alienation is how prevalent domestic violence is in cases where parental alienation is alleged. To simplify a complex debate: for some, an accusation of alienation is a weapon of choice for violent fathers who want to blame the mother and direct the court's attention away from their violence. For others, parental alienation is a useful concept in itself, and domestic violence is merely a special case—a reason not to apply, or perhaps to apply differently, the parental alienation framework.

My study confirms that domestic violence is not a mere exception or rare occurrence in parental alienation cases. Rather, it is the norm. If we look only at appellate cases mentioning parental alienation, we get the impression that only 22 percent of these cases are also about domestic violence. Yet looking under the surface to consider all the decisions in the family's litigation history reveals that at least 59 percent of cases involve a history or allegation of domestic violence. For reasons explained in the following section, even this high proportion is likely an underestimation. This means that appellate courts may see parental alienation as an issue unrelated to intimate partner violence, even as they are primarily dealing with families where there have been allegations of domestic violence.

This finding helps contextualize case law analyses of parental alienation and intimate partner violence. Previous studies have measured domestic violence in parental alienation cases as follows:

- Susan Boyd and Elizabeth Sheehy’s study of Canadian cases (except Quebec): there were allegations of intimate partner violence in 34 percent of the parental alienation cases studied.⁵¹
- My study of parental alienation cases in Quebec in 2016: there is an allusion to intimate partner violence or violence against the child in a quarter of the cases.⁵²
- Bala, Hunt and McCarney’s study of parental alienation cases between 1989 and 2008: the court found that there was no parental alienation, but rather justified estrangement due to abuse or violence, in 5 out of 175 total cases.⁵³
- John-Paul Boyd’s study of British Columbia cases: in 6 out of the 115 cases studied, “the court reached the decision that the child had become estranged from the rejected parent as a result of the parent’s actions.”⁵⁴
- Linda Neilson’s study of “357 Canadian trial and appeal cases in which parental alienation was claimed or found by a court”: 41.5 percent of parental alienation cases involved allegations of domestic violence and/or violence against the child.⁵⁵

⁵¹ See Sheehy & Boyd, *supra* note 3 at 83–87.

⁵² See Zaccour, “Parental Alienation in Quebec Custody Litigation”, *supra* note 2 at 1083.

⁵³ See Bala, Hunt & McCarney, *supra* note 2 at 167.

⁵⁴ JP Boyd, *supra* note 2 at 14.

⁵⁵ Neilson, *Parental Alienation Empirical Analysis*, *supra* note 2 at 3.

- Bryanne Harris's review of 100 Canadian cases:

allegations of domestic violence against the alienating parent were present in 33% of the cases and these allegations were substantiated in a finding of domestic violence in 6% of these cases. Allegations of domestic violence against the alienated parent were present in 38% of the cases, and these allegations were substantiated in a finding of domestic violence in 9% of the cases.⁵⁶

As we can see, there is an interest in finding out how prevalent domestic violence is in parental alienation cases, but it is hard to reach a consensus due to difficulties with the data and variation in methods. I hope to add a piece to the puzzle that brings a word of caution: whatever statistic we can extract on domestic violence within parental alienation cases, it is bound to be inexact and underestimated. The intractability of domestic violence in alienation cases has (or should have) important implications for judges and scholars.

LESSON 2: DOMESTIC VIOLENCE, ALLEGED OR PROVEN AT FIRST INSTANCE, IS OFTEN CONCEALED ON APPEAL

Out of eighteen groups of cases with traces of domestic violence, twelve—a full two thirds!—lost that context at

⁵⁶ Bryanne M Harris, *Assessing and Responding to Parental Alienation Cases: Does Gender Matter in Canadian Court Decisions?* (Masters Thesis, University of Western Ontario, 2014) at 19.

the appellate level. Even extreme violence can disappear: in *Droit de la famille — 19803*,⁵⁷ the Court does not mention the allegation, at first instance, of “extreme conjugal violence against [the mother] which led to severe depression, anxiety and post traumatic syndrome disorder.”⁵⁸ My finding that domestic violence tends to disappear from family cases challenges the popular belief, echoed in a 2007 decision by the Quebec Court of Appeal, that innocent fathers are unreasonably and categorically branded as “violent” in custody proceedings:

It seems to me that there is sometimes a certain drift in the meaning of the term [“violence”]—a drift that is not just semantic and that can in a sense contaminate one’s outlook on a case. This type of labelling, in addition to framing a case, can also contribute to exacerbating the frustration of the person so labelled, poisoning the relationship between the parties, and worsening an already difficult situation. Once pronounced, the word “violence” rarely disappears from the file, even when the proof of its existence is not made.⁵⁹

What explains, then, the disappearance of domestic violence in the cases studied? We can envision two scenarios: either the judges never received the information,

⁵⁷ *Droit de la famille — 19803*, 2019 QCCA 800.

⁵⁸ *Droit de la famille — 182879*, 2018 QCCS 5992 at para 3.

⁵⁹ *Droit de la famille — 072386*, 2007 QCCA 1418 at para 72 [translated by author, emphasis added].

or they chose not to include it in their decision. Both hypotheses suggest systemic problems about the legal system's response to male violence against women.

JUDGES ARE NOT TOLD ABOUT INTIMATE PARTNER VIOLENCE

When domestic violence is not pleaded before an appellate court or mentioned in the decision under appeal, a judge can still find out about it by looking through previous linked decisions, as I did. However, chances are the context will be lost. The literature reveals a myriad of reasons why domestic violence may not be pleaded before a court or why facts may be “lost in translation.”

One explanation is that men who are accused of domestic violence often retaliate with an accusation of parental alienation; therefore, women may hesitate to disclose domestic violence⁶⁰ or to insist on it on appeal. Protective actions, such as limiting contact with a violent ex-partner, can be labelled alienating behaviour.⁶¹ Moreover, merely saying that the father is violent, having

⁶⁰ See Lapierre & Côté, *supra* note 24 at 123; Feresin et al, *supra* note 48.

⁶¹ See Joyanna Silberg, Stephanie Dallam & Elizabeth Samson, “Crisis in Family Court: Lessons from Turned Around Cases”, Final Report to the Office of Violence Against Women, US Department of Justice (30 September 2013); Meier, “US Child Custody Outcomes”, *supra* note 34; Joan S Meier & Sean Dickson, “Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation” (2017) 35:2 *Law & Ineq* 311; Sandra Spelman Berns, “Parents Behaving Badly: Parental Alienation Syndrome In The Family Court—Magic Bullet Or Poisoned Chalice” (2001) 15:3 *Austl J Fam L* 191.

a negative view of the father, or showing animosity can be considered proof of alienation.⁶² In one of the cases where domestic violence disappeared, the first-instance decision cited an expert report that explicitly associated protective behaviours with parental alienation:

Ms. L . . . surely feels a lot of moral pain when she evokes especially her last years with Mr. M . . . The global picture then resembles what has been observed among **victims of psychological abuse**. Ms. L . . . presents herself with **an aura of victim**. This profile is to a certain extent compatible with her acts of affective protection towards her children. **This propension to affective protection can give rise to a process of parental alienation.**⁶³

The expert concluded that the children were alienated, even though there was no evidence that the mother openly denigrated the father.

Some studies suggest that mothers who denounce the father's violence receive worse custody outcomes.⁶⁴ Violent fathers are as likely as non-violent fathers to get

⁶² See e.g. Zaccour, "Parental Alienation in Quebec Custody Litigation", *supra* note 2.

⁶³ *Droit de la famille — 172056*, 2017 QCCS 3992 at para 49 [translated by author, emphasis added].

⁶⁴ See e.g. Silberg, Dallam & Samson, *supra* note 61.

custody,⁶⁵ even when their violence has been confirmed by professionals.⁶⁶ Women are also more than twice as likely to lose custody when they allege both sexual and physical violence against the child by the father compared to when they only allege sexual violence.⁶⁷ One shocking study found that women who inform mediators that the father has been violent towards them are less likely to obtain sole custody than the violent father.⁶⁸

Against this backdrop, we can understand why domestic violence may not be pleaded consistently through repeated interactions with the courts, especially if previous attempts to draw attention to the father's violence have proven useless or even backfired. While many believe the stereotype that mothers exaggerate or invent instances of

⁶⁵ See Dennis P Saccuzzo & Nancy E Johnson, "Child Custody Mediation and Domestic Violence" (2004) 251 Nat'l Inst Just J 21 at 22, online (pdf): <www.ncjrs.gov/pdffiles1/jr000251f.pdf> (reporting that "[f]athers who were accused of DV [domestic violence] were given primary custody in 10 percent of cases; non-DV fathers got primary custody 9 percent of the time"). See also Mary A Kernic et al, "Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence" (2005) 11:8 Violence Against Women 991 at 1006 (reporting that "[a]fter adjusting for relevant confounders, mothers in the IPV[intimate partner violence]-positive groups were no more likely than comparison group mothers to be awarded child custody").

⁶⁶ See Christine Harrison, "Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence" (2008) 14:4 Violence Against Women 381 at 395.

⁶⁷ See Meier, "US Child Custody Outcomes", *supra* note 34 at 97 ("2.5 times the odds").

⁶⁸ See Saccuzzo & Johnson, *supra* note 65.

domestic violence to win a custody battle, the reality is that women consistently under-disclose.⁶⁹

Some of the cases studied illustrate the risks of disclosing violence, in that a judge or expert recounts the mother's allegation with a negative or critical tone. For instance, in *Droit de la famille — 162424*, the mother appears stuck between the need to give the court a full portrayal of the father's parental capacity and the pressure to appear friendly and cooperative:

She denies with great detail having engaged in any form of parental alienation and she offers to continue the current status quo, that is, 50–50 shared custody. **Despite this offer**, the mother **nonetheless refers** to some episodes of violence by the father and of abusive language in the presence of their daughter.⁷⁰

Persisting in reporting domestic violence can be coded as stubbornness, especially when the mother lacks credibility—something that may happen precisely because of trauma symptoms.⁷¹ In some parental alienation cases, the more persistent the mother is in bringing evidence of

⁶⁹ Joan S Meier, “Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions” (2003) 11:2 Am U J Gender Soc Pol’y & L 657 at 684–685; Elizabeth M Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press, 2008) at 104–108.

⁷⁰ *Droit de la famille — 162424*, 2016 QCCS 4722 at para 12 [translated by author, emphasis added].

⁷¹ Jaffe & Crooks, *supra* note 29 at 9.

domestic violence to the court's attention, the more she is penalized. The negative sentiment towards mothers who continue disclosing domestic violence is revealed by subtly pejorative phrasing, such as “[t]he Mother continues to see herself as a victim of violence”⁷² or, as said of the same mother in a later case, “the mother persists in describing herself as a victim of conjugal violence.”⁷³ The expert's observation that the mother “presents herself with an aura of victim,”⁷⁴ in a case cited above, also connotes negative judgment.

The problem of course is that *not* disclosing domestic violence also puts mothers and children at risk. In the framing contest of cross-claim cases, victims of domestic violence are damned if they do, damned if they don't.

Finally, it is worth also mentioning that appellate courts may fail to pick up on a context of domestic violence because of impoverished or distorted facts. Domestic violence is often euphemized, disguised, or presented as simple conflict.⁷⁵ Therefore, courts may be unaware that domestic violence is being discussed. An example is a case that speaks of “inappropriate conduct towards the

⁷² *Droit de la famille* — 10936, 2010 QCCS 1745 at para 138.

⁷³ *Droit de la famille* — 123572, 2012 QCCS 6542 at para 12 [translated by author].

⁷⁴ *Droit de la famille* — 172056, 2017 QCCS 3992 at para 49 [translated by author].

⁷⁵ Michaël Lessard & Suzanne Zaccour, “Quel genre de droit? Autopsie du sexisme dans la langue juridique” (2017) 47:2/3 RDUS 227.

mother,”⁷⁶ an expression that blurs violence and conflict. The euphemistic discourse on domestic violence may contribute to its disappearance on appeal.

INTIMATE PARTNER VIOLENCE IS JUDGED IRRELEVANT

Another possible scenario is that judges were made aware of the father’s violence but did not deem it relevant or important enough to warrant mention. Of course, there is nothing wrong about appellate courts not recounting every fact proven or alleged at first instance, particularly if the question at stake is merely procedural. However, all the cases considered did mention the context of parental alienation. Because of the relationship between domestic violence and claims of parental alienation, the loss of an important part of the context is unfortunate.

How can domestic violence be considered not worth mentioning? In family law, there is a prevalent belief that domestic violence is unimportant, based on the twin myths that domestic violence stops after separation or does not affect the child.⁷⁷ These myths put women and children at risk, especially given the *Divorce Act*’s command that “the court shall not take into consideration the past conduct

⁷⁶ *Droit de la famille — 182288*, 2018 QCCS 4677 at para 27 [translated by author].

⁷⁷ See Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons From The Transcripts* (Vancouver: UBC Press, 2013) at 221; Peter G Jaffe, Nancy KD Lemon & Samantha E Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (Thousand Oaks, CA: Sage, 2003) at 9; Fiona Kelly, “Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family” (2009) 21:2 Can J Women & L 315 (at e.g. 334).

of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.”⁷⁸ The Supreme Court has also affirmed that reprehensible parental conduct is irrelevant “unless it relates to the ability of the parent to meet the needs of the child.”⁷⁹ The custodial parent’s safety concerns are entirely marginalized. In *Droit de la famille — 19698*,⁸⁰ the Court of Appeal goes a step further, stating that parental alienation is relevant to the analysis:

Yet the Supreme Court specified in *Goertz* that “[p]arental conduct, however meritorious or however reprehensible, does not enter the analysis unless it relates to the ability of the parent to meet the needs of the child.” This will be the case, for example, **when the parent behaves in a way akin to parental alienation** or tries to prevent

⁷⁸ *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 16(9). New amendments to the *Divorce Act* are due to come into force in 2021. Section 16(5) will then state that “[i]n determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.” *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, SC 2019, c 16, s 12.

⁷⁹ *Gordon v Goertz*, [1996] 2 SCR 27 at para 21, 134 DLR (4th) 321.

⁸⁰ Note that this case was not counted in the statistics for this study because parental alienation was not mentioned in relation to its facts.

contacts between the other parent and the child.⁸¹

In cross-claim cases, the parent who alleges alienation is privileged over the parent who alleges domestic violence, and this may explain the concealment of the latter.

We can see domestic violence being filtered out in a case allowing the father's appeal of a decision granting the mother unsupervised access. The appeal judgment recounted how the Director of Youth Protection has been involved with the family since the child was eight months old. Summarizing the decision to declare the child's situation compromised, the Court of Appeal wrote: "Justice Perreault underscores that the Director of Youth Protection alleges that the mother has unresolved antecedents of negligence and that the father has a drug addiction problem."⁸² That decision by Justice Perreault, however, had also noted the father's domestic violence:

At the time of the report, the father had completed a therapy for his drug addiction. **He is described as impulsive and violent.** He has antecedents of drug trafficking and possession of narcotics. After a four-year relationship, the father had found a new apartment, but, in fact, he still lived with the mother. The mother justified the father's

⁸¹ *Droit de la famille — 19698*, 2019 QCCA 731 at para 15 [translated by author, emphasis added].

⁸² *Droit de la famille — 162895*, 2016 QCCA 1914 at para 4 [translated by author].

behaviour, not realizing **the violence of which she was victim.**⁸³

In summarizing relevant facts pertaining to the father's situation, the Court of Appeal thus focused on drug consumption instead of domestic violence. We don't know that this questionable summary impacted the custody outcome, but the choice of relevant facts is puzzling, to say the least. It suggests that domestic violence might not be what makes an impression on judges deciding on a child's care.

I hasten to point out that, of course, the factors I have discussed can also apply at first instance. This means that even the cases where there are no signs of domestic violence at any level (the Group B cases) can be cases where domestic violence has "disappeared" because it was not pleaded or was found irrelevant.

Indeed, other studies have observed the euphemizing, distorting, and erasing of domestic violence at trial as well as in the mediation process.⁸⁴ In fact, in one of the cases studied, the Court of Appeal criticized the first-instance judge for paying insufficient attention to the testimony regarding the father's violence towards one of

⁸³ *Protection de la jeunesse – 121767*, 2012 QCCQ 10587 at para 5 [translated by author, emphasis added].

⁸⁴ See Suzanne Zaccour, "Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes" (2018) 31:1 Can J Fam L 57 [Zaccour, "Crazy Women and Hysterical Mothers"]; Lessard & Zaccour, *supra* note 75; Feresin et al, *supra* note 48; Neilson, *supra* note 46 at 127; Neilson, *Parental Alienation Empirical Analysis*, *supra* note 2; Sheehy & Boyd, *supra* note 3.

his ex-partners.⁸⁵ Domestic violence is minimized and ignored at all court levels and at all stages of the legal battle.

LESSON 3: DOMESTIC VIOLENCE SHOULD BE PROPERLY IDENTIFIED IN PARENTAL ALIENATION CASES

We have seen that courts fail to identify domestic violence in alienation cases. Why does it matter? In this section, we see the difference that intimate partner violence can or should make when properly identified and considered.

The first thing to note is that the mere fact that violence against the mother (or child) is mentioned does not mean it will be taken seriously. Judges and experts can still minimize, excuse, and neutralize family violence, like in one case where the father's violence is discounted because the child can recall "only three events."⁸⁶

Nonetheless, domestic violence often has the potential to change the nature of the case under study. This will be illustrated with a few sets of cases.

First, consider the case *Droit de la famille — 181055*. Here the father appealed from a judgment granting custody to the mother; he asked for a stay of the provisional execution of the judgment.⁸⁷ The Court of Appeal granted the stay, something which is possible only in narrow

⁸⁵ *Droit de la famille — 161960*, 2016 QCCA 1300 at para 98.

⁸⁶ *Droit de la famille — 20117*, 2020 QCCA 150 at para 40 [translated by author].

⁸⁷ See *Droit de la famille — 181055*, 2018 QCCA 806 at paras 1–2.

circumstances.⁸⁸ Reading the facts, we see a case about false abuse allegations, a common trope in parental alienation discourse:

there has been intense and acrimonious litigation between the parties since their separation in 2010 respecting custody and access to their two children . . . There is no doubt that the relationship between the parties has been both toxic and troubling. There have been numerous judgments in this file and many experts have been involved in preparing lengthy reports. **There have also been numerous interventions by Youth Protection and the police—largely at the request of the respondent mother—all of which have concluded that the complaints made against the appellant father were unfounded.**⁸⁹

The court also cited part of a previous decision which blamed the mother for cutting the father out of her and her children's lives. After going through these facts, the court discounted current allegations of child abuse: "this is not the first time that Y has alleged physical abuse by his father. All past similar claims have been dismissed by Youth Protection as unfounded and presumably resulting from prompting by the respondent mother."⁹⁰ The twelve-year-old child's wishes were similarly given little

⁸⁸ See *ibid* at paras 4–5.

⁸⁹ *Ibid* at para 9 [emphasis added].

⁹⁰ *Ibid* at para 15.

importance: “This is not the first time Y has indicated that he wishes to live with his mother, though the record shows that he has changed his mind about this time and time again.”⁹¹ The court concluded that “a serious and irreparable prejudice will result from Y being removed from his father and that the balance of inconvenience favours granting the stay and thus maintaining the status quo [of joint custody].”⁹²

What we read is a case about the worst kind of alienation: a mother making up child-violence allegations to prevent a child from having a relationship with their father.

But the case is coloured by the choice of facts to be recounted and repeated. The exclusion of domestic violence from these facts makes the mother’s behaviour appear irrational.

Looking through first-instance decisions associated with the same family, we see another potential narrative emerging. One first-instance decision not only described allegations of violence, but also characterized the mother’s description as truthful:

The Mother has a lot of complaints about the Father being manipulative. I have already said it, it is true that he has involved the children in the proceedings. He can be violent and yell. He is an emotive, angry man who is capable of making threats. **All of this I**

⁹¹ *Ibid* at para 18.

⁹² *Ibid* at para 20.

believe. He has insulted the Mother and has done so in the presence of the children. He has shown contempt towards her several times. His attitude towards her is often contemptuous. I have seen it even in court. These are, as I have said, serious problems. But I am of the view that, in the circumstances of this case, this does not affect the father's capacity to have custody.⁹³

Ironically—but as often happens in cases involving domestic violence—the father's behaviour is actually alienating behaviour: insulting the mother in the presence of the children, showing disdain towards her, implicating the children in the dispute.⁹⁴ Yet, even as the father is shown to be both violent and potentially alienating, he is found to be a capable father.

Another first-instance decision implicating the same family, rendered one year later, found the father in contempt “for having repeatedly sent emails to the [mother]” in breach of a court order.⁹⁵ The father was ordered to pay a punitive \$1100.⁹⁶

The case that seemed to be about an acrimonious mother who makes baseless complaints of child violence becomes, with another choice of facts, the story of a father

⁹³ *Droit de la famille — 114423*, 2011 QCCS 7548 at para 48 [translated by author, emphasis added].

⁹⁴ See Meier, “A Historical Perspective”, *supra* note 10 at 234 for the proposition that violent partners employ “alienating” behaviours.

⁹⁵ *Droit de la famille — 17473*, 2017 QCCS 947 at para 1.

⁹⁶ See *ibid* at para 14.

who harasses the mother, alienates the child, and disrespects court orders.

A second and similar example of a case's transformation is *Droit de la famille — 20370*.⁹⁷ Again, there is no mention of domestic violence in the appeal decision: the case is about false accusations of violence against the child. Yet, looking through the first-instance decision, we find at least one instance of domestic violence in the presence of the child. In this case, despite allegations that the father had been violent *and* despite alienation by the mother remaining unproven, custody was entrusted to the father. The Court wrote: “Even though there isn't any proof of parental alienation by the Mother, the Court finds a certain scent of alienation by the Mother.”⁹⁸

Why do these cases matter? False and malicious allegations of child violence are the emblem of parental alienation. Yet, allegations of child violence that seem inexplicable suddenly make a lot more sense (or a different sense) once domestic violence is recounted, especially as we know that intimate partner violence and child violence often co-occur.⁹⁹ The cases described above testify to the importance of contextualizing behaviour that appears alienating and testing the concurrent explanation of

⁹⁷ *Droit de la famille — 20370*, 2020 QCCA 418.

⁹⁸ *Droit de la famille — 191105*, 2019 QCCS 2367 at para 73 [translated by author].

⁹⁹ See e.g. Carolyn Copps Hartley, “The Co-occurrence of Child Maltreatment and Domestic Violence: Examining Both Neglect and Child Physical Abuse” (2002) 7:4 *Child Maltreatment* 349.

domestic and family violence. Domestic violence changes the narrative, if not always the outcome.

Similarly, the multiplication of procedures that signal “high conflict” in the parental alienation paradigm can be interpreted differently in the context of intimate partner violence. Excessive litigation may itself be domestic violence in the form of court-related harassment and economic violence by the parent with more means. It can also be explained by the protective mother being desperate to shield the child from the violent father, even if the costs are high and her chances are low. Courts must correctly identify and interpret these scenarios, or else they will continue being a tool for post-separation control.

Courts should also be wary of chastising both parties or encouraging mediation in response to excessive litigation. In *Droit de la famille — 111373*, a case where there is no mention of domestic violence in the appeal decision, the Court writes:

Each parent going back to a more conciliatory approach would no doubt be beneficial for all the people involved. In matrimonial matters, more than in any other, court decisions are not the only way to resolve difficulties. Reasonable agreements between the parties, under the sign of mutual understanding and respect, have virtues that

the best judicial orders could never replace.¹⁰⁰

Suggesting conciliation to a mother who, according to a previous decision, sees herself as a victim of domestic violence,¹⁰¹ disregards the woman's perspective and assumes her capacity to negotiate on an equal footing with her ex-partner.

A DIVIDED CASE: PARENTAL ALIENATION VERSUS DOMESTIC VIOLENCE

For a powerful example of why domestic violence must be identified and named, I now turn to the only divided appellate decision within my sample.

*Droit de la famille — 112019*¹⁰² is an appeal from a decision giving the father custody of two young children (a two-year-old and a four-year-old) following the mother's relocation. The majority judges dismissed the appeal; the dissenting judge would have allowed it and returned the custody of the children to the mother.

The majority judges start their decision with a minimalistic recounting of the facts that does not include domestic violence:¹⁰³

- the parties are in their early twenties;

¹⁰⁰ *Droit de la famille — 111373*, 2011 QCCA 889 at para 35 [translated by author].

¹⁰¹ See *Droit de la famille — 123572*, 2012 QCCS 6542 at para 12.

¹⁰² *Droit de la famille — 112019*, 2011 QCCA 1308.

¹⁰³ See *ibid* at paras 9–16.

- they lived together less than three years;
- the father did not see much of the children in the first year after the separation (the appellate judges do not say why—the reader might assume it is the mother’s fault, considering the role that parental alienation takes in the decision);
- the parties agreed that the mother would have custody;
- the mother met a man on the internet;
- the mother and children moved in with the new boyfriend in a new city; and
- the parties agreed that the children would be with the father for one week every two months.

Moving on to the trial judge’s decision to grant custody to the father,¹⁰⁴ the appellate judges note, with approval, what the trial judge observed based on the evidence before him:

- the mother-child bond seems “very strong” but “not necessarily positive” or “healthy” if the mother tries to exclude the father;¹⁰⁵
- the children love both parents;¹⁰⁶
- the trial judge fears alienation by the mother, and the father is more open to the mother’s involvement;¹⁰⁷
- there are not only negative, but also positive, elements in the psychological evaluation of the father;¹⁰⁸

¹⁰⁴ See *ibid* at para 17.

¹⁰⁵ See *ibid* at paras 28, 29.

¹⁰⁶ See *ibid* at para 31.

¹⁰⁷ See *ibid* at paras 31, 34.

¹⁰⁸ See *ibid* at para 35.

- while the father is far from perfect, he has changed¹⁰⁹ (but we do not know from what he has changed, as the appellate judges still have not mentioned domestic violence);
- the mother became infatuated with a stranger by chatting online, did not consider the children's interest, moved in with him, and robbed the children of their father;¹¹⁰ and
- the children will develop better relationships with their extended family if the father has custody.

After going through the trial judge's reasoning, the majority judges conclude that there was no error warranting intervention.

This analysis, and especially the recounting of the facts, obscures the real nature of the case: custody is granted to the mother's violent ex-partner, despite an agreement between the parents that the mother would have custody, to punish her for moving in with a new boyfriend. The difference that a more complete recounting of the facts can make is evidenced by the dissenting judge's decision.

Indeed, the dissenting judge sees things very differently. For him, it is unthinkable to deprive toddlers of their caring mother without serious cause: the trial judge's decision goes against the children's best interest.¹¹¹

¹⁰⁹ See *ibid* at para 40.

¹¹⁰ See *ibid* at para 47.

¹¹¹ See *ibid* at para 60.

The dissenting judge goes deeper into the facts and tells a different story:

- the parties lived together and had a first child;¹¹²
- while the mother was pregnant with their second child, the father assaulted her; she had to flee and find refuge with the father's parents;¹¹³
- the mother gave birth to her second child while the parties were still separated;¹¹⁴
- a criminal complaint was lodged against the father,¹¹⁵ and
- the father recognized these facts and agreed not to contact the mother or the children.¹¹⁶

In the dissenting judgment, these facts are very important. The mother recounted, and the father admitted, that it was not the first time that he was violent towards her. Domestic violence is relevant not only to explain why the father did not see the children following the separation, but also as an important factor in itself.¹¹⁷ For the dissenting judge, domestic violence, an issue ignored by the majority, is relevant to the father's parental capacity.

Moving on to the mother's decision to move to a new city, the dissenting judge once again tells the facts

¹¹² See *ibid* at para 61.

¹¹³ See *ibid* at para 62.

¹¹⁴ See *ibid*.

¹¹⁵ See *ibid* at para 63.

¹¹⁶ See *ibid*.

¹¹⁷ See *ibid* at para 73.

quite differently than the majority and trial judges. The paragraph is worth citing in full as it shows the mother's behaviour as understandable and reasoned:

After the separation, the appellant was 25 years old and was raising her two children alone. She evidently wished to start over and meet a man. She was lucky as she fell in love with a man who lived in city D. Unfortunately, he could not leave [the region of city D] to come live in city G. For her own happiness and for her children's, the appellant decided to go live in city D with her lover. Before leaving city G, she tried to communicate with the respondent via the Internet to reach an agreement regarding access rights. . . . [B]ut there was no agreement and so the respondent introduced a motion to institute proceedings to obtain custody of the children.¹¹⁸

Moreover, referencing the psychological report on the father, the dissenting judge cites the expert's observation that the father could become violent towards the children if he had to care for them for a long period.¹¹⁹

These facts set the stage for a very different analysis of the children's interests and the trial judge's errors. The risk of paternal violence alone, in my view, should put an end to any question of granting custody to the father, yet the majority judges do not even mention it.

¹¹⁸ *Ibid* at para 69 [translated by author].

¹¹⁹ See *ibid* at para 74.

As the dissenting judge finds, a father who (1) is prone to violence and (2) never cared for the children, either emotionally or financially, should not be granted custody.¹²⁰ The trial judge erred because he could not accept that the twenty-five-year-old mother was entitled to move forward with her life, with a man she met on the internet.¹²¹ He found the mother not credible, even though it was the father who lied,¹²² and he relied on other illogical findings.¹²³ The dissenting judge further observes that separating the children from the mother to favour occasional contact with grandparents is unjustified.¹²⁴

Interestingly, the dissenting judge looks at the children's interest by placing himself in their shoes:

Since the two children cannot express themselves, the [trial] judge should have put himself in their place and considered that the appellant is a loving and devoted mother, that the children have always been with her since their birth [...]. Putting myself in the place of the two children, I would not have much desire to go live with a man who assaulted my mother, who harassed her and threatened her,

¹²⁰ See *ibid* at paras 74, 78.

¹²¹ *Ibid* at para 81.

¹²² *Ibid* at para 88.

¹²³ *Ibid* at para 107.

¹²⁴ *Ibid* at para 93.

and who even invited my mother's partner to engage in a fist fight with him.¹²⁵

Echoing my comments above that domestic violence explains seemingly alienating behaviour, the dissenting judge finds that intimate partner violence explains and justifies the mother not wanting to see the father:

The judge blames the appellant for baptising Y without asking for the respondent's opinion. Considering that both parties are catholic, the failure to consult the father is not very relevant. Moreover, **considering that when the mother was pregnant she was assaulted by the respondent, one can understand that she did not wish to see him.** Perhaps she could have advised him of the date and the time of the religious ceremony, but she certainly did not have the obligation to invite him to the party that followed the religious ceremony. It is not unhelpful to say that the appellant did invite the respondent's parents to the party—parents with whom she is on good terms—even though that is not the case for the respondent.¹²⁶

Because violent men often denigrate their ex-partner, domestic violence is also relevant to the issue of denigration, which is often taken as a sign of parental

¹²⁵ *Ibid* at para 91 [translated by author].

¹²⁶ *Ibid* at para 96 [translated by author, emphasis added].

alienation: “Actually, given the behaviour of the respondent up to now and his character, I am much more concerned that the respondent will speak badly of the appellant than that the appellant will destroy the respondent’s image in the children’s mind.”¹²⁷

Even though the father is likely to be violent *and* alienating towards the children, it is the mother who loses custody. As is often the case within the twisted logic of parental alienation, the goal is supposedly to protect the children’s relationship with *both* parents, but in fact courts sacrifice the children’s bond with their primary caretaker to protect their non-existent relationship with an unfit father.¹²⁸

There is nothing surprising about courts telling the facts in a way that supports their conclusion. Yet the majority judges’ refusal to even acknowledge domestic violence puts the case firmly within the parental alienation paradigm. The majority judges can then present a selfish mother who moved for no good reason and are relieved from having to justify their controversial use of parental alienation in a context of violence. By contrast, the dissenting judge’s recounting of the facts shows a protective mother who tried to move on from a violent relationship and was punished for it—a mother who had

¹²⁷ *Ibid* at para 106 [translated by author].

¹²⁸ See Meier, “A Historical Perspective”, *supra* note 10 at 243. On the importance afforded to protecting (and even developing) fathers’ relationships with children (even over safety concerns), see Fiona Kelly, “Enforcing a Parent/Child Relationship at All Cost? Supervised Access Orders in the Canadian Courts” (2011) 49:2 *Osgoode Hall LJ* 277.

three excellent reasons to justify her sole custody: domestic violence, the parties' previous agreement, and proven capacity to take care of the children as the primary and even sole caretaker.

In family cases, we rarely get the benefit of seeing a case from two diametrically opposed angles. Dissents are rare, and so are successful appeals. This case thus provides a precious window into what family cases could look like if domestic violence were mentioned and given the centre stage it deserves.

LESSON 4: CONSIDERING PARENTAL ALIENATION WHILE IGNORING DOMESTIC VIOLENCE IS A FORM OF GENDER BIAS

Gender bias is an important theme in the parental alienation literature, and scholars debate the extent to which the parental alienation belief system penalizes mothers. Studies consistently show that mothers are more likely than fathers to be accused of alienation, yet some explain away the gender imbalance by stating that “differences in gender are [simply] reflective of custody and child care arrangements.”¹²⁹ In other words, because parental alienation is more often perpetrated by the custodial parent, and because mothers are often the custodial parent, any gender bias is merely apparent.

While it is true that custodial parents are more likely to be accused of alienation (as it is a strategy to get a change in custody), parental alienation is still articulated in ways that show gender bias. In my study of Quebec

¹²⁹ Bala, Hunt & McCarney, *supra* note 2 at 167.

parental alienation cases, for instance, I found that only women were found alienating based on passive or unconscious behaviours, such as feeling emotions or resentment, being overprotective, and asking the court not to order contact with the father.¹³⁰ Alienating fathers had engaged in tangible and concrete alienating behaviour outside of court.

Another facet of gender bias that appears clearly with this study is the privileging of the alienation story over the domestic violence story.¹³¹ Since mothers are more likely to be accused of parental alienation and fathers more likely to be accused of domestic violence, privileging parental alienation is gender bias. The preference for parental alienation cannot be justified by a desire to protect children—even leading alienation theorists recognize that the long-term effects of alienation on children are purely speculative,¹³² contrary to the effects of exposure to domestic violence. In other words, gender bias is also bias towards the male narrative.

The bias towards the parental alienation story is especially problematic in cross-claim cases, but it is most evident in some cases where the mother accuses the father of both alienation and domestic violence.

¹³⁰ See Zaccour, “Parental Alienation in Quebec Custody Litigation”, *supra* note 2 at 1103.

¹³¹ This is also discussed in Meier, “Getting Real About Abuse and Alienation”, *supra* note 1.

¹³² See Johnston & Kelly, “Commentary on Walker et al”, *supra* note 10 at 84.

An example can be found in *Droit de la famille* — 103138. The first-instance decision recounted that “the mother had to call the police many times. The father was following her despite a restraining order. There are three criminal charges pending against the father following complaints by the mother.”¹³³ Despite this context of intimate partner violence, it is the risk of parental alienation that survived on appeal. The domestic violence issue went unmentioned in the summary of the trial judge’s decision:

Even though [the judge] considers that [the father] has a good relationship with X, she is of the view that if the child remains in Quebec, **the evidence shows that there is a risk of parental alienation.** The [father’s] actions during the last few months indicate that this possibility exists and justify the judge’s conclusions considering the available evidence.¹³⁴

In another case, the mother alleged at trial “extreme conjugal violence against her which led to severe depression, anxiety and post traumatic syndrome disorder (PTSD).”¹³⁵ The trial judge minimized the issue: “The fact that the mother suffered PTSD and serious depression as a consequence of the toxic relationship she had with

¹³³ *Droit de la famille* — 103756, 2010 QCCS 6843, SOQUIJ AZ-50721040 at para 27.

¹³⁴ *Droit de la famille* — 103138, 2010 QCCA 2143 at para 16 [translated by author, emphais added].

¹³⁵ *Droit de la famille* — 182879, 2018 QCCS 5992 at para 3.

Monsieur is not a reason in itself to grant her custody.”¹³⁶ The judge found that whether there was parental alienation by the father was “not an easy question to answer,”¹³⁷ but that there was “definitively” a conflict of loyalty.¹³⁸ On appeal, domestic violence was not mentioned—neither by the court nor, it seems, by the appellant mother.¹³⁹ The grounds of appeal exclusively relate to alienation.

Privileging the parental alienation story over the domestic violence story can lead to dramatic consequences, as the two frameworks focus on very different risks and values. The horror stories abound in the literature: to prevent the loss of a parent, courts endanger the child and separate them from their other parent. In one of the cases studied, the mother was sentenced to six months of incarceration for not bringing the adolescent children to a summer camp, when the children themselves were refusing to go! The Court of Appeal quickly suspended the execution of the judgment by finding that there were procedural irregularities and that the sentence was excessive.¹⁴⁰ Nonetheless, a decision rendered the following year reveals that the mother, who had not had any contact with her son for more than two years, still could not resume contact.¹⁴¹ The potential negative consequences of a finding of parental alienation cannot be exaggerated.

¹³⁶ *Ibid* at para 32.

¹³⁷ *Ibid* at para 35.

¹³⁸ *Ibid* at para 36.

¹³⁹ See *Droit de la famille — 19803*, 2019 QCCA 800.

¹⁴⁰ *Droit de la famille — 12551*, 2012 QCCA 501.

¹⁴¹ *Droit de la famille — 133731*, 2013 QCCS 6621.

Gender bias already existed in family courts before the rise of parental alienation theory. This means that mothers must not only cope with the threat of parental alienation accusations, but also with a broader context in which women are easily disbelieved and pathologized.¹⁴² Contrary to the popular belief that mothers get easy wins in family courts, the cards are actually stacked against them from the very start.¹⁴³

**LESSON 5: WE CANNOT RELY ON A
“DOMESTIC VIOLENCE EXCEPTION” TO THE
PARENTAL ALIENATION BELIEF SYSTEM**

My study supports the argument that domestic violence cannot be treated as a mere exception in parental alienation cases. First, domestic violence is more like the norm than the exception, given the high proportion of cases in which traces of domestic violence allegations can be found. Second, the decision to apply the parental alienation framework unless there is domestic or family violence cannot work when violence is concealed. Thus, we cannot expect to solve the problems with parental alienation theory with rules regarding parental alienation (such as disregarding a child’s wishes or forcing contact) that apply unless there is domestic violence.

This conclusion should be seriously considered not only by judges and lawyers, but also by experts, evaluators, and actors in the child protection system.

¹⁴² See Zaccour, “Crazy Women and Hysterical Mothers”, *supra* note 84.

¹⁴³ See Meier, “A Historical Perspective”, *supra* note 10 at 245.

Recall that many scholars have exposed parental alienation as primarily a means of refuting claims of domestic violence.¹⁴⁴ Others see domestic violence and parental alienation as existing independently: Drozd and Olesen, for instance, say that domestic violence and parental alienation can coexist and that both hypotheses must be tested to discover the reason for a relationship problem.¹⁴⁵

In Kelly and Johnston's theory, "[c]hildren who are realistically estranged from one of their parents as a consequence of that parent's history of family violence, abuse, or neglect need to be clearly distinguished from alienated children."¹⁴⁶ But is it enough to distinguish parental alienation from realistic estrangement, given that Quebec courts do not consider the estrangement explanation before concluding that a parent is alienating?¹⁴⁷ As Joan Meier notes, "[v]irtually every article about alienation and abuse . . . gives lip service to this principle: that if abuse is real, then alienation is not."¹⁴⁸ But since unsubstantiated allegations of violence are

¹⁴⁴ See Meier, "Getting Real About Abuse and Alienation", *supra* note 1 at 221. See also Peter G Jaffe, Claire V Crooks & Nicholas Bala, "A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes" (2009) 6:3/4 J Child Custody 169 at 176.

¹⁴⁵ See Leslie M Drozd & Nancy Williams Olesen, "Is It Abuse, Alienation, and/or Estrangement?: A Decision Tree" (2004) 1:3 J Child Custody 65.

¹⁴⁶ Kelly & Johnston, *supra* note 9 at 253.

¹⁴⁷ See Zaccour, "Parental Alienation in Quebec Custody Litigation", *supra* note 2 at 1073, 1107.

¹⁴⁸ Meier, "Getting Real About Abuse and Alienation", *supra* note 1 at 242.

considered proof of alienation, and since women are blamed for “overreacting” even when domestic violence is proven, the problem remains.

For Meier, models that ask evaluators to choose between alienation and violence are dangerous, because “[t]reating parental alienation as an equivalent concern to abuse in custody-litigating families . . . inherently devalues abuse allegations.”¹⁴⁹ She recommends assessing abuse first “whenever there are allegations of abuse,”¹⁵⁰ and evaluating alienation only “after abuse has been screened out.”¹⁵¹ She adds that “[w]here abuse allegations are not confirmed, the allegations themselves may not be treated as evidence of alienation.”¹⁵² Other good-faith protective actions, such as calling child protection or taking the child to therapy, should also be excluded from the definition of alienation.¹⁵³ Meier’s suggestions are indispensable if we want to minimize the injustices caused by the parental alienation belief system.

I propose to go one step further: concerns about domestic violence should *always* be at the forefront, whether or not it is alleged. Courts facing cases of alleged parental alienation should know that, even if there is no trace of it in the file, domestic violence can still be present. They cannot rule out domestic violence simply because the

¹⁴⁹ *Ibid* at 221.

¹⁵⁰ *Ibid* at 242.

¹⁵¹ *Ibid* at 220.

¹⁵² *Ibid* at 243.

¹⁵³ *Ibid* at 230.

mother has not mentioned it or because it is not otherwise apparent.

Practically speaking, screening for domestic violence must happen in every case, even when domestic violence is not alleged.¹⁵⁴ For example, when courts are faced with allegedly alienating behaviours by a mother,¹⁵⁵ they should first ask whether her behaviour could be explained by domestic violence and whether it would be consistent with an attempt to protect herself and her child. Even when domestic violence cannot be confirmed despite active screening, legal professionals might still want to pause to consider what their practices and the rules they apply would mean if the mother and child were victims of undisclosed violence.

More generally, we also need to think about how the law and influential scholars define parental alienation. For family law to adequately ensure women's and children's safety, a series of unlikely steps must succeed: domestic violence must be alleged, identified, resolved, and properly dealt with. This is not the reality of our courts. Thus, the legal community cannot assume that domestic violence will simply sort itself out. A conscious effort must be made to develop legal rules that are sensitive to that (potentially hidden) context.

¹⁵⁴ This would be akin to the duty of family dispute resolution professionals in British Columbia to screen for family violence under the *Family Law Act*, SBC 2011, c 25, s 8.

¹⁵⁵ I found no trace, in any of the cases read, of disappearance of domestic violence against the father.

There are excellent arguments for simply eliminating the concept of parental alienation from family law. But if courts and evaluators are to use it, then we need a definition that accounts for domestic violence. The law and theory of parental alienation—from its definition to its consequences—should be constructed bearing in mind undisclosed domestic violence. This is far from the case now, as behaviours such as asking for full custody, moving to a women’s shelter, or saying that the father is dangerous can all be considered alienation.

If we cannot obtain a framework for parental alienation that works for cases of undisclosed domestic violence—a framework which will ensure mothers’ and children’s safety—then it is indeed time to retire the concept.

CONCLUSION

Elsewhere, I have argued that the right way to think about and construct family law rules is to prioritize domestic violence concerns and to treat situations of intimate partner violence as paradigmatic rather than exceptional cases.¹⁵⁶ The importance of centring domestic violence is all the more relevant in parental alienation cases, given the concept’s frequent use by violent fathers and its history as a tool to marginalize mothers’ safety concerns.

Parental alienation scholars reject this method and defend their theory by saying that it does not apply to

¹⁵⁶ See Suzanne Zaccour, “All Families Are Equal, but Do Some Matter More than Others: How Gender, Poverty, and Domestic Violence Put Quebec’s Family Law Reform to the Test” (2019) 32:2 Can J Fam L 425.

circumstances of family violence. But despite the appearances, domestic violence cannot be treated as an exceptional case—not in family law generally, and even less in parental alienation cases. In this study of alienation cases at the appellate level, 78 percent of the cases appeared to have no allegation or trace of domestic violence, yet previous decisions involving the same family revealed that at least 59 percent of alienation cases involved an issue of domestic violence. We must be very conscious of the risk that appellate courts—and the judges and scholars who read them—will see parental alienation as an issue unrelated to domestic violence, while parental alienation remains *primarily* alleged in domestic-violence-related cases.

My article thus sends a word of caution to scholars and judges who believe in treating “pure” parental alienation cases differently from cases with cross allegations of domestic violence and parental alienation. We cannot think about parental alienation without considering domestic violence, and this applies even within theories in which a finding of domestic violence excludes a finding of parental alienation.

Parental alienation and domestic violence are not separate fields of study.

