REMEDIES IN CANADIAN PARENTAL ALIENATION CASES: TURNING TO TORT LAW FOR SUPPORT

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Abstract

This thesis provides an avenue to remedy some of the harms associated with parental alienation for rejected parents – an issue that is inadequately addressed by Canadian family law cases. One of the major functions of the legal system is to allow injured parties the opportunity to seek recourse. This thesis questions whether the prevailing approach to parental alienation is capable of providing justice to rejected parents.

Family law centres on the best interests of children, a vulnerable group whose needs should be prioritized and protected. Parental alienation disputes destroy meaningful relationships between children and capable parents, but family law focuses on the best interests of children to the exclusion of all other interests, including a rejected parent's interest in justice. This thesis questions whether, given the harm done to rejected parents, that exclusion can be justified in cases of parental alienation.

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Introduction

In August 2021, I had an appointment with my family physician, Dr. X (pseudonym). During this visit, Dr. X asked me about my future career plans and what I would be working on during the fall of that year. I informed him that I was starting my Research Master of Laws (LL.M.) at Osgoode Hall and that I would be researching parental alienation, specifically, how Canadian courts are handling parental alienation disputes. As soon as I gave this brief synopsis of my Master's research, Dr. X said, "all of my patients who have gone through a divorce tell me that they have been alienated from their child. This is an issue that affects so many people." This brief exchange not only gave me confidence in the value of my proposed project but also made me realize just how pervasive and insidious this issue is in Canadian family law.

Parental alienation is not a new phenomenon. When relationships dissolve, children are routinely placed in an uncomfortable and uncertain position – feeling uneasy about new living arrangements, familial dynamics, their parent's relationship going forward, and potentially, a different parental figure (i.e. stepparent). Parents who prioritize the needs and feelings of their children help their children navigate this time of transition. Other parents use separation as a tool for division, brainwashing, and alienation, turning their children against that parent's former spouse for illegitimate reasons (as will become clear, parental alienation is distinct from genuine parental *estrangement,* wherein a child severs ties with one or both of his or her parents for legitimate reasons). The first chapter of this thesis provides insight into contemporary definitions of the term parental alienation, how Canadian courts treat parental alienation cases, and the gendered dimensions of this concept. Ultimately, this chapter casts doubt on whether the existing remedies used by Canadian courts are sufficient to deter future instances of parental alienation and if existing remedies address the plight, hurt, and need for justice of the rejected parent.

When a finding of parental alienation is made, courts have used three remedies routinely. First, courts have ordered parental education programs, where the alienator parent is introduced to resources about the negative effects of alienation behaviour, with the hope that providing information and "education" will alter the course of that parent's conduct.[1] Parental education programs are limited to cases of "mild" alienation and predicated on the belief that an alienator parent has the desire to change their behaviour and has insight into the damaging consequences that parental alienation has on children.[2] Most parental alienation cases are not "mild" in nature[3] and most alienator parents are too entrenched in their views and unlikely to alter their behaviour in an optional educational forum. In fact, some alienator parents are unlikely to alter their behaviour in a mandatory forum.[4] The second option that is frequently used by courts are orders for reconciliation therapy. This remedy involves an alienated child and rejected parent interacting with a therapist in order to develop techniques for effective communication and relationship repair.[5] Reconciliation therapy has been met with significant controversy in the court system. Some judges have determined that reconciliation therapy fits within the definition of treatment stipulated by the *Health Care Consent Act* and therefore requires the consent of the participants.[6] Other judges have determined that requiring children to participate in a therapeutic process without the requisite consent undermines the importance of having children involved in decisions that affect them.[7] Other judges have found that reconciliation therapy is not "treatment" within the

[1] Demosthenes Lorandos et al., *Parental Alienation: The Handbook for Mental Health and Legal Professionals* (Springfield: Charles C Thomas Publisher Ltd., 2013) at 135-136 [Lorandos].
[2] *Ibid*.
[3] Richard A Gardner, "Recommendations for Dealing with Parents who Introduce a Parental Alienation Syndrome in their Children" (1998) 28:3 J Divorce Remarriage 1 at 7-8 [Gardner].
[4] *X v Y*, 2016 ONSC 545 at para 117; *X v Y*, 2017 ONSC 1617 at paras 33-40.
[5] Hillary Vessel, "Parental Alienation and Reconciliation Therapy: Moving Toward Healthy Families" (2017) 88 Pa B Ass'n Q 185 at 187–188 [Vessel].
[6] *Barrett v Huver*, 2018 ONSC 2322 at paras 41, 43 [*Barrett*]; *Health Care Consent Act, 1996*, SO 1996, c 2, Sched A, s 10 [*HCCA*].
[7] *L(N) v M(RR)*, 2016 ONSC 809 at para 113 [*L(N)*].

meaning of the *Health Care Consent Act*; rather, it provides alienated children and rejected parents with the tools to regain a healthy and meaningful relationship.[8] This reasoning rests on the assumption that reconciliation therapy poses little to no risk of harm to alienated children and should not be viewed as treatment requiring consent.[9] Third, courts can alter the custody arrangement, moving the alienated child from the full-time care of the alienator parent into the full-time care of the rejected parent. Placing a child in the full-time care of a parent who they have been trained to despise can result in exceedingly negative outcomes including the child exhibiting violent behaviour, running away from home, and threatening suicide.[10] Sometimes, judges take the opposite approach and decide to retain the existing custody arrangement, leaving the alienated child in the full-time care of the alienator parent.[11] The rationale behind this choice is essentially that the child is so entrenched in his or her alienated views that altering the custody arrangement will do little to change his or her outlook.[12] Interestingly, all of the frequently-used remedies mentioned above do little to repair or otherwise redress the harm caused to the rejected parent as a result of the alienator parent's malicious conduct. This thesis takes issue with the paramountcy and singular focus of the best interests of the child principle in Canadian family law to the exclusion of considerations about the harm faced by the rejected parents as a result of being alienated from their children. The vital issue that I am exploring in this thesis is an alternative way for courts to approach parental alienation disputes – one that does justice to the rights of parental victims of parental alienation.

[8] *Leelaratna v Leelaratna*, 2018 ONSC 5983 at para 66 [*Leelaratna*].
[9] *Ibid* at para 84.
[10] *WC v CE*, 2010 ONSC 3575 at paras 106, 134 and 164 [*WC*].
[11] *L(N)*, *supra* note 7 at para 140.
[12] *Ibid*.

Psychological research shows that when a child is alienated from a capable, loving, nurturing parent, that child's life is significantly altered in both the short-term and the long-term.[13] In the short-term, alienated children experience feelings of hatred towards the rejected parent and express no desire to mend a relationship with the rejected parent.[14] These strong feelings of anger, disdain and negativity are tantamount to brainwashing, leaving an alienated child psychologically compromised and vulnerable. In the long-term, alienated children are at a greater risk of developing substance abuse disorders including alcoholism and drug addiction, as well as depression and anxiety disorders and trouble with intimate relationships.[15] Similarly, rejected parents experience mental health struggles as a result of losing the relationship with their child.[16] Interestingly, the majority of research about the psychological consequences of parental alienation behaviour focusses on damage and injury to the alienated child as opposed to the rejected parent. This general lack of research about the health "outcomes" of rejected parents coincides with the general lack of legislation and caselaw addressing the rejected parent's injuries and how these individuals can seek legal recourse.

The second chapter of this thesis explores the intrinsic value attached to parenting and comments on the monumental loss that comes with losing a child to parental alienation. Aristotle, for example, links what it means to live a "good life" with being happy.[17] For him, the ultimate goal of human existence is to achieve as many happy experiences and encounters as possible.[18]

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[13] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 F Ct Rev 249 at 260-264 [Kelly & Johnston].
[14] *Ibid*.
[15] Amy LJ Baker, "The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study" (2005) 33:4 Am J Fam Ther 289 at 292 [Baker].
[16] Saulyn Lee-Maturana et al., "Understanding Targeted Parents' Experience of Parental Alienation: A Qualitative Description from Their Own Perspective" (2021) 49:5 Am J Fam Ther 499 at 507 [Maturana].
[17] Carlotta Capuccino, "Happiness and Aristotle's Definition of Eudaimonia" (2013) 41:1 Philos Top 1 at 3 [Capuccino].
[18] Jerome Moran, "Aristotle on Eudaimonia" (2018) 48:1 Think 91 at 94 [Moran].

One way for individuals to engage in a life-giving, happy pursuit, is through participating in the role of a parent. Being a parent confers significant benefits for an adult, including being the recipient of unconditional love, laughter and insight.[19] All of these intangible gifts have the potential to provide a parent with fulfillment, enlightenment and therefore, happiness. In parental alienation cases, the intimacy, love, affection and meaning that a parent receives from actively engaging in their role as a parent is suddenly ripped away. Canadian family law in its current form does not account for the significant loss faced by the rejected parent because of the exclusive emphasis placed on the best interests of the child principle.

The final chapter of this thesis explores the potential for tort law to address the loss, damage and injury attached to losing a child as a result of alienation. Specifically, I am arguing that in cases of parental alienation, courts should recognize a tort of parental alienation. This would serve as a mechanism for the rejected parent to seek economic recovery for the trauma, grief, and loss attached to being alienated from their child. The use of tort law to remedy a "novel" harm is not unprecedented. In fact, in 2022, the case of *Ahluwalia v Ahluwalia* created the tort of family violence to recognize a pattern of controlling, abusive, and coercive conduct.[20] Justice Mandhane, the author of this foundational decision, emphasized that tort law must evolve to more suitably recognize and respond to the current realities of relationship dysfunction.[21] Although the reasoning offered by Justice Mandhane was direct, powerful, and "novel", tort law claims are not uncommon in family law cases. The torts of intentional infliction of nervous shock, assault, battery, and

[19] Andrew E Clark et al., *The Origins of Happiness: The science of well-being over the course of life* (Princeton: Princeton University Press, 2018) at 211-233 [Clark].
[20] *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 (CanLII) at para 52 [*Ahluwalia*]. Note, this case is currently being appealed.
[21] *Ibid* at paras 58-70.

cyberbullying have all been seen in family law disputes.[22] Additionally, innominate intentional torts have been used in family law decisions to provide legal redress to an injured party.[23]

I am relying on the civil recourse theory of tort law to craft a tort for parental alienation. This theory primarily acknowledges the importance of giving an injured individual a forum to confront the party who has wronged them.[24] Compensation (awarding an injured plaintiff money), deterrence (discouraging tortious conduct) and punishment (reprimanding harmful behaviour) are still elements of civil recourse theory, however, they are secondary goals to holding the tortious party accountable for their conduct. As such, a tort of parental alienation will primarily serve to acknowledge the hurt experienced by rejected parents. Secondarily, a tort of parental alienation will serve as a way to punish behaviour that attempts to destroy important parent-child relationships, and to use compensation to deter future instances of alienation. All subsequent discussions about punishment, deterrence, and compensation should be read with the ultimate goal of accountability in mind.

[22] For intentional infliction of nervous shock see *McLean v Danicic*, 2009 CanLII 28892 (ON SC). For assault see *Dhaliwal v Dhaliwal*, 1997 CarswellOnt 5774 (OCJ). For battery see *Costantini v Costantini*, 2013 ONSC 1626 (CanLII). For cyberbullying see *Yenovkian v Gulian*, 2019 ONSC 7279 (CanLII).
[23] *Cant v Cant*, 1984 CanLII 2157 (ON SC); *Lajoie v Kelly*, 1997 CanLII 22783 (MB QB).
[24] Benjamin C Zipursky, "Civil Recourse, Not Corrective Justice" (2012) 91:3 Geo LJ 695 at 735 [Zipursky].

Chapter 1 – How are Canadian courts currently approaching parental alienation disputes?

Imagine this. You grow up in a small town in Eastern Ontario, with few financial resources and opportunities. Your family is governed by traditional gender norms and roles; men are responsible for earning a wage while women are responsible for raising children and taking care of the household. Neither of your parents had the ability to pursue post-secondary education, however, they both encouraged you to leave your small town and explore your interests. You excel in literature and history courses during high school and decide to pursue women's studies as your undergraduate degree.

During your final year of high school, you start dating a classmate. This person has been a close friend of yours for the previous three years of high school. You know him and his family well. He is charismatic, personable, intelligent and athletic. He is unafraid to express his emotions and tell you about how he feels. In fact, he is usually the first one to cry during "sad movies". This is a rare quality, which you have not seen from the men in your life. It is something that attracts you to him. You decide to keep your relationship going and head off to university together. Throughout your four years of university, your relationship is generally positive, so much so, that during your final year, your boyfriend proposes to you. You say yes. You graduate with a women's studies degree and begin working in public policy. Your fiancée receives a degree in engineering. He finds a decent-paying job in his field immediately after graduation. Shortly after your marriage, you get pregnant and give birth to a beautiful baby boy. Your child means everything to you so much so that you decide to give up your career in public policy to be a stay-at-home mother.

Following the birth of your son, your husband's behaviour starts to change. He becomes controlling and paranoid. He says that he needs to know where you are at all times and starts monitoring your phone calls, text messages and spending habits. It appears that he is somewhat jealous of the close relationship between you and your son. On several occasions, he says to you

that he is feeling abandoned and neglected. "Our son has taken my privileged spot", he declares. What begins as controlling behaviour escalates to emotional abuse and then physical abuse. Essentially, you become trapped inside your home, unable to socialize with your friends or extended family. Your access to joint bank accounts is severed. One night, an argument erupts over your husband's controlling behaviour. This time, the conversation is nastier than normal. It becomes so toxic that physical assault occurs. You decide that this is the limit of what you will tolerate. Not only is this a safety issue for you, it is also a safety issue for your son. If your husband is capable of doing this to you during the heat of an argument, what else is he capable of? Maybe he will inflict this type of violence on your son? As a result of the escalating abuse in your relationship, you decide that it is time to leave. You plan your exit strategically for several weeks. The opportunity to leave presents itself when your husband is on a business trip out of the province. You pack some of your belongings and move to your friend's house with your son. You leave a note for your husband, telling him that you need some time and space and that you will contact him when you are ready. When your husband returns from his business trip, he reads the note and flies into a rage. He contacts everyone you know (parents, cousins, aunts, uncles, friends, previous employers, distant acquaintances) in an attempt to get in touch with you. His attempts are not simply limited to phone calls. In fact, he finds the addresses of the people on his "contact list" and shows up unannounced and uninvited at their front doors. Eventually, he finds you and begs you to come back to him. He says that things will be different going forward. That he will be less possessive and controlling. That he will never hit you again. Part of you believes that his behaviour will be different this time around, so you agree to give your relationship another chance. Within one month after rekindling this relationship, your husband reverts back to his manipulative, controlling and abusive tactics. He hits you one more time. Once again, you decide to leave,

realizing that you cannot function in such a toxic environment. When you leave this time, you are determined to never go back to him again.

The story doesn't end there. Your ex-husband stalks and harasses you for years. You try to involve the police to obtain a restraining order, but they are of little assistance. "You were the one who ended the relationship, he just needs time to heal. Just give him some time to get over his pain", they declare. He refuses to leave you alone, constantly phoning your cell phone even when you get a new number, mailing disturbing love letters to your address and renting an apartment on the same street. You tell your child that he should not have contact with his father. He is abusive, cruel, and has had an enormous negative impact on your life. You believe wholeheartedly that your child is unsafe when he is around your ex-husband. To some extent, you "encourage" your child to hate his father. Your ex-husband takes you to court where a judge is impressed by his charisma and charm. He believes that you have alienated your child against his father. You tell the judge that you have been living is a state of immense distress over the last several years because of your ex-husband's stalking. Unfortunately, there is a very limited "record of abuse" for the judge to review so he is unpersuaded by your allegations of abuse and stalking. The judge orders for you to have no contact with your son for three months while you attend therapy to address your alienating behaviour.

Imagine this. You are an ambitious, dedicated and successful female surgeon. You have been very academically driven your entire life, graduating at the top of your class during both your undergraduate degree and medical school. Becoming a surgeon requires many years of post-secondary education and a long and gruelling residency program. You decide to delay having a child under you are in your mid-thirties; female residents who get pregnant during residency are traditionally frowned upon by supervising physicians. Although this practice is discriminatory and sexist, you feel like you really don't have a choice but to obey this unwritten "rule".

During residency, you meet your partner. He is also training to become a surgeon. There is instant compatibility between the two of you. Your relationship evolves from casual dating to boyfriend and girlfriend, to engagement and ultimately, marriage. You have two beautiful children, a son and a daughter. Both of you are committed and loving parents, who prioritize the health and wellbeing of your children above everything else. When your children are young, your relationship is strong and flourishing. As your children grow older, you and your husband become more distant and detached. It seems like all of your discussions revolve around the children, their needs and their interests. The two of you have lost the intimacy that was once the bedrock of your relationship. Your husband's behaviour begins to change and you sense that something is off with him.

Unfortunately, your husband has an affair with another woman. When you discover the affair, you are understandably devastated. You and your husband try to work things out. He assures you that the affair was meaningless and that he wants to make things right with you. You forgive him for this transgression. A few months later, you discover that your husband hasn't been forthright and transparent about his behaviour. In fact, he has not had an affair with just one woman; you discover half a dozen women have had a relationship with your husband while you were married to him. With this overwhelming amount of evidence, you decide that it is time to

leave him. Shortly after your separation, your ex-husband is suspended from his surgery position as a result of a complaint to the College of Physicians and Surgeons of Ontario (CPSO). The stress of this complaint changes your ex-husband's behaviour significantly. He becomes angry and insecure. During his license suspension, he is unable to earn a living wage. He starts to fixate on the fact that your surgical career is thriving while he is waiting on the sidelines with a bruised reputation and ego. In an attempt to "get back at you" for your success, he chooses to turn your children against you. He tells your children that you are a "bad mother" who does not care about them. During one visit, your daughter falls while walking down the stairs of your home, which results in a bruise to her forearm. When your daughter returns to her father's home, he is exceedingly concerned about this bruise. He interrogates you relentlessly and does not believe your version of events. From here, he accuses you of abusing your children and files a complaint with the children's aid society. Your children resist seeing you and staying at your home. They say that they "hate you" and think that you are a "bad mother".

Imagine this. You fall in love, get married, have a child (not necessarily in that order). Your child is your world. Every action you take and every move you make are done with your child in mind. Raising a child is stressful and overwhelming, especially as a young adult. Invariably, the demands and responsibilities of parenting put a strain on your marriage. You and your partner become distant and detached. You begin to argue. Not just about parenting responsibilities and styles, but everything. Having a child has made you realize how different you are from your partner. You attempt to go for counselling to save your marriage. Ultimately, therapeutic intervention does not remedy the problems in your marriage. You decide that the appropriate next step is a separation, which is a mutual decision. The separation does not go well. Both parents "compete" to have more time with their child, wanting their child to see them as the "better parent". They also both try to make their ex-partner jealous. These petty tactics emphasize that something unsavoury is brewing in this relationship.

Approximately one year after your separation, you begin to date again. You find a partner who you are more compatible with. You have more in common. You are both goal-oriented, ambitious, hard-working and compassionate. When your ex-spouse finds out about your new relationship, they are furious. You begin to receive threatening letters and insults. Time with your child is withheld by your ex-spouse. The threats escalate in intensity, until you are eventually denied all contact with your child. When you try to reach your child, she says that she "hates you and wants nothing to do with you." You involve a lawyer in an attempt to regain parenting time. Your former partner also retains a lawyer. A number of outrageous allegations are made by your ex-spouse outlining why your child should not see you. These allegations include that you suffer from a sexually-transmitted disease and that you are an "unfit" parent. The court process is long, arduous and expensive and does not provide much relief or resolution. Even though the judge finds

the allegations egregious, your parenting time is implemented sporadically and it is inconsistently followed by your former partner. One day, you show up to your ex-spouse's house and knock on the door. No one answers. Oddly, no car is in the driveway. You peer through the front window but don't see any furniture. Suddenly, you feel a pit in your stomach and begin to hyperventilate. Where has your child gone? You contact all of your mutual friends and acquaintances to see if anyone has information about your child's whereabouts. No one knows anything. You try everything imaginable to find your child but none of your attempts are successful. Like a ghost, the most important person in your life is gone. The pain that you feel is unimaginable and indescribable. It is a pain that you experience every day, without fail.

Fifteen years later, you receive a Facebook friend request from a name you don't recognize. When you examine the profile picture more closely, the person's facial features look familiar. "Oh my god, it's my daughter!" you exclaim. You communicate back and forth through Facebook and decide to connect in-person – so much time has been lost. You are optimistic that you can have a relationship with the person you have been desperate to find for so many years. The in-person "sit-down" is not what you expected. Both of you are nervous, uneasy and confused. You really don't know what to say or do. Neither does your child. It is clear that there are two profoundly damaged people sitting across from one another. Even though both of you have approached this interaction with good intentions, it is unclear how to move forward or if "moving forward" is even possible.

It is revealed that fifteen years earlier, your ex-spouse moved to Florida. Your daughter was told that you were occupied with your new partner and "didn't love her anymore". Your daughter believed this whole-heartedly. She began to hate you and blame you for the problems in her life. This type of behaviour was encouraged by your ex-spouse. It is difficult to rebuild a broken

relationship when there are so many lies. When over a decade has passed. When your lives are so different. When so much has been lost.

Unfortunately, this is not simply a hypothetical scenario. It is an experience that so many people can relate to or have experienced. For me, this "story" is even more personal. In fact, this situation mirrors what a close family member went through approximately thirty years ago. The relationship between this individual and their child has never recovered, despite repeated attempts and enormous financial and emotional sacrifices.

Each of the aforementioned scenarios on pages eight to fifteen have raised problematics that are seen in Canadian family relationships. The first chapter of this thesis will provide some insight into what Canadian family law is equipped to deal with and where Canadian family law falls short of protecting the interests of both vulnerable children and loving, "good" parents who are capable of caring for their children. First, this chapter will define parental alienation, provide an overview of common behaviours seen by alienator adults and alienated children and outline the remedies that are frequently used once a finding of parental alienation is made. This chapter will also discuss case law involving judges who have chosen to deviate from the "commonly-used" remedies in parental alienation disputes. Finally, this chapter will comment on the gendered-nature of parental alienation cases and the scholarly research which has examined this gendered phenomenon. Ultimately, this chapter will make us reflect on whether the remedies used by courts in parental alienation cases accurately and adequately address this devastating problem.

Parental alienation cases are complicated, devastating and increasingly prevalent in the Canadian family court system. The complexity, conflict and trauma involved in parental alienation disputes have drawn a significant amount of commentary, especially over the last decade. Some scholars argue that courts are ill-suited to handle the breadth and depth of these cases, asserting that parental alienation should be assessed clinically.[25] Other scholars state that courts are best positioned to deal with parental alienation matters, however, the remedies implemented often fall short of what is necessary for meaningful relationship repair.[26] Another group of scholars focus on the reasons that parents alienate, arguing that this analysis is entirely absent from parental

[25] Benjamin D Garber, "Parental Alienation in Light of Attachment Theory: Consideration of the Broader Implications of Child Development, Clinical Practice, and Forensic Process" (2004) 4:1 J Child Custody 49 at 63 [Garber].
[26] Matthew J Sullivan & Joan B Kelly, "Legal and Psychological Management of Cases with an Alienated Child" (2001) 39:3 Fam Court Rev 299 at 302 [Sullivan & Kelly].

alienation judgements.[27] A final group of scholars believe that children's sincerely-held wishes need to be respected and therefore, these children should not be required to spend time with a parent that they despise, for legitimate or illegitimate reasons.[28] Regardless of the view(s) advocated for by parental alienation scholars, we know that parental relationships that are damaged through alienation conduct result in significant emotional scars for both alienated children and rejected parents.

This first chapter will provide a comprehensive definition for parental alienation, an overview of the remedies that parental alienation disputes attract and information about the charged, gendered nature of the parental alienation phenomenon.

"The hardest part of losing a child is everyday afterwards." - Anonymous

Traditionally, this quote is understood in the context of a child dying, where a parent is forced to cope with a monumental tragedy, however, loss is so much more complicated than just death. Parents involved in family law litigation routinely argue about child custody and access issues (currently known as decision-making authority and parenting time respectively). Sometimes, these disputes are high-conflict, bringing out the worst in dueling parents, seeming to support anything but a child's best interests. Parental alienation cases are examples of these types of cases. In fact, when a parent is alienated from their child, this is often considered as painful as losing a child from disease or accident. Having to watch your child grow from afar while knowing that your child hates you represents an indescribable pain and an incalculable loss. This pain cuts at

[27] 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 [Sheehy & Boyd].
[28] Laurence Steinberg & Elizabeth Cauffman, "Maturity of judgement in adolescence: Psychological factors in adolescent decision-making" (1996) 20:3 Law Hum Behav at 253 [Steinberg & Cauffman].

the core of a parent's being, often making it difficult for that parent to live a "normal" life. The loss of a child does not just happen in a morgue.

Parental alienation is a serious issue, which has become increasingly prevalent in Canadian family law cases.[29] Parental alienation is a family law concept where a child unreasonably rejects one of their parents, at the persuasion of the child's other parent. In 1949, Wilhelm Reich, a psychoanalyst, coined the term parental alienation, stating that divorce aggravates issues arising from pre-existing personality differences.[30] The angry parent chooses to damage the character of their spouse, turning the child against that parent.[31] This psychological manipulation results in a wide spectrum of damaging behaviour, including the child refusing to see the rejected parent and expressing disdain for the rejected parent.[32] Core to the definition of parental alienation is that the child's behaviour is incommensurate with the conduct and parenting style of the rejected parent. In fact, most rejected parents are considered by courts to be "good" parents, capable of providing nurturing and supportive care to their children.[33] Notably, cases of parental alienation are distinct from cases of estrangement, when a child rejects a parent for legitimate reasons, including abuse and neglect. In fact, the term estrangement is known as "realistic estrangement" in family law literature.[34] Parental alienation, by definition, always involves a child's *irrational* and *unfounded* rejection of their parent.

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[29] A search of CanLII using the term "parental alienation" revealed that between January 1, 2018 and December 31, 2022, there were 567 decisions. Between January 1, 2013 and December 31, 2017, there were 500 decisions. Between January 1, 2008 and December 31, 2012, there were 360 decisions. Between January 1, 2003 and December 31, 2007, there were 176 decisions.

[30] Wilhelm Reich, *Character Analysis*, 3rd ed (New York: Orgone Institute Press, 1949) at 575 [Reich].

[31] Judith S Wallerstein & Joan B Kelly, *Surviving the breakup: How children and parents cope with divorce* (New York: Basic Books, 1980) at 28 [Wallerstein & Kelly]

[32] Richard A Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003) 37:2 Fam LQ 273 at 287 [Warshak].

[33] *Ibid* at 291.

[34] William Bernet et al., "Measuring the Difference Between Parental Alienation and Parental Estrangement: The PARQ-Gap" (2020) 65:4 J Forensic Sci 1225 [Bernet].

Even though Reich's initial characterization of the term "parental alienation" preceded family law reforms that promoted women's equality and destigmatized marital dissolution, his definition remains accepted in contemporary accounts of this phenomenon.[35] One important shift from Reich's account, however, is that modern definitions of parental alienation focus less on the personality of the alienator parent and more on the harm caused to alienated children.[36]

In Canada, parental alienation emerged in the court system in the 1990s.[37] Since this legal acknowledgement, the number of parental alienation cases heard by the judiciary has grown dramatically, so much so that a 2009 article written in the *Toronto Star* characterized parental alienation as a "plague" in the family court system because of the volume, complexity, and emotional labour involved in legitimate allegations of this phenomenon.[38]

Psychological research concerning parental alienation has focussed on how to identify common behaviours among alienator adults and alienated children.[39] These behavioural cues act as indicators for the presence of parental alienation, serving as predictors of future conflict and relationship dysfunction. Below is a non-exhaustive list of some frequently identified behaviours in both alienator adults and alienated children:

<u>Alienator Adult:</u>

- Makes derogatory statements about the child's other parent;
- Corrects the child when he/she makes positive comments about his or her other parent.
- Justifies missed visits with the other parent, stating that they are "unnecessary";
- Avoids direct communication with the other parent, often speaking through the child;
- Does not invite the other parent to significant events in the child's life, including but not limited to school performances, sporting events, birthday parties and graduation ceremonies;

[35] Richard A Warshak, "Alienating Audiences from Innovation: The Perils of Polemics, Ideology, and Innuendo" (2010) 48:1 Fam Ct Rev 153 at 156 [Warshak]; Nicholas Bala et al, "Alienated Children and Parental Separation: Legal Responses in Canada's Family Courts" (2007) 33:1 Queen's LJ 79 at 82 [Bala].
[36] Richard A Warshak, "Parental Alienation: Overview, Management, Intervention, and Practice Tips" (2015) 28:1 J Am Acad Matrimonial Law 181 at 189 [Warshak].
[37] *M(C) v M(G)*, 1992 CanLII 14000 (ON SC). Although cases prior to this have referenced parental alienation, this case comments on parental alienation in more detail.
[38] See <https://www.thestar.com/life/health_wellness/2009/03/14/how_to_deal_with_toxic_parents.html>.
[39] Bala, *supra* note 35 at 86.

- Destroys telephone messages left by the other parent along with gifts and sentimental items, in order to remove any evidence of the other parent's influence and presence;
- Makes the child feel guilty about spending time with his or her other parent;
- Does not see the value in the child having a relationship with his or her other parent;
- Falsifies allegations about emotional, physical and sexual abuse;
- Relocates the child's primary residence, making access with the other parent onerous; and
- Informs the child that the rejected parent "does not love them anymore".[40]

Alienated Child:

- Routinely mentions how inadequate the rejected parent is;
- Justifies disdain for the rejected parent by using trivial examples;
- Sees one parent as infallible and the other parent as entirely culpable and morally blameworthy;
- Refuses to spend time with the rejected parent;
- Striking while in the rejected parent's care (refusing to eat meals, leave their room, or interact with the rejected parent);
- Expresses strong feelings of dislike for members of the rejected parent's family;
- Falsifies negative conduct done by the rejected parent; and
- Expresses little to no desire to reconcile with rejected parent.[41]

The behaviours outlined above indicate that an alienation environment breeds distrust, disorder and contempt. Specifically, a manipulative parent seeks to turn their child against the child's other parent. The full effects of parental alienation are complete when a child wants nothing to do with their other parent and hates their other parent.

Parental alienation disputes attract a broad range of remedies

Despite extensive jurisprudence on parental alienation, Canadian courts have adopted inconsistent approaches when dealing with this issue, specifically when crafting a suitable remedy. The traditional remedies used by courts in parental alienation cases include parental education programs, reconciliation therapy orders, and changes to custody arrangements.[42] Mixed results flow from this inconsistency. Orders for parental education programs are contingent on the parties'

[40] Bala, *supra* note 35 at 95-98; Richard A Garner, "Differentiating between parental alienation syndrome and bona fide abuse-neglect" (1999) 27:2 Am J Fam Ther 97 at 98-99 [Gardner].
[41] *Ibid*.
[42] Bala, *supra* note 35 at 112-134.

cooperation, which is highly unlikely given the divisive nature of parental alienation disputes.[43] Reconciliation therapy involves intensive psychological reprogramming, raising issues of consent to treatment and potential risks of harm pursuant to provincial legislation on consent to health care.[44] Changes to custody arrangements have led some children to lash out against the rejected parent, running away from home and even threatening to inflict harm.[45] Often, the success of these remedies has been limited. Although these measures aim to reunite the alienated child with the rejected parent, which is a laudable goal, they largely ignore the damage done to the rejected parent by the alienator parent and instead choose to focus exclusively on fixing the psychologically damaged child. This gap requires attention and further explanation.

Reconciliation therapy is frequently used in parental alienation disputes

Increasingly, Canadian judges direct parties in parental alienation disputes to participate in reconciliation therapy, with the goal of repairing the relationship between the rejected parent and the alienated child. Reconciliation therapy takes place in the presence of a trained therapist who has the skills to mend familial tensions in a neutral setting. Orders for reconciliation therapy have been met with significant controversy. Below is an overview of some of the reasons used in support of and against the use of reconciliation therapy in parental alienation disputes.

Several justifications have been offered for the use of reconciliation therapy by courts

Reconciliation therapy focusses on repairing the relationship that currently exists between the alienated child and the rejected parent in a structured and positive environment.[46] In *ET v LD*, the court required the parties to engage in a counselling program for damaged families, which prioritized these features. This program sought to "prevent strained family relationships,

[43] *Ibid* at 112-113. See *Kaplanis v Kaplanis*, 2005 CanLII 1625 (ON CA) [*Kaplanis*].
[44] *Health Care Consent Act*, 1996, SO 1996, c2, Sched A, ss 10-24.
[45] *L(N)*, *supra* note 7 at para 42.
[46] Vessel, *supra* note 5.

particularly where children resist having contact with a parent, from becoming more strained and difficult to repair".[47] Reconciliation therapy centres around providing alienated children and rejected parents with the tools to reunite and maintain a healthy relationship going forward.[48] In the reconciliation therapy "forum", parents and children have the opportunity to develop positive and healthy communication techniques and critical thinking skills.

A crucial piece of Ontario legislation which governs medical decision-making is the *Health Care Consent Act* (*HCCA*). This legislation aims to shield patients from drastic treatments which have the potential to cause harm or distress.[49] As such, the *HCCA*'s overarching goal is to protect vulnerable patients from decisions that have the potential to change the course of their lives negatively. Some scholars are of the view that the integrity of a given parent-child relationship should be a matter for mental health practitioners, not for the courts.[50] In family law, the governing standard for decisions is the best interests of the child.[51] Under the previous version of the *Divorce Act*, the best interests of the child standard was connected to the maximum contact principle, which emphasized that a child's best interests are intimately connected to that child being able to develop fruitful relationships with *all* of his or her capable parents.[52] Reconciliation therapy centres on skills for ameliorating the relationship between an alienated child and a rejected parent. Therefore, the argument goes, repairing relationships might not fall under the umbrella of the *HCCA*. I am sympathetic to this view, as will become clear.

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[47] *ET v LD*, 2017 ONSC 4870 at para 1 [*ET*].
[48] Vessel, *supra* note 5. An example of a reunification therapy program is Family Bridges. For a fulsome description of this workshop, please see <https://buildingfamilybridges.com>.
[49] *HCCA*, *supra* note 6, s 1.
[50] Jonathan W Gould & Philip M Stahl, "That Art and Science of Child Custody Evaluations: Integrating clinical and forensic mental health models" (2000) 38:3 Fam Court Rev 392 at 397 [Gould & Stahl].
[51] *Divorce Act*, RSC, 1985, c 3 2nd Supp, s 16(1) [*Divorce Act*].
[52] *Divorce Act*, RSC, 1985, c 3 2nd Supp, s 16(10), as repealed by *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.

Section 10 of the *HCCA* delineates the boundaries that healthcare providers must adhere to before administering treatment. For an individual to accept treatment they must (1) be capable of giving consent and (2) have given consent. Alternatively, if an individual is incapable, a substitute-decision maker must be capable of providing consent and must give consent for the incapable individual.[53] Under the *HCCA*, the definition provided for treatment is "anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose."[54]

As indicated above, reconciliation therapy aims to rebuild positive and meaningful relationships between alienated children and rejected parents, through the development of better communication skills and coping mechanisms. Since these skills are important in all relationships, the Legislature likely did not intend the *HCCA* to govern reconciliation therapy processes. In *Leelaratna v Leelaratna*, the court determined that reconciliation therapy did not satisfy the definition for "treatment" because it was not for a health-related purpose.[55] A health-related purpose relates to mental conditions and physical conditions,[56] while reunification therapy relates to relationship building.[57] Therefore, the court correctly reasoned, that the focus of reconciliation therapy was not treating a physical disease or a mental ailment and as such, does not fall under the umbrella of a health-related purpose.

In order for treatment to be administered, there must be a disease present. Interestingly, parental alienation has never been included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V). At the Ontario appellate level, whether "treatment" includes reconciliation therapy has not been determined.[58] This provides another piece

[53] *HCCA*, *supra* note 6, s 10.
[54] *Ibid*, s 2(1).
[55] *Leelaratna*, *supra* note 8.
[56] *Ibid* at para 59.
[57] *Ibid* at para 66.
[58] *NL v RRM*, 2016 ONCA 915 at para 37.

of evidence for why reconciliation therapy might not be included in the list of "treatments" contemplated by the *HCCA*.

Importantly, the *HCCA* explicitly states that this piece of legislation does not apply to treatments which pose "little or no risk of harm" to the patient.[59] If a treatment poses "little or no risk of harm", it does not require consent. In *ET v LD*, a family counselling program entitled "Families Moving Forward" was determined to have little risk of harm because it was structured to improve familial communication.[60] Similar reasoning was adopted in *Leelaratna* where the court found that reunification therapy allowed for conflict resolution and stress relief, conferring little risk of harm.[61] These cases demonstrate instances where courts have acknowledged the importance of repairing broken familial relationships as well as the limited risk attached to reconciliation therapy programs. Moreover, they state that the *HCCA* does not apply to orders for reconciliation therapy.

In *AM v CH*, the Ontario Court of Appeal discussed the differences between legislation surrounding health-related decisions and legislation about child custody (in this case, the *Children's Law Reform Act* and the *Divorce Act*).[62] While the *HCCA* focusses on capacity, consent, and the relationship between patients and treatment providers, the *CLRA* and *DA* centre on the best interests of the child.[63] When the *HCCA* engages custody-related decisions, courts have wide latitude to craft therapeutic orders, provided these orders are in the best interests of children.[64] As such,

> A court must always consider a child's views and preferences, but a child's refusal to participate in a therapeutic intervention will not necessarily determine whether a court can

[59] *HCCA*, *supra* note 6, s 2(1).
[60] *ET*, *supra* note 47 at para 60.
[61] *Leelaratna*, *supra* note 8.
[62] *AM v CH*, 2019 ONCA 764 at para 56 [*AM*].
[63] *Ibid* at paras 57 and 60.
[64] *Ibid* at para 71.

> make such an order. Rather, a court must assess the child's maturity and weigh their wishes accordingly, in relation to the various factors listed in section 24(2) of the *Children's Law Reform Act*.[65]

The court emphasized that therapeutic orders can have associated risks, including a child being resistant to engage in the therapeutic process as well as an unsuccessful therapeutic outcome/result.[66] These possibilities, however, should not impede courts from making therapeutic decisions that align with a child's best interests. After all, "[c]ourts cannot fix every problem".[67]

Importantly, other pieces of child-centred legislation including the *Child, Youth and Family Services Act (CYFSA)* expressly incorporate the consent provisions included in the *HCCA*.[68] The Legislature chose to omit the *HCCA*'s consent provisions in both the *Divorce Act* and the *Children's Law Reform Act*, which suggests that the Legislature did not intend for the *HCCA*-consent analysis to bleed into the best interests of the child analysis.

Courts have also recognized that reconciliation therapy has the potential to provide positive solutions and beneficial outcomes for alienated children and rejected parents.[69] In fact, an insidious problem in parental alienation cases which often results in long-lasting harm, is the failure to "treat" alienated children.[70] Research indicates that there are a number of programs which can curb the negative effects of parental alienation.[71] As such, reconciliation therapy can be encouraging and rewarding for alienated children and rejected parents, mitigating both the short term and long term impacts of alienating conduct.

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[65] *Ibid*.
[66] *Ibid* at para 72.
[67] *Ibid*.
[68] *Ibid* at para 63; *Child, Youth and Family Services Act*, 2017, SO 2017, c 14 Sched 1 at ss 22(7), 23(1) [*CYFSA*].
[69] *Karwal v Karwal*, 2015 ONSC 2025 at para 27.
[70] *Leelaratna, supra* note 8.
[71] *MMB(V) v CMV*, 2017 ONSC 3991 at para 1098.

Arguments have been advanced for why reconciliation therapy should not be ordered in parental alienation cases

There is significant debate about whether courts have the jurisdiction to craft orders for therapy.[72] Even though current federal and provincial family law legislation does not explicitly grant courts the authority to order therapy, many Canadian courts have assumed jurisdiction from section 16(6) of the *Divorce Act* and sections 24(2), 28(1)(b) and (c) of the *Children's Law Reform Act*.[73] These sections of legislation authorize courts to make a wide variety of orders that are consistent with the best interests, protection, and well-being of children. A large and liberal interpretation of this statutory framework has been used to include therapeutic orders within the scope of judicial authority. In other instances, courts have found judicial authority to order reconciliation therapy through use of the common law *parens patriae* power.[74]

The Ontario Court of Appeal has opined that specific statutory authority for therapeutic orders does not exist in family law. In *Kaplanis v Kaplanis*, the court determined that the necessary authority may exist at common law, but nonetheless cautioned against ordering therapy in family law disputes unless the parties could get along in some capacity.

> The legislation does not specifically authorize the making of an order for parental counselling and, while some trial judges have held the court has inherent jurisdiction to make a counselling order, carrying out the order requires the co-operation of the parents. There was no evidence that the parties would be able to agree on whom to appoint. There was no agreed process for the appointment of a counselor in the event that they could not agree who should be their counselor. Nor was there any evidence that they were willing to submit their disputes to be decided by a counselor outside the court process envisaged under the *Divorce Act* and without recourse to it.[75]

[72] *Testani v Haughton*, 2016 ONSC 5827 at para 9 [*Testani*].
[73] *Leelaratna v Leelaratna*, 2018 ONSC 5983; *Testani v Haughton*, 2016 ONSC 5827; *Fiorito v Wiggins*, 2015 ONCA 729.
[74] *ET v LD*, 2017 ONSC 4870; *Kramer v Kramer*, [2003] OJ No 1418, 37 RFL (5th) 381, 121 ACWS (3d) 1092 (ONSC).
[75] *Kaplanis*, *supra* note 43 at para 14.

Similar reasoning has been applied in the Ontario Superior Court decision of *Barrett v Huver*, which has taken *Kaplanis* to stand for the proposition that divorcing parties must have the ability to communicate with one another as a precondition for a judge to mandate family therapy.[76]

Several family treatment programs contain elements of both individual therapy and family therapy. For example, in *Barrett v Huver*, the court determined that the reconciliation therapy suggested by the respondent involved family, parent, and child therapy.[77] As such, the court concluded that this program satisfied the definition of "treatment" provided by the *HCCA*[78] and therefore, Ms. Barrett and her children needed to consent to this program.[79] The court also commented on the potentially harmful nature of reconciliation therapy programs, namely, that the stress of these sessions could cause children discomfort, sadness, anger, and anxiety.[80] It should be noted that the *Barrett* court's conclusions with respect to reconciliation therapy are inconsistent with the balance of the case law. The predominant (and, in my view, correct) disposition is that reconciliation therapy does not engage the *HCCA*.

Similarly, in *Testani v Haughton* the court outlined several factors which must be considered in order to determine if reconciliation therapy is a suitable option.[81] First, that "compelling evidence" exists showing that therapy will be beneficial.[82] Second, that there is a comprehensive proposal delineating a therapeutic schedule as well as the presence of a counsellor in the sessions.[83] Third, that the counsellor is provided with direction before therapeutic

[76] *Barrett*, *supra* note 6 at para 23.
[77] *Ibid* at para 39.
[78] *Ibid*.
[79] *Ibid* at para 47.
[80] *Ibid* at para 40. It is important to note that discomfort, sadness, anger, and anxiety are issues and "symptoms" that are commonly treated by mental health professionals.
[81] *Testani*, *supra* note 72 at para 18.
[82] *Ibid*.
[83] *Ibid*.

intervention occurs.[84] Together, these requirements emphasize that before therapy is ordered, evidence must be present that the therapy will be specific, targeted, and helpful. Therefore, the party proposing the use of reconciliation therapy bears the burden or showing that the benefits of reconciliation therapy outweigh the risks.

Some scholars have been critical of the use of reconciliation therapy in parental alienation cases (as well as family law cases in general), especially when children are forced to participate against their will, which is potentially in tension with Article 12 of the United Nations *Convention on the Rights of the Child*, under which "[t]he views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation."[85] In *AM v CH*, a thirteen-year-old alienated child expressed strong views that he did not wish to participate in reconciliation therapy or have anything to do with his father.[86] Importantly, evidence was adduced that the father had called his children derogatory names[87] and spanked them.[88] The Office of the Children's Lawyer (OCL) believed that the child had been realistically estranged from his father and not alienated from his father.[89] Even though the OCL acknowledged that the child's views were exceedingly negative, they conceded that his views were informed by lived experiences with his father.[90] The OCL recommended that the child remain in the custody of his mother and that access with his father be lessened, abandoned or exclusively initiated by the child.[91] Despite clearly articulated views and preferences, the wishes of this thirteen-year-old child were disregarded and

[84] *Ibid*.
[85] *United Nations Convention on the Rights of the Child*, opened for signature Nov 20, 1989, 1577 UNTS 3 (entered into force Sept 2 1990), article 12.
[86] *AM v CH*, 2018 ONSC 6472 at para 16 [*AM*].
[87] *Ibid* at paras 42-44.
[88] *Ibid* at para 31.
[89] *Ibid* at para 85.
[90] *Ibid*.
[91] *Ibid* at para 81.

he was compelled to participate in reconciliation therapy and live on a full-time basis with his father.[92] Justice Nicholson determined that this case was not a "hybrid" situation, rather, the child's feelings were caused by his mother's alienating behaviour.[93] Additionally, Justice Nicholson acknowledged that the change in custody would likely result in the child "struggl[ing] tremendously" but would only consider altering the custody arrangement after six months of time had passed and the child had meaningfully participated in the reconciliation therapy program.[94]

Some mental health professionals take issue with the perspective that an alienated child's views warrant little attention or consideration.[95] These professionals argue that parental alienation cases are multi-faceted and that attributing full blame to the alienator parent is an unrefined and unrealistic approach which does not consider the complexities and nuances of familial dynamics. Often, the alienated child's unfavorable views about one parent are informed by *both* their experiences with the rejected parent and the influence of the alienator parent.[96] As such, disregarding the grievances that an alienated child has with one of his or her parents oversimplifies the reality of most parental alienation cases and the family dynamics at play in these scenarios.

Even though the use of reconciliation therapy as a remedy in parental alienation disputes is contentious and polarizing, the discourse centres on the connection between reconciliation therapy and treatment. Interestingly, what is almost entirely ignored is the fact that orders for reconciliation therapy do not, in any meaningful sense, reprimand the alienator parent for his or her damaging conduct. Rather, the clinical solution of reconciliation therapy focusses on correcting

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[92] *Ibid* at para 183.
[93] *Ibid* at para 176.
[94] *Ibid* at para 167.
[95] Kelly & Johnston, *supra* note 13 at 250.
[96] Shely Polak et al., "Responding to Severe Parent-Child Rejection Cases Without a Parectectomy: A Blended Sequential Intervention Model and Role of the Courts" (2020) 58:2 Fam Ct Rev 507 at 518; Janet R Johnston & Matthew J Sullivan, ''Parental Alienation: In Search of Common Ground for a More Differentiated Theory" (2020) 58:2 Fam Ct Rev 270 at 279.

and undoing the damage done to the child as a result of alienation. As such, the alienator parent escapes any real consequences for their actions, which is problematic from the perspective of justice. This is not to say that family law *as a whole* should be penalty-oriented but rather, that there is a role for punishment in family law.

Judges have the authority to reverse custody in parental alienation disputes

Even though orders for reconciliation therapy are becoming increasingly common in parental alienation decisions, judges have other options at their disposal. One of these options involves altering the custody arrangement. Occasionally, judges decide to reverse custody, placing the alienated child in the care of the rejected parent. There are a number of considerations that must be weighed when a custody reversal is ordered. First, custody reversals are dramatic measures, disrupting the environment in which the child is accustomed to living. This results in a lack of stability and security, potentially in conflict with section 16(2) of the *Divorce Act*.[97] Second, parental alienation disputes involve strong feelings and unresolved issues. Placing a child with a parent who they have been trained to hate poses significant risks. The child may lash out physically against the rejected parent, run away from home, and potentially commit a crime. Once again, this has the ability to disrupt the physical, psychological and emotional well-being of the child, deviating from section 16(2) of the *Divorce Act*. Third, judges are usually more reluctant to implement a custody reversal when alienating behaviour has been present for an extensive period of time. This sentiment was succinctly summarized in *Hazelton v Forchuk*.

> Where parental alienation exists, it is manifestly important that steps be taken immediately. If they are not, the situation will only get worse. If the alienating parent continues to have unfettered access to the children, there is little doubt that the poisoning of the children's minds will continue. At some point, the restoration of a relationship with the other parent becomes much more difficult, if not impossible.[98]

[97] *Divorce Act*, *supra* note 51, s 16(2).
[98] *Hazelton v Forchuk*, 2017 ONSC 2282 at para 75.

When judges intervene during the infancy of alienation, there is a stronger likelihood that a custody variation will be met with less resistance and that the relationship between the alienated child and the rejected parent will recover. In *MaM v AWM*, after determining that the mother had engaged in alienating behaviour over the preceding year, Justice Audet reversed custody. Justice Audet was

> [E]ncouraged by the fact that the mother's alienating behaviours have only been going on for less than a year and have only significantly increased over the past three to four months. As of December 2018, B.A.M. still shared a close and loving relationship with his father … With swift action, I am hopeful that these relationships can be salvaged and repaired. This will not happen if B.A.M. is allowed to continue to live in his mother's primary care. It is also highly unlikely to happen if B.A.M. continues to have ongoing contact with his mother while the repair work is being done.[99]

Accordingly, the father was given sole custody with no access to the mother. Similar reasoning has been applied in other parental alienation cases.[100]

Even when parental alienation is present, judges sometimes choose to leave the child(ren) with the alienator parent

In certain instances, Canadian courts have decided not to order therapy and not to change the custody arrangement. Colloquially, this is referred to as the "do nothing" approach.[101] Essentially, even though the child is a victim of parental alienation, some judges feel that existing remedies will do little to mend the relationship between the alienated child and the rejected parent. The child's hatred for their parent is too entrenched and forcing a damaged child to spend time with a parent they despise might cause more harm than good. Below is an overview of some arguments which have been advanced in support of and against the "do nothing" approach.

[99] *MaM v AWM*, 2019 ONSC 2128 at para 44.
[100] *AM*, *supra* note 86 at para 16 (decision affirmed on appeal); *AM v CH*, 2019 ONCA 764; *X v Y*, 2016 ONSC 545 at paras 185, 304a).
[101] *WC*, *supra* note 10 at para 129.

Arguments have been made supporting the "do nothing" approach

The Ontario *Children's Law Reform Act* stipulates that judges need to examine the views and preferences of children when making a custody arrangement.[102] This factor becomes particularly important when the child is older, typically in his or her teenage years. Even though a child's views and preferences are not the only factor to consider, they must be given a certain amount of weight. This underscores a dilemma that courts are often faced with, namely, that older children are at risk of running away from home if they do not wish to live in that particular location. Typically, when children decide to run away from home, there will be deleterious effects and potentially lengthy trauma.

In *L(N) v M(RR)*, a sixteen-year-old child who was alienated from his father as a result of years of brainwashing from his mother, refused to live with or spend time with his father.[103] This resistance resulted in police involvement because the child fled from his father's home. When analyzing the child's best interests, Justice Perkins acknowledged that an alienating environment is problematic for a child's development, however, the child in this case was resolute about what he wanted – he wanted to stay with his mother.[104] Therefore, a child's views should be respected, acknowledged and given weight, even if an objective observer might regard them as irrational or misguided. This approach of acknowledging sincerely-held beliefs is analogous to the techniques employed by the Office of the Children's Lawyer (OCL) when they represent a vulnerable child. This approach involves analyzing the strength, independence and consistency of the alienated child's views.[105] These criteria have been adopted by judges when determining a suitable custody

[102] *Children's Law Reform Act,* RSO 1990, c C12, s 24(3)(e) [*CLRA*].
[103] *L(N), supra* note 7 at para 106.
[104] *Ibid* at para 140.
[105] *Jewish Family and Child Services of Greater Toronto v K(J),* 2014 ONCJ 792 at para 29.

arrangement.[106] When an alienated child's views are very strong, highly consistent over time, and older/more independent, these factors might weigh in favour of preserving the existing custody arrangement.

An argument has been advanced that it is senseless to demand that a child live in an environment that they find unsuitable.[107] In *De Melo v De Melo*, two teenage children were alienated from their father. Even though this finding was made, the court determined that compelling the children to have contact with their father would cause distress to these children and would probably be a futile exercise for the court to engage in.[108] Similarly, in *Kincl v Malkova*, a teenage girl's preferences were respected by the court when crafting a custody order. The court reasoned that regardless of the its decision, the teenager would make her own choices.[109] The aforementioned cases emphasize that an older child's views and preferences might not align with their long-term best interests; however, they are illustrative of how that teenager will conduct himself or herself in the immediate future. Courts must be cognizant of this when crafting a custody reversal.

Arguments have been made objecting to the "do nothing" approach

Section 16(1) of the *Divorce Act* provides judges with wide latitude when determining what constitutes the best interests of the child.[110] When a child lives in (and is exposed to) an alienating environment, that environment is not consistent with a child's best interests. Similarly, Ontario's *Children's Law Reform Act* is clear that the views and preferences of a child are one of many factors that must be considered when determining a child's best interests.[111] This one factor is not

[106] *Ludwig v Ludwig*, 2019 ONCA 680 at para 74 [*Ludwig*].
[107] *Stefureak v Chambers*, [2004] OJ No 4253 at para 64, 2004 CarswellOnt 4244 (ONSC) [*Stefureak*].
[108] *De Melo v De Melo*, 2015 ONCA 598 at para 13 [*De Melo*].
[109] *Kincl v Malkova*, 2008 ONCA 524 at para 3 [*Kincl*].
[110] *Divorce Act*, *supra* note 51, s 16(1).
[111] *CLRA*, *supra* note 102, s 24(3).

determinative or paramount. Furthermore, the gravity of this decision must be weighed against a child's age and level of maturity, especially when there is a finding of alienation.

The Supreme Court of Canada determined that the mature minor doctrine has the potential to give children a voice in decisions impacting them.[112] When analyzing a child's level of maturity, courts typically analyze the following three factors: whether the views verbalized by the child are the product of that adolescent's own mind; whether the adolescent is under the influence of his or her family members, relatives, or other adults in his or her life; and whether the child has any pre-existing challenges or vulnerabilities which might impair his or her judgement and decision making.[113] Alienation is seen as one of the most pervasive types of familial abuse and influence, whereby an adult attempts to control the thoughts and behaviour of a child. Barbara Fidler, a psychologist with extensive experience in parental alienation disputes, has opined that once a court makes a finding of parental alienation, that court should not attach meaningful weight to that child's views and preferences, independent of the age of the alienated child.[114]

Some scholars have argued that the "do nothing" approach is inherently problematic because it allows courts to "give up" on the development of healthy and meaningful relationships between parents and children. The best interests of the child require judges to prioritize not only the short-term best interests of the child but also the long-term best interests of the child. Psychological research has confirmed that alienated children who remain with an alienator parent are significantly more likely to develop behavioral problems, mental health issues, as well as difficulties with intimacy and healthy sustained, long-term, interdependent relationships.[115] Even

[112] *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 at para 23 [*AC*].
[113] *Ibid* at para 96.
[114] *WC*, *supra* note 10 at para 139.
[115] Naomi Ben-Ami & Amy JL Baker, "The Long-Term Correlates of Childhood Exposure to Parental Alienation on Adult Self-Sufficiency and Well-Being" (2012) 40:2 Am J Fam Ther 169 at 173 [Ben-Ami & Baker].

though an alienated child may want to abandon a relationship with the rejected parent, this is likely not conducive with that child's long-term best interests. As such, judges are cautious when they choose to leave a child in an alienating environment given the long-term consequences of alienation behaviour.

I support the use of reconciliation therapy orders by courts as well as judges giving alienated children's views and preferences limited consideration and weight. Reconciliation therapy is not treatment and instead, focusses on developing tools for healthy and effective communication – skills that all parents and children should develop for meaningful relationships. Reconciliation therapy does not pose a risk of harm to vulnerable children. By contrast, alienated children *have already been* exposed to significant emotional harm(s) by the campaign of denigration propagated by the alienator parent. Furthermore, attaching weight and significance to an alienated child's views and preferences fails to acknowledge that these views are inaccurate and the product of manipulation by the alienator parent. Ultimately however, the discussion about the use of reconciliation therapy and the amount of weight which should be given to an alienated child's views and preferences serves as a distraction from the issue of consequences for the alienator parent.

In rare instances, findings of contempt of court have been made in parental alienation disputes

Canadian family law courts have the ability to find a party in contempt of court, and can impose significant consequences once this finding is made, including imprisonment, payment of a fine to the court, payment of a fine to another party, paying costs in a step of the proceeding, or obeying the terms of a more stringent court order.[116] Traditionally, family courts make a finding of contempt when a parent disregards an access order. It is important to note that contempt orders

[116] *Courts of Justice Act*, O. Reg. 114/99: Family Law Rules, rule 31(5) [*Courts of Justice Act*].

are infrequent in parental alienation disputes. The rationale for this is multi-pronged. First, sending a child's primary caregiver to prison rarely coincides with the best interests of the child because children rely on in-person nurturing, affection and interaction, which are impossible when a parent is incarcerated. A similar rationale militates against the imposition of a significant fine. Depleting a parent's resources results in fewer funds for the child. Second, parental alienation cases involve abuses of power, where the alienating parent manipulates the thoughts and behaviour of the alienated child. Punishing the alienating parent plays into the abusive narrative that the rejected parent is the "source of all of the family's problems" (ex. "if your mother was a better parent, none of this would have happened"). Essentially, contempt of court might result in further alienation of the rejected parent.

Contempt of court is a quasi-criminal procedure in nature and as such, the allegation must be proven beyond a reasonable doubt. Accordingly, the party advancing the argument about contempt bears the burden of proof. The test for contempt of a court order contains three components. First, the court order that was breached must have been unambiguous and clear.[117] Second, the party must have been aware of the order at the time it was breached.[118] Third, the party must have breached the order intentionally, by either failing to do what the order required or by acting in direct opposition to the terms of the order.[119] Additionally, the party must have been provided with the terms of the order that was ultimately breached.[120]

Findings of contempt are made for one of two reasons. First, to punish behaviour that is particularly egregious and reprehensible. Second, to preserve the administration of justice. To illustrate the former, the case of *L(AG) v D(KB)* is applicable. This case, broken into two decisions,

[117] *Godard v Godard*, 2015 ONCA 568 at para 11; *Jackson v Jackson*, 2016 ONSC 3466 at para 51
[118] *Godard*, *ibid*; *Jackson, ibid* at para 51.
[119] *Godard*, *ibid*; *Jackson, ibid* at para 53.
[120] *L(AG) v D(KB)*, 2009 CanLII 14788 (ON SC) at para 30 [*L(AG)*]; *Jackson, ibid* at para 49.

dealt with custody and access and findings of contempt respectively. After determining that the mother had alienated the children from their father (decision 1)[121], Justice McWatt discussed five previous court orders involving these parents, spanning an eight-year period. The five previous court orders dealt with the creation of a parenting plan, having the mother attend counselling sessions, and increasing the father's contact with his children both in-person and over the phone.[122] None of these orders were complied with, in fact, they were actively obstructed by the respondent mother.[123] Justice McWatt determined that the respondent mother consented to the orders while in the courthouse, having no intention of actually complying with these orders.[124] Her behaviour was a ruse to shield herself from scrutiny. Justice McWatt concluded,

> [N]ot only do I not believe her evidence about why she denied access to the children by A.L., but her evidence does not leave me with a reasonable doubt, nor any doubt, that she willfully committed contempt in relation to all five court orders in question. The evidence of her contempt is overwhelming. I am absolutely sure that she intended all of the breaches alleged for her own interests. The evidence is clear and unequivocal. Her actions in this regard were not in the best interest of the children.[125]

As such, the respondent mother's conduct was so deplorable that a fine attached to a finding of contempt was appropriate and necessary. The respondent was ordered to pay the applicant father approximately $20,000 in contempt fines as a result of breaching several court orders. In addition, the respondent mother was ordered to pay the applicant father $15,000 in costs.[126] Similarly, in *de la Sablonniere v Castagner*, the respondent father, Mr. Castagner, was ordered to pay $4,000 in contempt fees.[127] Justice Kane provided an overview of Mr. Castagner's conduct, outlining how he tried to destroy Ms. de la Sablonniere's life by alienating their children from her, calling the

[121] *L(AG) v D(KB)*, 2009 CanLII 943 (ON SC).
[122] *L(AG)*, *supra* note 120 at paras 12-27.
[123] *Ibid* at para 48.
[124] *Ibid* at para 46.
[125] *Ibid* at para 50.
[126] *Ibid* at paras 53-56.
[127] *de la Sablonniere v Castagner*, 2012 ONSC 176 at para 237 [*de la Sablonniere*].

police on her, filing complaints to the Children's Aid Society, and advancing outlandish allegations against her new partner, Mr. Germain.[128] Consequently, a finding of contempt of court was necessary to acknowledge this reprehensible behaviour.[129]

Other contempt of court cases involve preserving the administration of justice, ensuring that the integrity of the family law system is maintained and upheld. In *McMillan v McMillian*, the respondent mother was given a prison sentence of five days because of repeated violations of access orders.[130] Justice Quinn's rationale for this sentence centred on upholding the integrity of the justice system.[131] When a court order is disregarded with impunity, public confidence in the justice system suffers. Simply expressing dissatisfaction with this behaviour is insufficient, especially when this becomes a pattern of abuse and manipulation. Failing to punish this behaviour sends a message that the judicial system benefits those who disregard its authority and fails to protect those who uphold its values and rely on it for family reunification and stable contact with their children.[132] In fact, Justice Quinn called for an element of law reform citing that had "tougher sanctions been the norm in this area of the law from the outset, and had been known to be so, some of the last eight years of acrimony could have been avoided."[133] Perhaps, if Ms. McMillan's disturbing conduct was reprimanded earlier, Mr. McMillan might have had a better relationship with his children. Clearly, the "system of justice cannot and should not tolerate the deliberate disobedience or defiance of a court order. The protection of the administration of justice requires that such conduct be dealt with appropriately."[134] Justice Quinn provided an overview of the different options at his disposal for finding Ms. McMillian in contempt of court. He determined

[128] *Ibid* at para 235.
[129] *Ibid.*
[130] *McMillan v McMillan*, 1999 CanLII 14982 (ON SC) [*McMillan*].
[131] *Ibid.*
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*

that awarding a full indemnity cost award or substitute access time were unlikely to deter Ms. McMillan. Justice Quinn conceded that a term of imprisonment was not in accordance with the best interests of her children; however, he acknowledged that imprisonment is never in the best interests of children regardless of the offence.[135] In these circumstances, a term of imprisonment was the only way to preserve public confidence in the administration of justice. Justice Quinn's reasoning in *McMillan v McMillan* is a good example of the circumstances where maintaining confidence in the administration of justice is seen as an important consideration in a family law case as opposed to an exclusive focus on the best interests of the child.

Parental alienation judgements can contain provisions concerning police enforcement

Section 36 of the *Children's Law Reform Act* provides guidance for when police can intervene in custody matters.[136] Specifically, when a court believes that a child is being withheld from an individual who has parenting time or decision-making authority or when an individual intends to abduct a child, the police can be directed by court order to find the child in question and subsequently reunite the child with the appropriate person.[137] Additionally, section 36(7) of the *Children's Law Reform Act* requires judges to select an expiration date for the order.[138] This provision seeks to prevent the parties from constantly appearing in court to enforce a court order. Instead of an extensive back-and-forth, section 36 of the *CLRA* allows police to directly act on the instructions of a judge when access is refused. In *Allen v Grenier*, Justice Mazza emphasized that family law orders involving police should only be used in rare instances, and as a method of "last resort".[139] In *Hajji v Al-Jammou*, over the course of three months, the children's attitudes towards

[135] *Ibid*.
[136] *CLRA*, supra note 102, s 36.
[137] *RGA v KAC*, 2011 ONCJ 278 (CanLII) at para 70.
[138] *CLRA*, supra note 102, s 36(7). This provision states, "An order made under subsection (2) shall name a date on which it expires, which shall be a date not later than six months after it is made unless the court is satisfied that a longer period of time is necessary in the circumstances".
[139] *Allen v Grenier*, 1997 CanLII 14628 (ON SC) at para 38 [*Allen*].

their mother changed dramatically, while living with their father. After determining that this was a case of parental alienation, Justice Audet crafted a temporary order changing custody, while also including a provision using section 36 of the *Children's Law Reform Act*. Specifically, "[i]f the father fails to deliver the children … pursuant to s.36 of the *Children's Law Reform Act,* R.S.O. 1990, c. C.12, the police force having jurisdiction in any area shall locate, apprehend and deliver the children to the Applicant mother …in a manner that is sensitive to the children."[140] Justice Audet emphasized that a section 36 order should be used when other mechanisms are inadequate for preserving the physical and mental health of children.

A novel remedy of reducing spousal support has been used in a parental alienation case

A 2010 decision from the Ontario Superior Court entitled *Bruni v Bruni*, implemented a unique remedy after making a finding of parental alienation. Catherine Bruni and Larry Bruni were married for eleven years and had two children. At the time of separation, their two children, Taylor and Brandon, were nine years old and seven years old respectively. Shortly after Catherine and Larry separated, they entered new romantic relationships. In fact, Catherine began a relationship with Sam, Larry's best friend. Understandably, this caused jealousy and bitterness between Catherine and Larry. It is important to note that the hatred between Catherine and Larry extended well beyond that of "lovers scorned". Shortly after Larry moved out of the matrimonial home, he received numerous threats from Catherine and her family. These threats ranged from being run over by a van[141], being attacked by a member of the Hells Angels biker gang[142], being shot in the head if Larry did not allow Sam to adopt his children[143], and being drowned in a local canal.[144]

[140] *Hajji v Al-Jammou*, 2020 ONSC 6403 (CanLII) at para 45 [*Hajji*].
[141] *Bruni v Bruni*, 2010 ONSC 6568 (CanLII) at para 18 [*Bruni*].
[142] *Ibid* at para 20.
[143] *Ibid* at para 21.
[144] *Ibid* at para 23.

These circumstances led to Larry signing a separation agreement, which gave Catherine sole custody and Larry generous access. Unfortunately, the generous access arrangement in the separation agreement was quickly disregarded by Catherine. On more than one occasion, Catherine would only allow Larry to spend time with his children if he gave her money for household repairs.[145] Essentially, Catherine was extorting Larry, which was one of the many reasons that Larry initiated litigation. Remarkably, Larry's difficulties with access intensified during a break in the litigation, directly in conflict with the "best-foot-forward" appearance that most family law litigants present. As such, "[Catherine's] conduct reflects the lack of respect she has for the legal system and the utter disregard with which she treats Larry's parental rights. She is a law unto herself. She is also oblivious to her lack of objectivity in matters of access."[146] Catherine's alienation resulted in Taylor refusing to see Larry, stating that he was a "loser" and was not her real father.[147]

Justice Quinn emphasized that both the parents and the stepparents involved in Taylor and Brandon's lives were responsible for the familial dysfunction. Larry routinely stuck up his middle finger while driving past Catherine's house.[148] He also impersonated Catherine online in an attempt to disparage her character. Sandra, Larry's new spouse, was heavy-handed in her disciplinary tactics and routinely asked Brandon about events occurring at his mother's house.[149] Catherine, however, was responsible for the most egregious conduct towards the children. She routinely denigrated Larry in front of her children, encouraging them to hate their father. Catherine prevented her children from speaking with Larry on the phone and stated that if they had a

[145] *Ibid* at para 45.
[146] *Ibid* at para 48.
[147] *Ibid* at para 50.
[148] *Ibid* at para 71.
[149] *Ibid* at paras 74-76.

relationship with Larry, they would "go to jail". [150] Catherine shared all of her negative feelings about Larry with her children and deliberately tried to tarnish the relationship between father and children. Finally, Sam was also guilty of alienating Taylor and Brandon from their father. He hurled insults at Larry when the opportunity arose and tried to obstruct Larry's relationship with his children.[151] The problematic conduct of every parent involved in the lives of Taylor and Brandon made determining a suitable custody and access arrangement difficult. Justice Quinn determined that Larry should have modest access to Brandon, especially since Brandon wanted to maintain a relationship with his father.[152] For Taylor, the circumstances were different. Taylor expressed on several occasions that she hated her father, thought of him as a "deadbeat", the source of all of her problems, and did not wish to have anything to do with her father.[153] Taylor was found to be too entrenched in her views as a result of Catherine's alienation. As such, "the alienation here is so severe that it is in the best interests of Taylor not to order or enforce access by Larry. If access happens, fine."[154]

The Ontario *Family Law Act* provides guidance when analyzing whether spousal conduct should impact a spousal support award. Namely, section 33(10) of the *Family Law Act* states that "[t]he obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship."[155] The language used in section 33(10) of the *Family Law Act* is targeted and severe. First, the phrase "course of conduct" implies a repeated pattern of behaviour and not simply a one-time event.[156]

[150] *Ibid* at para 80.
[151] *Ibid* at para 84.
[152] *Ibid* at para 125.
[153] *Ibid* at para 88.
[154] *Ibid* at para 128.
[155] *Family Law Act*, RSO 1990, c F3, s 33(10) [*FLA*].
[156] *Bruni*, *supra* note 141 at para 205.

Second, the words "unconscionable", "obvious" and "gross repudiation" indicate that the behaviour must be severe, extreme, intentional and unreasonable. Justice Quinn found that Catherine sought to obliterate the bond between Larry and Taylor, causing lasting and unforgiveable damage.[157] Justice Quinn went on to outline why Catherine needed to be "punished" for her behaviour, reasoning that "[d]ollars cannot replace the father-daughter relationship that Catherine has destroyed. However, in the circumstances of this case, justice has only a Hobson's choice. Catherine's alienation of Taylor and Larry must be condemned, and an effective method of expressing that condemnation is by way of a reduction in spousal support."[158] As such, Justice Quinn reduced Catherine's spousal support to one dollar ($1) per month.[159]

Justice Quinn made some very interesting and revealing comments in his decision – comments that go beyond a strict analysis about how family law legislation should be applied to the facts of this case. Justice Quinn outlined the role, scope, and limitations of family law courts for dealing with high conflict disputes. Some of his significant excerpts include:

> *"The legal system does not have the resources to monitor a schedule of counselling (nor should it do so). The function of Family Court is not to change people, but to dispose of their disputes at a given point in time. I preside over a court, not a church."*[160]

> *"Despite the involvement of Niagara Family and Children's Services … and the court, the parties repeatedly have shown that they are immune to reason. Consequently, in my decision, I have tried ridicule as a last resort."*[161]

[157] *Ibid* at para 209.
[158] *Ibid* at para 211.
[159] *Ibid* at para 212.
[160] *Ibid* at para 131.
[161] *Ibid* at para 213.

"Paging Dr. Freud. Paging Dr. Freud. This is yet another case that reveals the ineffectiveness of Family Court in a bitter custody/access dispute, where the parties require therapeutic intervention rather than legal attention. Here, a husband and wife have been marinating in a mutual hatred so intense as to surely amount to a personality disorder requiring treatment."[162]

"In the midst of this social stew, perhaps it is not surprising that Larry and Catherine are having problems, serious problems, regarding the custody of, and access to, their children. The source of the difficulties is hatred: a hardened, harmful, high-octane hatred. Larry and Catherine hate each other, as do Larry and Sam. This hatred has raged unabated since the date of separation. Consequently, the likelihood of an amicable resolution is laughable (hatred devours reason); and a satisfactory legal solution is impossible (hatred has no legal remedy)."[163]

These excerpts clearly emphasize that the legal system in its current form has limited ability to deal with parents who alienate their children and destroy beneficial relationships. Ultimately, these passages indicate that the Canadian family law system might need an agreed-upon mechanism to reprimand parents who engage in alienating conduct.[164]

The intersection between parental alienation and gender remains a primary focus in parental alienation research

An extensive body of scholarship has focussed on the gendered dimensions of parental alienation disputes.[165] In fact, the relationship between parental alienation and gender appears to

[162] *Ibid* at paras 1-2.
[163] *Ibid* at para 10.
[164] It is important to note that reducing spousal support might not be a sufficient mechanism in parental alienation cases for two reasons: First, depending on relationship dynamics, there are not always spousal support payments to reduce. Second, being deprived of future money is likely not as punitive as having to part with money that an individual already has.
[165] See 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; Suzanne Zaccour, "Parental Alienation in Québec Custody Litigation" (2018) 59:4 C de D 1073; Carol S Bruch, "Parental Alienation Syndrome and Parental Alienation:

be an area that a large number of parental alienation scholars choose to focus on. This, in part, makes sense. The origins of this gendered debate likely began with the "tender years doctrine", where young children were placed in the care of their female parent because of the belief that women were more nurturing and therefore better able to address the needs their young children compared to their male parent counterparts.[166] This belief is succinctly summarized by Justice Roach in a family law decision provided by the Ontario Court of Appeal in the 1950s:

> No father, no matter how well-intentioned or how solicitous [sic] for the welfare of such a child, can take the full place of the mother. Instinctively, a little child, particularly a little girl, turns to her mother in her troubles, her doubts and her fears. In that respect nature seems to assert itself. The feminine touch means so much to a little girl; the frills and the flounces and the ribbons in the matter of dress; the whispered consultations and confidences on matters which to the child's mind should only be discussed with Mother; the tender care, the soothing voice; all these things have a tremendous effect on the emotions of the child. This is nothing new; it is as old as human nature and has been recognized time after time in the decisions of our Courts …[167]

Eventually, Canadian courts began to recognize that both male and female parents were capable of providing tender care, a soothing voice, emotional support, reassurance during times of fear and doubt as well as the necessary comforting "touch".[168] In 1993, the Supreme Court of Canada acknowledged that parenting roles vary from family-to-family and that women are not intrinsically more capable of parenting.[169] As such, the tender years doctrine was abandoned and mothers were not automatically assumed to be the custodial parent for young children. Dr. Richard Gardner suggested that when Canadian courts veered from the presumption of "mother's always

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Getting It Wrong in Child Custody Cases" (2001) 35:3 Fam LQ 527; Michele A Adams, "Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights" (2006) 40:2 Fam LQ 315.

[166] Paul Millar & Sheldon Goldenberg, "Explaining Child Custody Determinations in Canada" (1998) 13:2 Can JL & Soc 209 at 211 [Millar & Goldenberg].

[167] *Bell v Bell* 1955 CarswellOnt 165 (ON CA). Similar reasoning was adopted in other provincial jurisdictions, including British Columbia and Prince Edward Island. See *Bratland v Bratland*, 1976 CarswellBC 113 (BC SC), 29 RFL 34 (BCSC) at para 22; *DeJong v DeJong*, 14 RFL (2d) 222, 1980 CarswellPEI 13 (PEI SC) at para 10.

[168] *Talsky v Talsky*, [1976] 2 SCR 292 at paras 48, 50. Note, this acknowledgement occurred in the 1970s.

[169] *Young v Young*, 1993 CanLII 34 (SCC), [1993] 4 SCR 3 at para 38. There was also a push from fathers' rights groups for this type of acknowledgement [*Young*].

get custody of their young children", mothers were disappointed and irritated by this decision, fearing that they had lost their "privileged" position in the custody realm.[170] According to Richard Gardner, this disappointment and anger translated to increased instances of parental alienation.[171] Women became a frequent focus in parental alienation disputes and were often blamed as the reason for relatively high rates of parental alienation cases in the Canadian legal system, so much so that the term "malicious mother syndrome" emerged in 1995, coined by Ira Turkat.[172] It is important to note that Turkat's initial findings which focussed on women being the sole "perpetrators" of parental alienation were modified four years later, in 1999.[173] His subsequent research showed that men were also capable of engaging in alienation behaviour. This resulted in a change in terminology from "malicious mother syndrome" to the more gender-inclusive "malicious parent syndrome", emphasizing that parental alienation should be seen as a gender-neutral term.[174]

Parental alienation conversations about gender are polarizing. Feminist activists argue that parental alienation is often raised by fathers as a way to immunize the violence that they have imposed on female partners and their children.[175] In effect, feminists state that parental alienation claims overshadow the plight of victims of domestic violence.[176] Critics of feminism assert that women engage in parental alienation conduct to prevent fathers from having meaningful

[170] Michele A. Adams, "Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Father's Rights" (2006) 40:2 Fam LQ 315 at 331 [Adams].
[171] Richard Gardner, *The Parental Alienation Syndrome and the Differentiation between Fabricated and Genuine Child Sex Abuse* (San Francisco, Creative Therapeutics Inc., 1987) at 55 [Gardner].
[172] Ira Daniel Turkat, "Divorce Related Malicious Mother Syndrome" (1995) 10 J Fam Viol 253 at 255 [Turkat].
[173] Ira Daniel Turkat, "Management of Visitation Interference" (1997) 36:2 Judges J 17 at 19 [Turkat].
[174] Deirdre Conway Rand, "The Spectrum of Parental Alienation Syndrome" (1997) 15:3 Am J Forensic Psych 23 at 36 [Rand].
[175] Lenore E Walker & David L Shapiro, "Parental Alienation Disorder: Why Label Children with a Mental Diagnosis?" (2010) 7:4 J Child Custody 266 at 274-278 [Walker & Shapiro].
[176] Peter G Jaffe et al, *Child Custody & Domestic Violence: A Call for Safety and Accountability* (New York: Sage Publications Inc., 2003) at 9 [Jaffe et al.].

relationships with their children.[177] They cite jealousy and revenge as prime motivators for this behaviour.[178] Somewhere in the middle of these views exists groups who condemn parental alienation behaviour regardless of the gender of the offending parent. Importantly, these scholars argue that when domestic violence allegations are proven in court, the focus of these cases should be centred on violence against women as opposed to parental alienation.[179]

The intersection between parental alienation and instances of domestic violence has been explored in detail by Canadian scholars.[180] Suzanne Zaccour conducted an analysis of Québec family law appellate decisions between 2010 and 2020 to examine the relationship between claims of parental alienation and instances of domestic violence.[181] Specifically, Suzanne Zaccour was interested in understanding whether the term domestic violence "disappeared" from parental alienation cases when comparing the trial-level decision with the appellate-level decision. Her prediction was that even when domestic violence was raised as an issue at the Québec Superior Court, it was routinely absent from decisions of the Québec Court of Appeal.[182] To conduct this research, decisions involving parental alienation from the Québec Court of Appeal were identified. From here, the history of these cases was analyzed to determine if domestic violence was present at the trial-level decision(s).[183] Thirty-one cases satisfied this inclusion criteria.[184] Interestingly, for twelve of the thirty-one cases in this cohort (amounting to 39% of the cases analyzed), there was a reference to domestic violence in a lower court decision, however, this topic was not

[177] Adams, *supra* note 170.
[178] *Ibid*.
[179] Andraé L Brown "Criminal Rewards: The Impact of Parental Alienation Syndrome on Families" (2008) 23:4 Journal of Women and Social Work 388 at 391 [Brown].
[180] Sheehy & Boyd, *supra* note 27.
[181] Suzanne Zaccour, "Does Domestic Violence Disappear from Parental Alienation Cases? Five Lessons from Québec for Judges, Scholars, and Policymakers" (2020) 33:2 Canadian Journal of Family Law 301 at 304 [Zaccour].
[182] *Ibid* at 317.
[183] *Ibid* at 317.
[184] *Ibid* at 319.

discussed at all in the appellate decision.[185] Additionally, six of the thirty-one cases examined (amounting to 19% of the cases analyzed) mentioned domestic violence in both the trial decision and the appeal decision.[186] Therefore, 58% of parental alienation cases analyzed involved domestic violence.[187] From this, five major conclusions were drawn. First, that parental alienation cases and domestic violence circumstances often co-occur.[188] Second, that judges often disregard instances of domestic violence, viewing it as largely irrelevant in family law cases.[189] Third, that domestic violence should be addressed in appellate decisions if discussed at the trial-level.[190] Fourth, that choosing to omit domestic violence information in appellate judgements represents a form of gender bias, privileging the experiences of the predominantly male (rejected) parent over the female abused custodial (alienator) parent.[191] Finally, that parental alienation cases should be approached with the understanding that domestic violence is involved in the majority of these relationship dynamics (in this case, 59% of the relationships analyzed).[192] As such, domestic violence screening should occur in every case of parental alienation appearing before the courts.[193] Zaccour argues that without a more refined approach for parental alienation cases, the safety of women and children are in jeopardy.[194] She also argues that domestic violence should not be dismissed from parental alienation cases even if it is not explicitly alleged/pled.[195]

Research conducted by Sean Dickson and Joan Meier emphasized that when fathers advanced claims of parental alienation, abuse allegations by women and children were dismissed

[185] *Ibid* at 319.
[186] *Ibid* at 319.
[187] *Ibid* at 321.
[188] *Ibid* at 321.
[189] *Ibid* at 330.
[190] *Ibid* at 334.
[191] *Ibid* at 348.
[192] *Ibid* at 354.
[193] *Ibid* at 355.
[194] *Ibid* at 356.
[195] *Ibid* at 355.

in 72% of the appellate cases analyzed by the study's authors.[196] This finding was even more pronounced when parental alienation claims were raised in tandem with sexual abuse allegations. In these instances, 95% of appellate cases were dismissed.[197] Other research conducted by Susan Boyd and Elizabeth Sheehy showed that allegations of intimate partner violence were present in approximately 34% of the parental alienation cases that were reviewed.[198] Similarly, research by Linda Nelson showed that approximately 41.5% of parental alienation cases in her cohort of cases involved allegations of either violence directed at the child of the relationship or violence directed at the female spouse.[199] Finally, Nicholas Bala and colleagues found that even though the majority of published parental alienation judgements involved mothers who engaged in alienating behaviour, women are more often the custodial parent, likely accounting for this statistical discrepancy.[200] Accordingly, a more refined analysis must be conducted about the percentage of female alienator parents who are primary caregivers compared to the number of male alienator parents who are primary caregivers. Comparing these results will help determine if women or men (on average) engage in more alienating behaviour.

For the purposes of this thesis, the gender of the alienating parent is largely irrelevant.[201] Canadian jurisprudence confirms that both mothers and fathers engage in alienation behaviour. As such, the analysis canvassed in this work will be independent of the gender of the alienating parent.

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[196] 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 at 331 [Meier & Dickson].
[197] *Ibid* at 320.
[198] Sheehy & Boyd, *supra* note 27 at 83-87.
[199] Linda C Neilson, *Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?* (Fredericton & Vancouver: Muriel McQueen Fergusson Centre for Family Violence Research & FREDA Centre for Research on Violence Against Women and Children, 2018) at 3 [Neilson].
[200] Nicholas Bala, Suzanne Hunt & Carolyn McCarney, "Parental Alienation: Canadian Court Cases 1989–2008" (2010) 48:1 Fam Ct Rev 164 at 167 [Bala, Hunt & McCarney].
[201] Some research shows that female alienator parents may "legitimately" engage in alienation behaviour to protect their child(ren) from an abusive male partner. 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; Daniel G Saunders & Kathleen C Faller, "The Need to Carefully Screen for Family Violence When Parental Alienation is Claimed" (2016) 46:6 Mich Fam Law J 7.

The first chapter of this thesis has provided a condensed summary of an issue that is ravaging the Canadian family system. Parental alienation cases choose to predominantly focus on reuniting the alienated child with the rejected parent, however, very little attention is paid to making the rejected parent "whole". As such, the current system for addressing parental alienation cases does not comprehensively account for the significant loss to parents when their child is alienated from them. Furthermore, the existing approach for dealing with alienator parents does not factor this loss (and the "value" of this loss) into the remedies used by judges in parental alienation cases. Chapter Two of this thesis will explore the value of parenting and the significance of losing a child through alienation from a philosophical perspective.

Chapter 2 – What does it mean for a parent to lose a child to alienation?

The first chapter of this thesis provided an overview of the problems associated with parental alienation disputes and how Canadian family law in its current form attempts to address these problems. The second chapter of this thesis seeks to examine the connection between parenthood and what it means to live a "good life". There is an enduring and age-old adage that having a "good life" involves a meaningful and healthy connection between parent and child and that this relationship is integral to the identity of both the parent and the child.[202] This important connection between both parent and child as well as child and parent are being under-valued in the current Canadian parental alienation family law framework. Chapter Two elaborates on the value of parenting from a philosophical perspective.

A number of theories have been advanced about the value of parenting. These theories have come from the perspectives of both children and parents

Being a parent confers certain obligations and therefore, certain rights and responsibilities.[203] Parenting requires an immense amount of responsibility, organization, and decision making. Parents have the ability to choose all aspects of their child's upbringing including education, socialization, religion, healthcare, extracurricular activities, discipline, diet and exercise.[204] In fact, these choices are outlined in Canada's *Divorce Act*[205] and Ontario's *Children's Law Reform Act*.[206] Importantly, parents can prevent other individuals from making these crucial decisions about their child's upbringing. This "right of exclusion" is one of the unique rights attached to parenting. Numerous theories have been used to explain parental obligations as well as the "special spot" parents hold in relation to child rearing. The fiduciary model, also known as the

[202] Sharon R Kaufman, *The Ageless Self: Sources of Meaning in Late Life* (Madison: The University of Wisconsin Press, 1986) at 154 [Kaufman].
[203] Joseph Millum, "How Do We Acquire Parental Rights?" (2010) 36:1 Soc Theory Pract 112 at 117 Millum].
[204] *Divorce Act, supra* note 51, s 16(3).
[205] *Ibid*, s 2(1).
[206] *CLRA, supra* note 102, s 18(1).

child-centred model, states that parenting responsibilities create parental rights.[207] In other words, for children to live healthy, happy and functional lives, someone must make decisions for them when they lack the capacity to do so. As a practical matter, the individual best positioned to make these necessary decisions is typically that child's parent(s).[208] Importantly, parental decision making must be informed by the duty of care that a parent owes to their child(ren).[209]

Early theories about parental interests in their children focused on the notion that parents had proprietary "ownership" over their offspring.[210] These theories were typically connected to the genetic relationship between parents and children, specifically that parents were responsible for "creating" children and that this creation resulted in ownership.[211] Proponents of this theory assert that parents have ownership over their genetic material and that this genetic material was required to produce and form their child(ren).[212] As such, it logically flows that parents have ownership over their child(ren), who are composed of their genetic material. This theory of "ownership" is known as proprietarianism.[213] Understandably, this theory has been denounced as society's normative values have undergone an evolution. Presently, society is more inclined to view children as autonomous agents in their own right, thereby attaching less value to consanguinity than we once did. The concept of children being extensions of their father's legal person is fraught with problems, including the fact that children should not be used for the sole purpose of advancing a

[207] Jeffrey Blustein, *Parents and Children: The Ethics of the Family* (Oxford: Oxford University Press, 1982) at 104-114 [Blustein].
[208] Lainie Friedman Ross, *Children, Families, and Health Care Decision Making* (Oxford: Clarendon Press, 1998) at 20 [Ross].
[209] David Archard & David Benatar, *Procreation and Parenthood* (Oxford, Oxford University Press, 2010) at 108; Samantha Brennan & Robert Noggle, "The moral status of children: Children's rights, parents' rights, and family justice" (1997) 23:1 Social Theory and Practice 1 at 17.
[210] Barbara Hall, "The origin of parental rights" (1999) 13:2 Public Affairs Quarterly 73 at 75 [Hall].
[211] Andrew Franklin-Hall, "Creation and Authority: The Natural Law Foundations of Locke's Account of Parental Authority" (2012) 42:3 Canadian Journal of Philosophy 255 at 261 [Franklin-Hall].
[212] *Ibid* at 257.
[213] David Archard, "Do parents own children?" (1993) 1:3 Int J Child Rights 293 [Archard].

parent's agenda, needs and desires.[214] Additionally, critics of proprietarianism correctly point out that this theory is fundamentally flawed because human beings are not property and should not be treated as property.[215]

A theory proposed by Harry Brighouse and Adam Swift provides a compelling description about the connection between parental rights and what it means to be a parent.[216] These scholars assert that parenting confers something that is intrinsically good (and valuable) for the parent.[217] Having the ability to participate in rearing your child(ren) confers something enormously meaningful, valuable, important and life-giving.[218] The identity of a parent becomes inescapably attached to their relationship with their child(ren). This is an identity that is so fundamental that it cannot be achieved through other pursuits, endeavors or relationships.[219] Children provide parents with love, trust, affection, appreciation, insight and purpose. As such, the attachment, love and meaning connected to the act of parenting must be protected and seen as fundamental.[220] Scott Altman expands on this account asserting that parental happiness is intimately connected to involvement in a child's education, nurturing and counselling.[221] Finally, according to James Rachels, "[a] loving relationship with one's children is, for many parents, a source of such happiness that they would sacrifice almost anything else to preserve it."[222]

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[214] Hall, *supra* note 210 at 77.
[215] Sarah Chan & Muireann Quigley, "Frozen Embryos, Genetic Information and Reproductive Rights" 21:8 Bioethics 439 at 443; Glenn Cohen, "The Constitution and The Rights Not to Procreate" (2007) 60:4 Stanford Law Review 1135 at 1152.
[216] Harry Brighouse & Adam Swift, "Parents' Rights and the Value of the Family" (2006) 117:1 Ethics 80 at 92 [Brighouse & Swift].
[217] *Ibid* at 93.
[218] *Ibid* at 94.
[219] *Ibid*.
[220] *Ibid* at 95.
[221] Scott Altman, *Parental Control Rights* (Blake and Ferguson, 2018) at 210 [Altman].
[222] James Rachels, *Morality, Parents, and Children* as seen in *Person to Person* (Philadelphia, Temple University Press, 1989) at 223 [Rachels].

Another theory about parental rights was proposed by Ferdinand Schoeman, who argued that an essential part of parenting is developing and maintaining intimate relationships with children.[223] For this to occur, governments must not prevent this intimacy from developing and flourishing.[224] According to Schoeman, the intimate relationship between parents and children is essential to the meaning of parenthood and adds value to the life of the parent.[225] The relationship between a parent and a child involves a commitment by the parent to care for the child, nurture the child, protect the child and teach the child. This commitment provided by a parent to their child creates "roots" in that parent's life.[226] Governments should only interfere with the life-giving pursuit of attachment and intimacy when a child's safety and security are jeopardized.[227] Interestingly, Schoeman's theory appears to centre on how intimacy is the most important thing in the parent-child relationship and therefore, intimacy allows a parent to feel fulfilled and live a complete life. One potential problem with this emphasis on intimacy and "living well" is that intimacy can be garnered through many different types of relationships. Adults can become involved in intimate relationships with individuals other than their children. In fact, the relationship between parent and child is typically not viewed as an "intimate" one.[228] Often, intimate relationships are reserved for adults who have the ability to choose the partner that they wish to gain intimacy from. As well, adults usually have the ability to specify/control the terms of that intimate relationship.[229] A similar view has been adopted by James Rachels who argues that loving a child is important for human flourishing.[230] Children provide parents with unconditional love, a

[223] Ferdinand Schoeman, "Rights of Children, Rights of Parents and the Moral Basis of the Family" (1980) 91:2 Ethics 6 at 14 [Schoeman].
[224] *Ibid* at 19.
[225] *Ibid* at 14.
[226] *Ibid*.
[227] *Ibid* at 19.
[228] *Ibid* at 17.
[229] *Ibid* at 16.
[230] Rachels, *supra* note 222 at 223-224.

form of love which cannot be garnered in other meaningful relationships and the equally compelling prospect of loving another unconditionally. By creating and rearing a child, a parent not only gains something intrinsically valuable, they also receive a rare form of "everlasting" love.[231]

Another view about the meaning and value of parenting focusses on the benefits that "proper" parenting serves for society-at-large.[232] Children who have a supportive, educational, stable and nurturing upbringing are more likely to contribute productively to society. Jennifer Robak Morse argues that when parents are denied the opportunity to raise insightful, global citizens, this harms both parent who loses this opportunity and also society generally.[233] Specifically, parenting allows for the creation of a just society. By contrast, instances of parental alienation not only fracture the relationship between a parent and their child, they also prevent that parent from having a lasting impact on the future of society, through their child. As such, the rights conferred by parenting are not limited to rearing a parent's own child but also having influence on the future trajectory of an ever more just society for generations to come. Essentially, this view of parenthood intimates that a parent's rights are subordinate to the social function of the parent-child relationship, thereby instrumentalizing the parent-child relationship. The rights of the parent to raise their child are somewhat contingent on that parent having the "right" impact on society as a whole through their child, which is problematic. If we accept that parenting is intrinsically valuable *to the parent* – as opposed to, say, a service provided by the parent to the child on society's behalf – the threshold for state interference in the parent-child relationship will necessarily be quite high.

[231] *Ibid.*
[232] Katherine Bartlett, "Re-Expressing Parenthood" (1988) 98:2 Yale L J 293 at 297.
[233] Jennifer Robak Morse, "No Families, No Freedom: Human Flourishing in a Free Society" (1999) 16:2 Social Philosophy and Policy 290 at 294 [Morse].

Consequently, we must be prepared to accept the basic legitimacy of a wide range of parenting choices, some of which will attach strong social disapproval.

In Canada's *Divorce Act*, the best interests of the child are the most important consideration when crafting custody orders.[234] This standard requires judges to consider several factors when determining the custody arrangement that is most suitable for a child.[235] These factors include the child's need for stability, the strength of the child's relationship with each of his or her parents, the child's views and preferences, the child's cultural and religious upbringing and the presence of family violence.[236] The best interests of the child standard does not treat children and adults as equal rights-holders: children are, with some justification, seen as a vulnerable population, deserving of protection and paramount consideration. In instances of parental alienation, the fulfilment of being a parent is ripped away suddenly, amounting to a monumental loss and happiness denied. Currently, the significance of this enormous loss is entirely absent from the best interests of the child framework. This suggests, to me, that the best interests of the child standard in parental alienation cases should be balanced against the well-being and happiness of the rejected parent. Preserving the parent-child relationship, including by deterring parents generally from engaging in alienating conduct, is a goal that should be viewed comparably to the best interests of the child principle. Given that the parent-child relationship is 1) so fundamentally unique and 2) of such profound value to the parent, Canadian family law should regard the protection of that relationship, and providing justice to those deprived of that relationship, as no less significant than the promotion of the child's interests. To that end, the best interests of the child principle should not operate as a barrier to punishing alienator parents and compensating rejected parents. Such a

[234] *Divorce Act, supra* note 51, s 16(1).
[235] *Ibid*, s 16(2), 16(3) [*Divorce Act*].
[236] *Ibid*.

balancing would help courts to better account for the profound loss attached to having a child taken from a parent, both physically and emotionally. Additionally, the best interests of the child should embrace the view that ongoing harm to the rejected parent in alienation cases is also harmful to children.

Aristotle has advanced views about the intrinsic value of parenting

Aristotle's *Nicomachean Ethics* explores the connection between parenting and what it means to live a "good life" and obtain happiness.[237] Aristotle describes happiness as something that is intrinsically valuable, the ultimate goal of human existence, and connected to an individual's ability to realize their full potential.[238] Aristotle links a happy life with a virtuous life.[239] In order to obtain happiness, an individual must have complete virtue, which is analogous to moral character and involves doing the right thing. According to Aristotle, individuals become happy and come closer to obtaining complete virtue by participating in worldly pursuits (intellectual knowledge, self-discipline and learning emotional balance) in an engaged manner which they can take pleasure in.[240] By extension, happy and virtuous individuals facilitate the creation of a happy and virtuous society. Parenting allows individuals the opportunity to express their love for their children in an active and consistent way. Additionally, for Aristotle, living a virtuous life involves seeking the mean between extremes and flourishing through goodness.[241] Through parenting, individuals develop a sense of fulfilment through playing an important human role, become involved in a virtuous pursuit (that is, child-rearing), and come closer to what Aristotle believes to be a "good life". Crucially, Aristotle regards parenting as an intrinsically virtuous pursuit, not a

[237] Richard McKeon, *The Basic Works of Aristotle* (New York: Random House, 1941) at 928 [McKeon].
[238] *Ibid* at 929.
[239] *Ibid*.
[240] Moran, *supra* note 18.
[241] Robert C Bartlett & Susan D Collins, *Aristotle's Nicomachean Ethics* (Chicago: University of Chicago Press, 2012) at Book 8 [Bartlett & Collins].

pursuit that is virtuous by virtue of its social utility. Conversely, superficial happiness and gratification from parenting that is experienced by an alienator parent who takes satisfaction by becoming the "preferred" parent and "winning" against their former spouse, evokes an inferior form of happiness. Indeed, it would be more accurate to say that this form of happiness arises not from parenting, but from causing suffering to one's former spouse. The connection to parenting is almost identical.

Comprehensive engagement with Aristotle's moral philosophy is well beyond the scope of this thesis, and my reliance on Aristotle's analysis of parenting should not be taken as an endorsement of Aristotle's worldview more broadly. For instance, *Politics Book I* contends that free men are morally and intellectually superior and dominant over wives, children, and slaves.[242] Aristotle also argues that children are the property of parents and likens them to "hair and teeth which have fallen out".[243] These conceptions run counter to my worldview which is committed to individual autonomy and equality and therefore, these conceptions do not align with what this research aims to accomplish. Instead, Aristotle's understanding of happiness is being used for the narrower purpose that parenting results in value and joy for the parent, allowing that parent to live a "good life".

In *De Generatione Animalium,* Aristotle comments about the spectrum of love experienced by "superior animals" and "inferior animals".[244] For the most inferior animal, feelings of caring and attention end at the moment of birth.[245] For animals slightly above the "inferior" category, attention and caring last until their young reach a formative stage of development.[246] For the most

[242] McKeon, *supra* note 237 at 1127.
[243] Bartlett & Collins, *supra* note 232.
[244] McKeon, *supra* note 241 at 665-680.
[245] *Ibid*.
[246] *Ibid* at 666.

intelligent and "superior" animals, love, caring and attention exist in perpetuity.[247] Human beings fall into this final stage of superiority. Aristotle spends a significant amount of time discussing the friendship that exists between a parent and a child. The relationship between parent and child is not equivalent. The parent is in a more elevated position than the child. This unequal status marks a difference in terms of the amount of love expected from each party, with the individual in the superior position expecting more love than the individual in the more inferior position.[248] This view of the amount of love provided based on status appears to most accurately reflect the fact that parents and children are capable of different "types" of love. The parent is responsible for exercising an active form of love towards their child involving emotional and material support.[249] Conversely, the child's love towards their parent consists of loyalty, respect, and appreciation.[250] For the parent, the love that they experience for their child is linked to the fact that their child is biologically connected to them, in other words, a product of their creation (of course, this conception of love being attached to biology is limiting and does not reflect the love and attachment experienced by adoptive parents, parents who have used surrogacy, and many LGBTQ individuals/relationships). Furthermore, this type of love allows the parent to love themselves more fully.

> This is what the position of benefactors is like; for that which they have created well is their handiwork, and therefore they love this more than the handiwork does its maker. The cause of this is that existence is to all men a thing to be chosen and loved, and that we exist by virtue of activity (i.e. by living and acting), and that the handiwork *is* in a sense, the producer in activity; he loves his handiwork, therefore, be he loves existence. And this is rooted in the nature of things; for what he is in potentiality, his handiwork manifests in activity.[251]

[247] *Ibid* at 676.
[248] *Ibid* at 1066.
[249] *Ibid*.
[250] *Ibid*.
[251] *Ibid* at 1085.

Therefore, by having the opportunity to express love, caring and consideration for someone else (especially children), parents validate their existence.

At the forefront of Aristotle's moral philosophy is the concept of virtue. Aristotle divided virtue into two different categories: moral virtue and intellectual virtue.[252] Moral virtue (also known as *ethike*) is derived from habit whereas intellectual virtue (also known as *ethos*) is derived from teaching, which involves time and experience.[253] Virtue is not limited to acquiring practical skills in specific situations; it also consists of how individuals should think and feel. Adults have the ability to possess virtue in both of its forms, whereas children can acquire virtuous abilities through interactions with capable adults.[254] Children have the most important and extensive encounters with their parents. As such, through interactions with parents and observations of parents, children gain insight about how they should act, react and feel in a broad range of situations.[255] Additionally, children can acquire virtue through specific actions and activities. Todd Goodsell and Jason Whiting use the example of an adult teaching a child to play the piano to showcase this concept.[256] Traditionally, when children (especially young children) are given a new task to learn, they have limited attention and focus. The parent emphasizes the importance of learning this new skill, dedicates time to teaching their child how to read music (in this instance), how to place their fingers on the keyboard of the piano and how forceful the child needs to be when pressing the keys on the keyboard.[257] The parent also helps their child when he/she feels overwhelmed with all this new musical information and prevents their child from losing interest

[252] *Ibid* at 952.
[253] *Ibid*.
[254] McKeon, *supra* note 237 at 348.
[255] Rosalind Hursthouse, *On virtue ethics* (Oxford: Oxford University Press, 2001) at 104 [Hursthouse].
[256] Todd L Goodsell & Jason B Whiting, "An Aristotelian theory of family" (2016) 8:4, Journal of Family Theory and Review 484 at 489 [Goodsell & Whiting].
[257] *Ibid*.

or becoming discouraged when they make a mistake or fail to master the material.[258] According to Goodsell and Whiting, this experience is transformative for both the parent and the child.[259] For the child, he or she acquires new skills beyond just how to play the piano. He or she also learns how to be dedicated to a specific task and how to accomplish a goal.[260] For the parent, teaching their child how to play the piano highlights the importance of patience in parenting.[261] It also allows a parent the opportunity to reflect on which parts of their teaching worked well and which parts of their teaching fell short. Through teaching, the parent develops better patience, which permeates multiple aspects of that parent's life. Increased patience improves the parent's character and allows them the chance to obtain "practical wisdom".[262] Practical wisdom develops when an individual knows how to respond, react and behave in each specific situation. According to Aristotle, "the work of man is achieved only in accordance with practical wisdom as well as with moral virtue; for virtue makes us aim at the right mark, and practical wisdom makes us take the right means."[263] The aforementioned example illustrates that the virtuous pursuit of parenting confers significant benefits to the character and humanity of the parent. When a parent loses a relationship with their child as a result of alienation, that parent no longer has the opportunity to express love, caring and consideration for their child, removing a love that the parent came to rely on and identify with. This extraordinary loss chips away at the parent's identity, virtue and wisdom, fundamentally altering their life and humanity. This enormous change and associated misery have yet to be comprehensively addressed by Canadian courts.

[258] *Ibid*.
[259] *Ibid* at 490.
[260] *Ibid* at 494.
[261] *Ibid* at 489.
[262] *Ibid*.
[263] McKeon, *supra* note 237 at 1028.

Parental alienation is an issue that most Canadians can relate to, either through direct experience or indirect knowledge. This pervasive problem is endemic to society. Failing to acknowledge the pitfalls of current approaches to parental alienation remedies leaves a substantial segment of psychologically damaged children and adults without legal recognition or redress. Understanding the intricacies of parental alienation remedies will provide Canadian courts with a more uniform approach for equitably and robustly addressing this issue, thereby allowing injured parties the opportunity to seek redress.

Bruker v Marcovitz **provides important information about the value parenting confers to the parent**

The case of *Bruker v Marcovitz* is traditionally studied in the context of courts' willingness to award damages for breaches of contractual obligations that are fundamentally religious in nature; however, the case provides insight about the value attached to the pursuit of parenthood and the insurmountable loss when that pursuit is denied or prevented.

For a divorce to be valid under Jewish religious law, the husband must give his wife a *get*.[264] Essentially, a *get* is a document presented by the husband to the wife, giving the wife permission to leave the marriage and enter into a new relationship (and potentially, another marriage).[265] Obtaining the *get* occurs inside a rabbinical court, known as a *beth din*.[266] If a husband refuses to give his wife the *get*, she is trapped in her current marriage. In addition to being religiously confined to a marriage that she no longer wishes to be in, if a Jewish woman without a *get* decides to remarry, any children produced from that union will be considered *mamzerim* ("illegitimate") from a religious standpoint (tellingly, a woman who cannot leave her marriage is

[264] *Bruker v Marcovitz*, 2007 SCC 54 (CanLII), [2007] 3 SCR 607 at para 3 [*Bruker*].
[265] *Ibid* at para 3.
[266] *Ibid* at para 3.

known as an *agunah* – literally a "chained one").[267] This represents a very difficult situation for religious Jewish women.

> Under Canadian law, she is free to divorce her husband regardless of his consent; under Jewish law, however, she remains married to him unless he gives his consent. This means that while she can remarry under Canadian law, she is prevented from remarrying in accordance with her religion. The inability to do so, for many Jewish women, results in the loss of their ability to remarry at all.[268]

For fifteen years, Mr. Marcovitz refused to give his wife the *get*, despite having agreed to do so in the context of a civil (that is, non-religious) divorce settlement.[269] Paragraph 12 of this agreement stated that the *get* would be given to Ms. Bruker by Mr. Marcovitz "immediately upon the granting of the Decree Nisi."[270] It took Mr. Marcovitz fifteen years to give Ms. Bruker the *get* and appear in front of the rabbinical court.[271] At that time, Ms. Bruker was forty-seven years old and unable to have children.[272] Ms. Bruker initiated a claim for $1,350,000 in damages for Mr. Marcovitz's breach of the civil settlement, which resulted in Ms. Bruker's inability to remarry and her inability to have religiously-recognized Jewish children.[273] At the trial-level court, Justice Mass determined that freedom of religion did not shield Mr. Marcovitz from liability for his breach of the civil settlement – namely, his failure to give Ms. Bruker a *get*.[274] Therefore, "[o]nce there is a civil contract, even if its object relates to religious obligations, it is justiciable and within the jurisdiction of the civil court."[275] Accordingly, the Québec Superior Court had the authority to award damages for Mr. Marcovitz's breach of contract and for the fifteen-year time period where Mr. Marcovitz

[267] *Ibid* at para 4.
[268] *Ibid* at para 5.
[269] *Ibid* at paras 10-11.
[270] *Ibid* at para 24.
[271] *Ibid* at para 29.
[272] *Ibid* at para 29.
[273] *SBB c JBEM*, 2003 CanLII 75122 (QC CS) at para 14 [*SBB*].
[274] *Ibid* at paras 12, 23.
[275] *Ibid* at para 19.

failed to deliver the *get* to Ms. Bruker.[276] Justice Mass also determined that damages could be awarded for Ms. Bruker being unable to remarry pursuant to the rules of the Jewish faith as well as for Ms. Bruker being unable to have religiously-legitimate children.[277] In regard to Ms. Bruker's inability to remarry, the court found that even though Ms. Bruker did not receive any marriage proposals, she was "entitled to exercise her freedom of religious choice as she alone determined it. It is not for Defendant to impose on her a degree of religiosity, to say that she could have remarried in the Reform Synagogue or sought an annulment …"[278] For Ms. Bruker to have a second Orthodox Jewish wedding, she needed a *get* from a *beth din*, which was blocked by Mr. Marcovitz's conduct for fifteen years.[279] As such, Justice Mass awarded Ms. Bruker $37,500 in damages, representing $2,500 for each of the fifteen years that the *get* was not provided to her.[280] For the damages associated with losing the ability to have "legitimate" Jewish children, the court awarded Ms. Bruker $10,000, reasoning that her desire to have additional children was intimately connected to her desire to have additional "legitimate" children.[281] Without the *get*, Ms. Bruker's options for a potential partner were more limited and did not align with her religious views (i.e. she would need to marry someone outside of the Orthodox Jewish community). Justice Mass awarded nominal damages as a result of this deprivation.[282]

At the Québec Court of Appeal, the court overturned Justice Mass' decision, finding that freedom of religion generally precludes judicial enforcement of contractual obligations of a religious nature.[283] The Court of Appeal also reasoned that "to condemn Mr. Marcovitz to pay

[276] *Ibid* at paras 19,35.
[277] *Ibid* at paras 50-52.
[278] *Ibid* at para 46.
[279] *Ibid* at para 47.
[280] *Ibid* at para 49.
[281] *Ibid* at para 50.
[282] *Ibid* at para 52.
[283] *Marcovitz c Bruker*, 2005 QCCA 835 (CanLII) at paras 76, 90.

damages in such circumstances would be inconsistent with the recognition of his right to execute his religious beliefs or duties as he sees fit without curial intervention."[284]

The Supreme Court overturned the decision of the Québec Court of Appeal and thereby affirmed the trial judge's decision about Ms. Bruker's entitlement to damages. The Supreme Court stated that it is well-understood that damages should be awarded when a contract is breached.[285] In response to Mr. Marcovitz's religious freedom argument, the court held that freedom of religion does not permit one to "opt out" of freely undertaken contractual obligations, although it may preclude an order for specific performance (that is to say, Ms. Bruker would likely not have been able to obtain an order compelling Mr. Marcovitz to give her a *get*).[286] The trial judge correctly determined that when Mr. Marcovitz failed to give Ms. Bruker the *get*, as stipulated by the civil divorce settlement, he breached their agreement. The Supreme Court did not change the breach of contract damages award stipulated by the trial judge, finding that Justice Mass exercised his discretion appropriately.[287] Further, the Supreme Court decided that Justice Mass correctly quantified Ms. Bruker's inability to remarry and have religiously-accepted children. Once again, the Supreme Court refused to disturb the trial decision. As such, the Supreme Court confirmed that Ms. Bruker was entitled to damages for the harms flowing from Mr. Marcovitz's breach of the civil settlement – namely, her inability to remarry within the Orthodox Jewish community and have additional, religiously "legitimate" children.[288] *Bruker v Markovitz* represents an explicit acknowledgment by Canadian courts that value is associated with the relationships that parents

[284] *Ibid* at para 80.
[285] *Bruker*, *supra* note 264 at para 94.
[286] *Ibid* at paras 79, 88.
[287] *Ibid* at para 95.
[288] *Ibid* at para 97.

have with children (or prospective children) and that this type of relationship/bond can be costed out and quantified.

It is interesting to note that Mr. Marcovitz refused to give Ms. Bruker a *get* because, in his view, Ms. Bruker had alienated their children from him, although this claim was never comprehensively addressed in any of the judgements.[289] In other words, Mr. Marcovitz denied Ms. Bruker a *get* because he wanted to punish her for parental alienation and (from his perspective) had no other recourse. If Canadian family law was better equipped to recognize parental alienation as a harm for which redress is available, maybe the *get* dispute might have been resolved at a much earlier stage of litigation.

While family law does not fully address the poignant sense of meaning attached to parenting and consequently, losing a child as a result of parental alienation tactics, other legal options exist to acknowledge the profound loss involved in parental alienation disputes. One potential solution or avenue of recourse that exists is tort law. This will be the focus of Chapter Three of this thesis.

[289] *Ibid* at paras 68, 112.

Chapter 3 – Can tort law be used in parental alienation disputes to "fix" this insidious problem?

The best interests of the child are paramount in family law. This makes some sense, given the fact that one of the major purposes of family law is to protect vulnerable children, ensuring that they have the opportunity to develop positively and thrive. The best interests of the child is so central to Canadian family law that it is present in every piece of federal and provincial family law legislation. Even though there are legitimate reasons for placing a heavy emphasis on the best interests of the child in Canadian family law, other important considerations in relationships are neglected. Typically, when people suffer injustice, they can seek a remedy and associated damages. In family law, there are no remedies available, mainly because, in my view, the system is focussed exclusively on promoting the best interests of the child. If we were to make room for other principles, such as a wronged party's right to justice and relief, that would improve the system as a whole.

As a result of the near-exclusive focus on promoting the best interests of the child, Canadian family law is ill-equipped to provide rejected parents – that is, the victims of parental alienation – with anything resembling justice. It does not have the necessary capacity to punish. Tort law, however, has this capacity. In fact, tort law claims and family law cases can intersect. Tort law focusses primarily on awarding damages to injured victims, and secondarily on punishing individuals who have committed wrongful acts.[290] For instance, family violence can both have an impact on custody arrangements and serve as a basis for an action for assault or battery.[291] Additionally, section 61(1) of Ontario's *Family Law Act* codifies the right of dependants to sue in tort when a caregiver is injured or killed because of the negligent conduct of another individual.[292] As such, there is conceptual space within the broader framework of family law for remedies in tort.

[290] Philip H Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020) at 7 [Osborne].
[291] Laura Buckingham, "Striking Back: The Tort Action for Spousal Violence" (2007) 23:2 Can J Fam L 273 at 304-305 [Buckingham].
[292] *FLA, supra* note 155, s 61(1).

Additionally, tort law is capable of evolving together with society. Importantly, "[t]he law of torts is anything but static, and the limits of its development are never set."[293] When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.[294]

Parental alienation results in serious and long-lasting emotional ailments for both the alienated child and the rejected parent. As such, making the alienating parent responsible for the costs, including the non-monetary costs, connected with this damage emphasizes a crucial purpose of tort law - namely, to put the victim of the tort in the same position they would have been in if the tort had not occurred – although it must be acknowledged that, in cases of psychological or emotional harm, such restoration may not be possible, and the function of any damage award may be primarily or wholly punitive.[295] A remedy in tort also endeavours to compensate the victimized parent who has experienced distress by being alienated from their child. A tort of parental alienation would need to consider the closeness of the relationship between the rejected parent and the alienated child before the alienation conduct, the severity of the alienation behaviour, the causal connection between the alienation behaviour and damage to the relationship between the alienated child and the rejected parent, and the emotional heartache suffered by the rejected parent as a result of losing a relationship with their child.[296] The purpose of this refinement is to ensure that the tort of parental alienation is not too broad to include cases of legitimate estrangement and not too narrow to prevent legitimate recovery. Given all of these factors, I am arguing for the recognition of a tort of parental alienation in Canada.

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[293] William L Prosser, *Handbook of the Law of Torts*, 4th ed (Minnesota: West Publishing Company, 1971), at 3-4 [Prosser].
[294] *Ibid.*
[295] Bruce L Beverly, "A Remedy to Fit the Crime: A Call for the Recognition of the Unreasonable Rejection of a Parent by a Child as Tortious Conduct" (2013) 15:1 Utah L Rev 1137 at 1159 [Beverly].
[296] Sandi S Varnado, "Inappropriate Parental Influence: A New App for Tort Law and Upgraded Relief for Alienated Parents" (2011) 61:1 DePaul L Rev 113 at 150-164 [Varnado].

Philosophical approaches underpinning tort law

There are four major philosophical approaches to tort law – the economic analysis approach, the corrective justice approach, the civil recourse approach, and the fairness approach. Each of these approaches acknowledge that tort law attempts to address two essential questions:

1) In what ways are individuals allowed to treat one another?
2) Who is responsible for shouldering blame when a wrong is committed?[297]

These questions are answered differently by each of the aforementioned approaches.

The economic analysis approach to tort law focusses on the interplay between tort law, safety, and assumption of risk.[298] Economists approach these issues through a cost-benefit analysis by examining market transactions.[299] As such, morality *per se* takes a backseat to transactional rationality. For instance, economists analyze motor vehicle accidents through the lens of societal safety. A significant number of motor vehicle accidents could be prevented if every road was considered a school zone (30 kilometers/hour to 40 kilometers/hour) for speed limit purposes, however, this change would significantly impact societal productivity. To arrive at an "optimal" speed limit, economists consider the costs associated with convenience, safety, and liability.[300] A similar technique is used to determine the role of tort law in the legal system. Economic theorists believe that tort law should be a tool for appropriate societal safety.[301] If an individual assumes an excessive amount of risk, he/she should be forced to bear the costs associated with that risk.[302]

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[297] Jules Coleman & Scott Shapiro, *Philosophy of Tort Law* (Oxford: Oxford University Press, 2021) at 656. Please note, Chapter 17 (which contains the page referenced herein) is written by Arthur Ripstein [Coleman & Shapiro].
[298] Michael Faure, *Tort Law and Economics* (Cheltenham: Edward Elgar Publishing Ltd, 2009) at 206-207 [Faure]
[299] Richard A Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1983) at 192 [Posner].
[300] Guido Calabresi, "The Decision for Accidents: An Approach to Nonfault Allocation of Costs" (1965) 78:4 Harv L Rev 713 at 717 [Calabresi].
[301] William M Landes & Richard A Posner, "The Positive Economic Theory of Tort Law" (1981) 15:4 Ga L Rev 851 at 858 [Landes & Posner].
[302] Catherine M Sharkey, "In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule" (2018) 85:4 Univ Cincinnati Law Rev 1017 at 1025 [Sharkey].

Alternatively, preventing legal recourse after suffering a "legitimate" injury instills fear and reduces productivity.[303] Tort law should ensure that individuals (and society more broadly) do not spend an inordinate amount of time preoccupied with safety but must effectively compensate those who are injured while being "cautious".[304] Accordingly, the major function of tort law for the economist is to prioritize an appropriate investment in societal safety. Damages subsequently flow from the prioritization.

The corrective justice approach to tort law does not focus on incentives but rather, on how the wrongful act of the tortfeasor and the injury to the victim intersect.[305] According to corrective justice proponents, the economic analysis approach uncouples this "transaction".[306] For the corrective justice theorist, courts should not focus on the defendant's conduct in isolation. Instead, courts should examine the defendant's conduct in relation to the plaintiff, specifically whether the defendant's negligent conduct compromised the plaintiff's safety, resulting in injury to the plaintiff.[307] As such, it is insufficient to simply focus on safety from an individual-perspective. Instead, safety must be analyzed relationally.[308] This relational view informs classic concepts in tort law like duty of care, standard of care, and causation. The corrective justice account also involves a moral dimension, something that is missing from the economic analysis approach.[309] By examining the interaction between the injured plaintiff and the tortious defendant, there is an implicit acknowledgement that certain conduct is reprehensible. Therefore, the appropriate remedy

[303] Richard A Posner, "A Theory of Negligence" (1972) 1:1 J Leg Stud 1 at 33 [Posner].
[304] *Ibid* at 37.
[305] Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 22 [Weinrib].
[306] Richard W Wright, "Substantive Corrective Justice" (1991) 77:2 Iowa L Rev 625 at 667 [Wright].
[307] Ernest Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 68 [Weinrib].
[308] *Ibid* at 62.
[309] John Gardner, "What is Tort Law for? Part 1. The Place of Corrective Justice" (2010) 30:1 Law Philos 1 at 50 [Gardner].

involves addressing the tortious wrong directly and compensating the victim according to these injuries.[310]

Other scholars have modified this preliminary conception of corrective justice, including Jules Coleman and John Gardner.[311] Coleman posits that tort law should be used to correct wrongdoing and to hold the tortious party responsible for injurious conduct.[312] In other words, the corrective justice approach to tort law should be modified to a retributive justice approach.[313] In effect, Coleman's modified version of corrective justice focusses on punishment and retribution.[314] Gardner chooses to focus on the reasons behind tortious conduct.[315] Here, a tortfeasor is required to compensate an injured party because the tortious act is wrong in and of itself and therefore, morally reprehensible.[316] The actual injury suffered by the victim is secondary to the innate wrong of the tortfeasor's behaviour.

The civil recourse theory adopts many of the tenets of the corrective justice theory, including the relationship between the tortfeasor and the victim, and the importance of understanding wrongdoing.[317] Civil recourse proponents argue that torts involve relational wrongs. Where the civil recourse theory departs from the corrective justice theory concerns the appropriate remedy.[318] The purpose of the remedy is not limited to addressing the wrong that was caused but rather, confronting the person who caused the injury and seeking "justice" beyond damages.[319]

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[310] Weinrib, *supra* note 305 at 95-96.
[311] Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2003) [Coleman]; John Gardner, *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019) [Gardner].
[312] Coleman, *supra* note 311 at 18-22.
[313] *Ibid* at 33.
[314] *Ibid* at 34.
[315] Gardner, *supra* note 311 at 44.
[316] *Ibid* at 44-48.
[317] Benjamin C Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91:3 Geo LJ 695 at 742 [Zipursky].
[318] *Ibid* at 748-752.
[319] Mark A Geistfeld, "Tort Law and Civil Recourse" (2021) 119:6 Mich L Rev 1289 at 1292 [Geistfeld].

The notion of "confronting" the party who aggrieved an injured individual represents a more expansive definition of "justice", premised on the social contract theory advanced by John Locke.[320] According to this theory, when an individual has suffered an injury, the state owes the injured party a *right* to be heard.[321] This *right* is free-standing, and independent from a damages award. The focus of the civil recourse theorist is not the quantum of the damages award but instead, the opportunity to "present your case" and to be heard in a neutral forum.[322] This becomes especially important in cases where a monetary award insufficiently compensates an injured party (for instance, the death of a loved one in a motor vehicle accident or the sentimental value attached to family jewellery that was destroyed in a fire). A damages award allows a suffering party the opportunity to purchase new jewellery or to pay for necessary therapy to process the loss of a loved one, however, no sum of money will remedy the aforementioned losses. If the "correct" theory which underpins tort law is limited to sufficiently/comprehensively addressing the tortious wrong, a large number of circumstances will fail to satisfy this objective. Importantly, the civil recourse theory does not deny the importance of compensation and deterrence. Rather, it sees these elements as being less important than the right to be heard, to express a legitimate grievance, and to hold the injurer accountable.

The civil recourse theory has been met with criticism. Richard Posner and Guido Calabresi argue that the civil recourse theory lacks practicality.[323] A fundamental feature of the "Western" legal system is a *right* to seek recourse post-injury.[324] Accordingly, the civil recourse theory simply

[320] Nathan B Oman, "Consent to Retaliation: A Civil Recourse Theory of Contractual Liability" (2011) 96:2 Iowa Law Rev 529 at 544-545 [Oman].
[321] Christopher J Robinette, "Two Roads Diverge for Civil Recourse Theory" (2013) 88:2 Indiana Law Rev 543 at 550 [Robinette].
[322] *Ibid.*
[323] Guido Calabresi, "Civil Recourse Theory's Reductionism" (2013) 88:2 Indiana Law Rev 449 at 452-454 [Calabresi]; Richard A Posner, "Instrumental and Noninstrumental Theories of Tort Law" (2013) 88:2 Indiana Law Rev 469 at 473-475 [Posner].
[324] *Ibid.*

restates a fundamental tenet of the legal system. Furthermore, how should judges craft a remedy after concluding that a wrong has been committed? According to these scholars, civil recourse theory appears to be premised exclusively on the right to seek justice, however, the legal system in its current form is acutely aware of the need to craft a suitable remedy once a party has been wronged. As such, this approach limits the significance of the remedy-crafting function available to courts.

The final philosophical approach to tort law centres around fairness, specifically, the importance of safety and security. George Keating relies on John Rawls's theory of justice to argue for a tort law system that prioritizes personal security.[325] This conception is similar to the economic analysis approach outlined earlier (which focusses on determining optimal levels of safety), however, fairness theorists assert that tort law should adequately distribute the benefits and risks associated with a variety of behaviours as opposed to remedying the injury caused to an individual.[326] Essentially,

> Because our lives are distinct and our ends diverse we cannot treat questions of interpersonal risk imposition as matters of personal choice writ large. We cannot treat them as matters of rationality and must treat them as matters of reasonableness. We can no longer ask: "Do the expected benefits of this risk exceed its expected accident costs?" We must ask: "Is it fair for one person to put another's life, limbs and personal property in peril in this way?" "Is the imposition of this kind of risk to the long run expected advantage of the class of persons disadvantaged by it?" "Do they stand to gain more than they lose from the right to impose equivalent risks, or from the contribution that the imposition of this kind of risk makes to their well-being?[327]

By emphasizing the type of risk that individuals in society agree to assume, the fairness conception approach to tort law deals with distributive justice as opposed to corrective justice.

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[325] Gregory C Keating, "Reasonableness and Rationality in Negligence Theory" (1996) 48:2 Stanford Law Rev 311 at 316 [Keating]; Gregory C Keating "The Idea of Fairness in the Law of Enterprise Liability" (1997) 95:5 Mich L Rev 1266 at 1300, 1302, 1310 [Keating].

[326] Gregory C Keating, "Form and Substance in the 'Private Law' of Torts" (2021) 14:1 J Tort Law 45 at 56-57 [Keating].

[327] Gregory C Keating, "Fairness and Two Fundamental Questions in the Tort Law of Accidents" (2000) USC Law School, Olin Working Paper No. 99-21 at 8 [Keating].

My proposal for creating a tort of parental alienation aligns with the civil recourse theory of tort law. The civil recourse theory supports the creation of this tort because it involves rectifying harm caused by a wrongdoer, compensating the victim of this harm, and allowing the victim the opportunity to seek "justice". Civil recourse prioritizes three features. First, and of central importance to this theory, empowering injured victims to hold their victimizer accountable – something that is absent for rejected parents in alienation cases. Second, prohibiting injurious conduct (which includes physical, psychological, and emotional injuries that are deliberately inflicted or negligently inflicted). Third, repairing loss resulting from injurious conduct. The first element of accountability is particularly applicable to a tort of parental alienation, which engages morally blameworthy conduct and malice. This leaves open the possibility for a punitive damages award. Civil recourse theory conceives of the civil action *process* as part of the remedy, whereas corrective justice theory conceives of the two as separate and sequential (that is, the remedy is what is awarded at the end of the process).

Civil recourse underpins many of the governing features of tort law, namely, how the tortious defendant is linked to the injured plaintiff, and how tort law should be used to remedy wrongs, as opposed to optimizing a suitable level of "risk-taking". Importantly, the theory of civil recourse deals with compensation, deterrence, and punishment simultaneously, while prioritizing the right to a *process* whereby an injured parent can attempt to hold the person who wronged them accountable. The tort of parental alienation, therefore, aims to incorporate all of these fundamental elements.

In response to the practicality concerns, while it is true that civil recourse theory might have some application difficulties when crafting a remedy, it *is* useful when deciding what private wrongs should be actionable in the first place. Civil recourse theory is not simply about providing

guidance to judges; it is a way of conceptualizing the purpose of tort law - one that recognizes that the opportunity to confront one's wrongdoer in court can be valuable *even if the injury is not easily quantifiable*. As such, the civil process becomes an element of the remedy.

The creation of a parental alienation tort has been explored by one other scholar

Bruce Beverly has proposed a creation of a tort of parental alienation in the United States, discussing how traditional tort law can be modernized to accommodate this new tort.[328] Specifically, Beverly spends time outlining the concept of loss of consortium and how this might be applicable to the creation of a novel and necessary parental alienation tort.[329]

In Ontario, loss of consortium no longer exists as an available tortious remedy; however, loss of consortium was historically raised by male plaintiffs when their wives were injured in an accident.[330] This tort was based on the belief that when a man's wife was unable to function as a result of her injuries, this adversely impacted the man's stature in society as well as his ability to care for himself.[331] It was also believed that women were the "property" of men and therefore, injury to a man's wife constituted damage to "property".[332] Interestingly, this avenue of recourse was only available for men with injured wives and not for wives and children of injured men. Understandably, this tort was met with extreme resistance as women began to gain equal-footing in both society and in law. As such, section 69(3) of the then *Family Law Reform Act* abolished this cause of action.[333] Section 69(3) of the *Family Law Reform Act* read "[n]o action shall be

[328] Beverly, *supra* note 295 at 1156.
[329] *Ibid* at 1157.
[330] Stella J Bailey, "A Married Woman's Right of Action for Loss of Consortium in Alberta" (1979) 17:3 Alta L Rev 513 at 514 [Bailey].
[331] *Ibid* at 515.
[332] *Ibid* at 514.
[333] *McIntyre v Docherty*, 2009 ONCA 448 (CanLII) at para 34 [*McIntyre*].

brought by a married person for the loss of the consortium of his or her spouse or for any damages resulting therefrom."[334]

In 1980, the United States recognized the common law right of a child to sue based on the loss of consortium of a parent, using the term parental consortium.[335] Parental consortium referred to the legitimate expectations of what a child was entitled to receive from his or her parent, including financial support, food, shelter and material items, as well as emotional support including love, attachment, nurturing, consistency, and spending time together.[336] In cases where a parent was wounded or killed as a result of an accident, the benefits that children were reasonably entitled to receive from that parent have been suddenly taken away. This profound loss is associated with mental health challenges, relationship struggles, helplessness and, in some instances, physical illness.[337] In parental alienation cases, relationships between parents and children are often irreparably damaged resulting in tremendous loss and suffering; a situation that is analogous to instances where a parent is injured or killed in an accident. For the alienated child, the relationship that existed with their parent is "dead" and they have lost out on the love and affection that comes with a meaningful relationship with a parent. The same circumstances exist for the rejected parent. Having a child who hates you because of your former spouse's vendetta is gut wrenching and devastating. In some ways, having an alienated child might feel worse for a parent than having a deceased child. When a child dies, a parent is sometimes given the time and space to mourn this loss. The parent makes funeral arrangements, is comforted by friends and family, takes time off work and hopefully, begins to heal from such an enormous tragedy. Society

[334] *Family Law Reform Act*, RSO 1980, c 152, s 69(3) [*Family Law Reform Act*].
[335] Beverly, *supra* note 295 at 1155. See *Ferriter v Daniel O'Connell's Sons, Inc.*, 413 NE 2d 690, 692-96 (Mass 1980).
[336] Michael A. Mogill, "And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium" (1992) Ariz St L J 24:1 1321 at 1324 [Mogill].
[337] *Ibid* at 1336.

understands that grieving after the death of a child is complicated and that compassion, empathy and understanding are required for the damaged parent to cope. In instances of parental alienation, this grieving process is not widely understood or recognized by society. Rejected parents do not have the opportunity to memorialize the loss of their child or gain any type of closure. They might even see their child in the community or witness their child's life unfold on social media, without having the ability to build memories with their child or participate in their life. The rejected parent's wounds are never given the opportunity to heal. The natural grieving process is constantly interrupted or entirely non-existent. Ultimately, this leaves open the possibility that the act of parenting confers something intrinsically valuable and should be compensable if taken away, ultimately deterring conduct that intrudes on the "sacred" act of parenting.

The importance of viewing marriage as a *reciprocal union/partnership* appears in Canadian legislation, specifically, Ontario's *Family Law Act*, which states:

> *Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to* ***recognize marriage as a form of partnership****; and whereas in support of such recognition it is necessary to provide in law for the* ***orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership****, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children;*[338]

The words "recognize marriage as a form of partnership" warrant closer examination. The union of marriage is premised on individuals coming together as equals to form a deep connection that is presumed to be emotional, physical, and – in many cases – spiritual. Most Christian wedding vows include some version of the phrase, "for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish, until parted by death."[339] Unfortunately, as a society we know

[338] *FLA, supra* note 155, Preamble.
[339] See <https://www.theknot.com/content/traditional-wedding-vows-from-various-religions>. This excerpt from marriage vows might not be applicable to all religious traditions, however, its sentiments largely hold true across different religious lines.

that approximately 40% of Canadian marriages end in divorce.[340] Some divorces are amicable, others are torturous and abusive, begging the question, what happens when spouses fail to treat one another as "partners"? The Ontario *Family Law Act* contains several provisions which aim at remedying instances where a partnership in marriage has been absent or where a partnership in marriage has decayed. Examples of these provisions in the Ontario *Family Law Act* include section 5(3) – improvident depletion of a spouse's net family property[341], section 5(6) – variation of share[342], section 12 – orders for preservation[343], section 24(6) – arrest without warrant[344], section 33(10) – conduct[345], sections 40 and 46 – restraining orders[346], and section 43 – arrest of absconding order[347]. These provisions emphasize that the Legislature turned its mind to the reality that in certain relationships, individuals will be incapable of acting as "partners" and consequently, finances from the relationship will not be "split down the middle". Ultimately, these provisions

[340] See <https://www150.statcan.gc.ca/n1/daily-quotidien/220309/dq220309a-eng.htm>.
[341] *FLA, supra* note 155, s 5(3). During situations where a spouse attempts to intentionally reduce the scope of their net family property, courts have the ability to account for that individual's assets before the official date of separation occurs. Instances of improvident depletion conduct include fraudulent transfers and gambling large sums of money resulting in significant losses.
[342] *Ibid*, s 5(6). This section of the *Family Law Act* provides an enumerated list of circumstances where courts may deviate from the "equal partnership model", awarding one spouse more than his or her share of the net family property.
[343] *Ibid*, s 12. This section of the *Family Law Act* focusses on ensuring that one spouse is prevented from intentionally reducing the other spouse's entitlement to his or her share of the net family property.
[344] *Ibid*, s 24(6). Spouses in Ontario have equal possession rights to the matrimonial home, independent of ownership. Traditionally, both spouses have the right to reside in the matrimonial home while the court determines the division of assets. During high conflict divorces, two warring parties are unlikely to share a space in an amicable and respectful manner. In these situations, a court can make an order for exclusive possession requiring one spouse to vacate the matrimonial home. This order can be enforced by the police. If the order is violated, that individual can be arrested.
[345] *Ibid*, s 33(10). This provision of the *Family Law Act* was referenced in *Bruni v Bruni*, 2010 ONSC 6568, as justification for reducing Catherine Bruni's spousal support to $1 per month.
[346] *Ibid*, s 40, 46. Section 40 is a non-dissipation order which can be used in a matrimonial proceeding. A restraining order can be used to prevent intentional depletion (section 40). Sometimes during periods of relationship breakdown, a spouse fears for his or her safety because of their former partner's threatening or violent conduct. Similarly, section 46 allows courts to issue restraining orders during times of volatility to protect the individual who is fearing for his or her safety.
[347] *Ibid*, s 43. Attempting to flee from the financial responsibilities attached to a relationship can result in a warrant for that individual's arrest, followed by that individual actually being arrested.

indicate that deviating from the presumption that a marriage "partnership" exists is likely important and necessary when some relationships go awry.

Canadian courts have also used torts to remedy problematic conduct upon relationship dissolution/partnership deviation, with a view to both compensating the injured party and deterring future instances of such behaviour through punishment. The following section provides an overview of the torts of assault, battery, intentional infliction of nervous shock, and cyberbullying as well as some information about how these torts evolved in the Canadian legal system. Even though some of the cases mentioned below are not family law decisions, they provide an important overview of how these foundational torts have been created, refined, and implemented in the family law context. Ultimately, these decisions show that treating parental alienation cases in tort serves to punish abusive parents, which should not be seen as in tension with the best interests of the child principle governing family law.

In order to make the case for a Canadian tort of parental alienation, and analyze the consequences thereof, I am relying on Canadian jurisprudence involving litigants who have advanced arguments about the creation of novel torts. This will allow for an analysis about why certain novel torts were accepted while other novel torts were rejected. This information will inform the techniques that should be used for a new tort of parental alienation to be recognized by Canadian courts.

Intentional Infliction of Nervous Shock

Wilkinson v Downton "created" the tort of intentional infliction of nervous shock

The tort of intentional infliction of nervous shock, also known as the tort of mental distress, has an interesting history. Prior to the seminal case of *Wilkinson v Downton*, the tort of intentional

infliction of nervous shock could not be raised unless the plaintiff suffered a physical injury.[348] If a plaintiff was suffering from mental anguish, legal recourse using this tort was unavailable. The legal system was not equipped to address or value the "cost" of mental distress damages.[349] Fortunately, *Wilkinson v Downton* expanded the scope of nervous sock to accommodate the mental injuries and suffering logically connected to tortious conduct. In *Wilkinson v Downton*, the defendant, Mr. Downton, decided to play a "practical joke" on Mrs. Wilkinson by telling her that her husband was in an accident where both of his legs were broken.[350] Mr. Downton instructed Mrs. Wilkinson to immediately take a cab to help her injured husband.[351] Understandably, the news that Mr. Downton delivered was very distressing to Mrs. Wilkinson, causing significant issues including vomiting and weeks of incapacity because of mental anguish.[352] These injuries resulted in significant medical expenses as well Mr. Wilkinson having to take time off work to care for his distressed wife. [353] Importantly, Mrs. Wilkinson did not have any pre-existing health conditions which would have made this incapacity more likely.[354] The court reasoned that the defendant knowingly and willingly acted in a way to cause the plaintiff harm and infringed her safety. Justice Wright stated that

> It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.[355]

[348] *Wilkinson v Downton*, [1897] 2 QB 57 [*Wilkinson*].
[349] *Lynch v Knight* (1861), 11 ER 854 at 863 [*Lynch*].
[350] *Wilkinson*, *supra* note 348 at 58.
[351] *Ibid* at 58.
[352] *Ibid*.
[353] *Ibid*.
[354] *Ibid*.
[355] *Ibid* at 59.

Justice Wright analyzed existing case law about the connection between the "fright" and the damage caused to the victim.[356] Ultimately, the reasoning in these cases was determined to be inapplicable to Mrs. Wilkinson's circumstances.[357] The injuries suffered by Mrs. Wilkinson were not too remote a consequence from Mr. Downton's actions.[358] Accordingly, Mr. Downton was liable for damages of 100 pounds.[359] *Wilkinson v Downton* is an important case for several reasons. First, the court acknowledged that mental distress injuries are just as compensable as physical distress injuries. Second, the court confirmed that conduct can be imputed to an individual.[360] If the conduct was calculated to cause injury, the tortfeasor intended the consequences of his or her actions.[361]

From *Wilkinson v Downton,* the tort of intentional infliction of mental distress was accepted in Canadian law and refined into a three-part test. In order to establish the tort of intentional infliction of nervous shock, a claimant must establish three elements. First, that the defendant intentionally engaged in conduct that was flagrant and outrageous.[362] Second, that this conduct was calculated to produce harm.[363] Third, that this conduct resulted in a visible and provable injury.[364]

Clark v Canada refined the test for intentional infliction of nervous shock in the Canadian context

In the Canadian context, *Clark v Canada* was a seminal case which recognized how mental ailments, symptoms, and injuries, could lead to the recovery of emotional distress damages. Here,

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[356] *Victorian Railways Commissioners v Coultas* (1888), 13 AC 222 (PC); *Allsop v Allsop* (1860), 157 ER 1292 (Ex Ct).
[357] *Wilkinson, supra* note 348 at 59.
[358] *Ibid.*
[359] *Ibid.*
[360] *Ibid.*
[361] *Ibid.*
[362] *Rahemtulla v Vanfed Credit Union*, 1984 CanLII 689 (BC SC) at paras 52-56 [*Rahemtulla*].
[363] *Ibid.*
[364] *Ibid.*

the plaintiff, Alice Clark, worked as a member of the Royal Canadian Mounted Police (RCMP) in Red Deer, Alberta, beginning in 1980.[365] Shortly after she began her post, she was transferred to a traffic section position.[366] During the 1980s, there were very few women employed by the RCMP and therefore, during most of Mrs. Clark's work shifts, she was the only female present.[367] Shortly after Mrs. Clark's transfer to the traffic division, she started to experience gender-based harassment. She was bombarded with sexist and lude comments, told that she was "not a woman until she bore a child" and on multiple occasions, she was physically groped.[368] Despite her pleas for this behaviour to stop, it continued and worsened over her tenure with the RCMP. Mrs. Clark's work environment had a significant impact on her mood, her physical health, and her desire to come to work. The persistent harassment and bullying which she was exposed to resulted in her feeling like a "piece of dirt".[369] Even when Mrs. Clark complained to her superiors about the toxic climate at work, her concerns were routinely dismissed and few improvements were made even when her supervisors witnessed the harassment she experienced. All of these instances caused Mrs. Clark's performance at work to suffer, leading to her request for a transfer in 1986.[370] This request was denied and instead, Mrs. Clark was provided with three options. She could quit, be placed on a medical discharge or be terminated.[371] This threat under the guise of multiple options caused Mrs. Clark's emotional state to deteriorate to the point where she suffered a mental crisis, being unable to concentrate or respond to external cues appropriately.[372] Mrs. Clark's condition improved when she was transferred from Red Deer, however, in May 1987, Mrs. Clark was informed that she was

[365] *Clark v Canada*, 1994 CanLII 3479 (FC), [1994] 3 FC 323 [*Clark*].
[366] *Ibid.*
[367] *Ibid.*
[368] *Ibid.*
[369] *Ibid.*
[370] *Ibid.*
[371] *Ibid.*
[372] *Ibid.*

under investigation for some of her prior conduct. This investigation would determine if she would face charges of criminal assault.[373] News of this investigation sent Mrs. Clark into further mental health challenges. Ultimately, Mrs. Clark chose to resign from her post even though she was acquitted of both criminal assault charges.[374] Justice Dubé of the Federal Court determined that Mrs. Clark was harassed during her time with the RCMP, that this harassment resulted in her resignation and that her anxiety and depression were directly related to the harassment that she received at work.[375] In addition to claims of negligence, damages for breach of contract and violations of her *Charter* rights, Mrs. Clark claimed damages for pain and suffering alleging intentional infliction of nervous shock.[376] Justice Dubé was satisfied that the circumstances of this case met the test for intentional infliction of nervous shock.[377] The repeated instances of harassing, sexist and intimidating behaviour of the Red Deer RCMP Brach was "calculated to produce some effect of the kind which was produced" and resulted in significant, visible and provable injuries, namely, depression and anxiety.[378] Extensive medical documentation supported these diagnoses. Importantly, Justice Dubé concluded that Mrs. Clark's injuries were more than just mere anguish and fright.[379] Mrs. Clark was awarded special damages (composed of damages for intentional infliction of nervous shock) amounting to $88,000 as well as $5,000 in general damages.[380] A very important takeaway from this decision is confirmation that mental health conditions including depression and anxiety are considered visible and provable illnesses that are compensable.

[373] *Ibid.*
[374] *Ibid.*
[375] *Ibid.*
[376] *Ibid.*
[377] *Ibid.*
[378] *Ibid.*
[379] *Ibid.*
[380] *Ibid.*

The existence of the tort of intentional infliction of nervous shock underscores the fact that courts are capable of punishing and providing compensation for cruel and malicious conduct resulting in psychological injury, separate and distinct from any financial "injury". Courts have recognized that when individuals behave egregiously and in a way that causes harm, this behaviour should be punished and courts should send a message to members of society that this behaviour will not be tolerated. This is one of the functions of tort law, distinct from and just as important as the compensatory function. Parental alienation cases involve cruel and malicious conduct towards an ex-spouse. Courts recognize that this behaviour is enormously damaging and is associated with long-term consequences for both alienated children and rejected parents; however, courts seem to be generally unwilling to hold the alienator parent financially responsible for their poor behaviour. Before *Wilkinson v Downtown*, injured individuals suffering from mental distress were unable to pursue financial recourse for conduct that is objectively egregious. Courts came to recognize that this lack of recourse was wrong. This change in "culture" and thinking leaves open the possibility that courts will come to recognize the value of treating parental alienation as a tort in its own right.

Several Ontario family law decisions involve findings of intentional infliction of nervous shock

In the family law context, the tort of intentional infliction of emotional distress has been advanced in several cases. Usually, this argument is unsuccessful; however, there have been a few crucial cases where individuals have been awarded intentional infliction of emotional distress damages based on egregious conduct by the defendant.

McLean v Danicic

In *McLean v Danicic,* the tort of intentional infliction of mental suffering and emotional distress was not pled, however, based on the Mr. Danicic's conduct, Justice Young determined

that the elements of this tort were satisfied.[381] Mr. Danicic engaged in a course of persistent and repeated harassing behaviour. During the post-separation period, Mr. Danicic sent Ms. McLean two threatening packages.[382] The first one was received by Ms. McLean in January 2007.[383] This package housed naked pictures of Ms. McLean, with a list containing the names and addresses of her family members and friends.[384] A note was contained with these photos stating that if Ms. McLean did not stop "ruining people's lives", these explicit images would be distributed to the individuals on the list.[385] This would happen until Ms. McLean could not "cross the road without people knowing what a truly disgraceful fucking fat pig [she was]."[386] The second package contained a letter detailing various sexual acts performed by Ms. McLean with a threat to expose this information to Ms. McLean's grandmother if she did not stop certain financial requests connected to their relationship dissolution (ex. spousal support).[387] Interestingly, even though the second package was addressed to Ms. McLean, the return address was that of Mr. Danicic.[388] The harassment and threats of humiliation caused Ms. McLean to report Mr. Danicic to the police, where he was subsequently charged with criminal harassment and extortion.[389] These packages caused Ms. McLean a significant amount of stress and anxiety, so much so that she sought medical attention.[390] She lived under constant fear that Mr. Danicic would follow through with his threats and potentially escalate his cycle of abuse, endangering her life.[391] "She continues to be fearful for herself and others, including her legal counsel and her family. She is particularly fearful of his

[381] *McLean v Danicic*, 2009 CanLII 28892 (ON SC), para 84 [*McLean*].
[382] *Ibid* at para 48.
[383] *Ibid* at para 48.
[384] *Ibid* at para 50.
[385] *Ibid* at para 49.
[386] *Ibid* at para 49.
[387] *Ibid* at para 51.
[388] *Ibid* at para 52.
[389] *Ibid* at para 53.
[390] *Ibid* at para 86.
[391] *Ibid* at para 86.

taunt that one day it will start again and be much worse, contained in the second package she received."[392] Justice Young found on a balance of probabilities that Mr. Danicic sent the two aforementioned packages to Ms. McLean and that he caused her anxiety, stress and fear.[393] Accordingly, Justice Young awarded Ms. McLean $15,000 in compensatory and aggravated damages based on the tort of intentional infliction of mental suffering.[394]

Attia v Garanna

Similarly, in *Attia v Garanna*, during a family trip to Egypt in the couple's separation period, Ms. Garanna and her parents abducted the children of the marriage and refused to return them to Ontario.[395] Mr. Attia went one year without seeing his children.[396] Mr. Attia sought intentional infliction of mental suffering damages because of Ms. Garanna's child abduction.[397] Justice Ricchetti acknowledged that intentional infliction of mental suffering damages are available in family law cases, however, to be successful with this claim, the plaintiff must show evidence of a "provable illness".[398] Even though Mr. Attia struggled emotionally because of his children's abduction, there was no medical evidence adduced about a medical diagnosis[399] Therefore, the tort of intentional infliction of mental suffering was unavailable in this case.[400] Once again, this emphasizes the importance of medical evidence in order to be successful with a claim of intentional infliction of mental distress damages.

McLean v Danicic and *Attia v Garanna* underscore the fact that courts in family law disputes are willing to consider and award damages for behaviour the constitutes intentional

[392] *Ibid* at para 86.
[393] *Ibid* at para 86.
[394] *Ibid* at para 87.
[395] *Attia v Garanna,* 2010 ONSC 1261, 2010 CarswellOnt 1168 at para 28 [*Attia*].
[396] *Ibid* at para 38.
[397] *Ibid* at para 318.
[398] *Ibid* at para 319.
[399] *Ibid* at para 319.
[400] *Ibid* at para 319.

infliction of nervous shock. The tort of intentional infliction of nervous shock is an appropriate use of tort law as a necessary punitive instrument to address egregious conduct. Where the harm being remedied is psychological or emotional, there is a sense in which the compensatory and punitive functions of tort law can be said to have fused. Parental alienation cases involve emotional warfare and outrageous conduct which produces enormous short-term and long-term harm to both the alienated child and rejected parent. These realities fit nicely within the realm of the tort of intentional infliction of nervous shock, thereby providing a necessary and appropriately punitive instrument for handling increasingly common parental alienation disputes.

The torts of assault and battery are routinely seen in Canadian family law cases

Given the rising prevalence of domestic violence in intimate relationships, tort law is frequently seen in family law cases. The torts of assault and battery provide an avenue of recourse for victims of physical abuse along with controlling behaviour. Scholars often refer to parental alienation as a form of psychological "violence" against the alienated child and rejected parent.[401] This leaves open the possibility that parental alienation conduct could be viewed through the lens of "assaultive" behaviour. The following cases provide a brief overview of how relationship violence has been handled by Ontario courts recently.

Costantini v Costantini

In *Costantini v Costantini*, Mrs. Michelle Costantini commenced an application against Mr. Phillip Costantini, seeking a divorce as well as damages for assault and battery, intentional infliction of mental suffering, and punitive damages.[402] The damages claim for assault, battery and intentional infliction of mental suffering pertained to a violent event where Mr. Costantini broke

[401] Jennifer J Harman et al., "Parental alienation behaviours: An unacknowledged form of violence" (2018) 144:2 Psychol Bull 1275 [Harman et al.].
[402] *Costantini v Costantini*, 2013 ONSC 1626 (CanLII) at para 1 [*Constantini*].

into the home where Mrs. Costantini was staying, grabbed her by the neck, choked her, slammed her head against the wall and bashed her face on the floor.[403] Mrs. Costantini suffered several physical and mental injuries from the incident including bruises, neck pain, headaches, depression, fear, insomnia and post-traumatic stress disorder.[404] The tort of assault occurs when there is "the intentional creation of the apprehension of imminent harmful or offensive contact."[405] Conversely, the tort of battery occurs when an individual intentionally interferes with the plaintiff's person.[406] This must be physical in nature and must be socially offensive.[407] In siding with the Applicant, Justice Pazaratz determined that Mr. Costantini committed the torts of assault and battery, intending to injure Mrs. Costantini both physically and emotionally.[408] Justice Pazaratz awarded Mrs. Costantini $15,000 in damages because of the assault and battery that she endured.[409]

Dhaliwal v Dhaliwal

Dhaliwal v Dhaliwal involved two decisions, one of a criminal law nature and a second of a family law nature. In the criminal law decision, Mr. Dhaliwal was criminally convicted of assaulting his wife. The family law decision dealt with division of assets, child custody arrangements as well as civil claims for damages as a result of Mr. Dhaliwal's chronically abusive behaviour, which included physical abuse, emotional abuse, financial abuse and verbal abuse.[410] This abuse was directed at both Mrs. Dhaliwal and their daughter, which ultimately resulted in Mrs. Dhaliwal leaving the marriage and filing for divorce. The consequences of Mr. Dhaliwal's abuse were profound and debilitating for Mrs. Dhaliwal, including depression, difficulty

[403] *Ibid* at para 8.
[404] *Ibid* at paras 11, 13.
[405] *Ibid* at para 46.
[406] Allen M Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at 45 [Linden].
[407] *Ibid.*
[408] *Ibid* at para 57.
[409] *Ibid* at para 63.
[410] *Dhaliwal v Dhaliwal*, 1997 CarswellOnt 5774, [1997] O.J. No. 5964 (OCJ) at para 57 [*Dhaliwal*].

concentrating, disrupted sleep, reduced self-esteem and anxiety.[411] Additionally, Mrs. Dhaliwal was a member of the Sikh community, which typically frowned on separation and divorce.[412] This cultural mindset intensified Mrs. Dhaliwal's feelings of depression and despair. Accordingly, Justice Métivier awarded Mrs. Dhaliwal $5,000 in general damages and $5,000 in aggravated damages, totaling $10,000 in damages because of Mr. Dhaliwal's assaultive behaviour.[413] Justice Métivier reasoned that "[t]he fact that the husband was convicted and punished in the criminal court system does not deter the making of this award in any way."[414] Additionally, this award was meant to reflect society's outrage in Mr. Dhaliwal's behaviour and consequently, to send a message that conduct of this nature is unacceptable and to be punished.[415] The court's express acknowledgment of the need to punish Mr. Dhaliwal gives us some sense of how a tort for parental alienation might be conceptualized. Courts are already willing to punish those who subject their spouses to cruelty and psychological violence, therefore, it would not be difficult to establish that parental alienation falls within the scope of this already-recognized category of behaviour that warrants punishment.

Costantini v Costantini and *Dhaliwal v Dhaliwal* emphasize that courts are willing to treat domestic violence seriously. Parental alienation cases are not dramatically different from situations of domestic violence. Often, parental alienation circumstances involve power imbalances, psychological control, and imposing/domineering behaviour. This provides another point of intersection between tort law and parental alienation cases, potentially providing an avenue of recourse for "abused" rejected parents.

[411] *Ibid* at para 63.
[412] *Ibid* at para 62.
[413] *Ibid* at para 64.
[414] *Ibid* at para 64.
[415] *Ibid* at para 65.

Canadian cases have adopted "uncategorized" torts in order to provide deserving plaintiffs legal redress

"Innominate intentional tort" is a term that refers to an intentional tort that has not been explicitly identified and categorized. Examples of these torts include infecting another individual with a disease, poisoning food, setting a trap in someone's path and removing medically-necessary treatment from a patient who is incapacitated.[416] The following cases outline courts' willingness to compensate individuals who otherwise would not have been recognized in the current legal system, and to impose punishment that would not otherwise be possible. It is important to note that some of these cases involve family law issues while others focus on areas of law that are distinct from family law.

Cant v Cant

After Mrs. Cant filed a petition for divorce, Mr. Cant abducted their child, Jonathan, and took him to Australia during an access visit.[417] Mrs. Cant spent approximately two years searching for her son, enduring significant financial and emotional heartache. These financial costs included the fees associated with a private investigator, airplane tickets, hotel accommodations, car rentals, legal advice and advertisements looking for her child's whereabouts.[418] All of these expenses totalled $31,937.34.[419] Mrs. Cant argued that these expenses were compensable. The argument that Mrs. Cant advanced was that she had legal custody of Jonathan during the time when he was abducted by Mr. Cant and that Jonathan's abduction resulted in economic loss.[420] Citing *Wilkinson*, Justice Salhany acknowledged that the circumstances of this case did not amount to physical harm,

[416] Robert M Solomon et al, *Cases and Material on the Law of Torts*, 9th ed (Toronto: Caswell, 2015) at 97 [Solomon et al.].
[417] *Cant v Cant*, 1984 CanLII 2157 (ON SC) [*Cant*].
[418] *Ibid*.
[419] *Ibid*.
[420] *Ibid*.

however, Mrs. Cant was still entitled to compensation for her economic loss.[421] Importantly, even if tortious conduct could not be specifically defined, this should not bar a plaintiff from receiving legitimate financial recovery.

It is important to note that Mrs. Cant suffered economic loss, which is not always the case in parental alienation disputes. However, *Cant v Cant* is being cited for a different principle, namely that conduct can be tortious even if it does not line up with any recognized tort. Even though rejected parents might be able to pursue the innominate intentional tort avenue, this would likely need to be done in a separate action, whereas a tort for parental alienation could be awarded in the course of Family Court proceedings.

Lajoie v Kelly

The plaintiff, Ms. Joanne Lajoie worked as a waitress in the defendant, Mr. Michael Kelly's restaurant.[422] She was seventeen years old, and the mother of a newborn baby.[423] Shortly after Ms. Lajoie commenced her employment at Mr. Kelly's restaurant, she was subjected to repeated sexual advances.[424] Despite her requests for this behaviour to stop, Mr. Kelly continued to make inappropriate, lude comments, gestures and contact.[425] Examples of this included asking Ms. Lajoie for a kiss at work and stating that he was attracted to a woman who washed dishes while naked on the floor.[426] Understandably, Mr. Kelly's behaviour made Ms. Lajoie very uncomfortable. Ultimately, she decided to leave her position at the restaurant because of shame and embarrassment.[427] Ms. Lajoie argued that she was sexually harassed and was entitled to damages

[421] *Ibid*.
[422] *Lajoie v Kelly*, 1997 CanLII 22783 (MB QB) at para 3 [*Lajoie*].
[423] *Ibid* at para 3.
[424] *Ibid* at para 5.
[425] *Ibid* at para 7.
[426] *Ibid* at para 13.
[427] *Ibid* at para 7.

pursuant to the *tort* of sexual harassment.[428] Justice Smith analyzed if the tort of sexual harassment was present in Canadian law. In concluding that sexual harassment was a tort and an independent actionable wrong, Justice Smith emphasized that tort law is *dynamic* and *ever-evolving*.[429] Just because a claim for a specific tort has not been previously advanced, does not mean that it should not exist in Canadian law.[430] Even though Justice Smith determined that this sexual harassment was "relatively minor in nature"[431], Ms. Lajoie was awarded nominal damages of $1,000.[432]

Bhadauria v Seneca College

Mrs. Bhadauria was a very educated woman with a bachelor's degree, master's degree and doctorate in mathematics.[433] In addition to these credentials, Mrs. Bhadauria had teaching experience in the province of Ontario. For four years, Mrs. Bhadauria applied for several teaching positions at Seneca College. Unfortunately, she received zero interviews and consequently, zero job offers.[434] Mrs. Bhadauria claimed that she was denied these opportunities because of her ethnicity.[435] Mrs. Bhadauria claimed damages flowing from what she argued was discriminatory conduct, breaching section 4 of the Ontario *Human Rights Code*.[436] At the Ontario Superior Court, Justice Callaghan dismissed Mrs. Bhadauria's case stating that this cause of action should have been dealt with pursuant to the procedures outlined by the Ontario *Human Rights Code*.[437] Mrs.

[428] *Ibid* at para 26.
[429] *Ibid* at para 41.
[430] *Ibid* at para 41.
[431] *Ibid* at para 57.
[432] *Ibid* at para 57.
[433] *Seneca College v Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 SCR 181 at 183 [*Bhadauria*].
[434] *Ibid* at 183.
[435] *Ibid* at 183.
[436] *Ibid* at 183.
[437] *Ibid* at 184.

Bhadauria argued that the common law provided a duty not to discriminate.[438] This argument was accepted by the Ontario Court of Appeal.[439] Specifically, the court found that it did

> [N]ot regard the Code as in any way impeding the appropriate development of the common law in this important area. While the fundamental human right we are concerned with is recognized by the Code, it was not created by it. Nor does the Code … contain any expression of legislative intention to exclude the common law remedy.[440]

The court also emphasized that even though a common law *tort of discrimination* had not previously been recognized by the judiciary, it had also never been definitively rejected.[441] As such, the appeal was granted and the trial-level decision was overturned.[442] At the Supreme Court of Canada, the court overturned the Ontario Court of Appeal's decision finding no support for the creation of a tort of discrimination at common law[443], however, this reasoning largely hinged on the enforcement scheme stipulated by the *Ontario Human Rights Code* which mandated the use of an administrative tribunal, a board of inquiry and potentially, judicial review by a court.[444] Importantly, the claim in *Bhadauria* failed because there exists, in Ontario, a complete legislative scheme for the adjudication of claims of discrimination. There is no comparable scheme in place for the adjudication of claims of parental alienation, so the common law remains free to develop unless and until the Legislature indicates otherwise.

Cant v Cant, *Lajoie v Kelly*, and *Bhadauria v Seneca College* all provide insight into how Canadian courts have acknowledged that sometimes, the existing legal framework does not sufficiently account for the tortious losses that plaintiffs experience. As such, the lack of an existing remedy in tort should not preclude courts from awarding compensation through the use

[438] *Ibid* at 189.
[439] *Seneca College v Bhadauria*, 1979 CanLII 71 (ON CA).
[440] *Ibid.*
[441] *Ibid.*
[442] *Ibid.*
[443] *Bhadauria*, *supra* note 433 at 190.
[444] *Ibid* at 194.

of undifferentiated torts. Even if the courts decline to recognize a free-standing tort of parental alienation, the conduct that is constitutive of parental alienation could nonetheless be actionable as an innominate intentional tort (although I maintain that a stand-alone tort would be preferable, in the interests of legal clarity and ease of access for plaintiffs). Parental alienation results in injuries to both alienated children and rejected parents, which could be compensable through the use of an innominate intentional tort pathway.

The tort of publicly placing someone in false light has been recognized in Canadian family law cases

In an age of digitization, bullying has become an even more prominent and pressing problem. The seemingly limitless possibilities provided by the virtual ethos are also associated with some sinister effects, including the fact that individuals are constantly reachable and without anonymity. As such, tort law has attempted to acknowledge this increasingly common issue.

Yenovkian v Gulian focussed on the effects of cyberbullying and privacy invasion committed by Mr. Vem Yenovkian on Ms. Sonia Gulian as well as the damage caused to two children of their marriage.[445] Mr. Yenovkian engaged in a prolonged and calculated campaign of bullying against Ms. Gulian and her family on a variety of different social media platforms.[446] The photos and videos posted by Mr. Yenovkian often took aim at his children, calling them "damaged", "abused", "autistic" and "drugged with opiates and tranquilizers" after spending time with their mother and maternal grandparents.[447] Mr. Yenovkian accused Ms. Gulian and her parents of committing multiple crimes including child abduction, forgery, child abuse, and assault.[448] He also

[445] *Yenovkian v Gulian*, 2019 ONSC 7279 (CanLII) at para 1. This case is quite complicated because of jurisdictional issues paired with the fact that the family has moved around many times. Importantly, this case deals with multiple family law issues including claims for custody and support [*Yenovkian*].
[446] *Ibid* at para 19.
[447] *Ibid* at para 22.
[448] *Ibid* at para 23.

reported Ms. Gulian and her parents to the schoolboard, the police, the Federal Bureau of Investigation (FBI) and child welfare agencies.[449] These deplorable actions were also accompanied by hundreds of derogatory emails.[450] Despite repeated warnings and court orders, Mr. Yenovkian continued to post defamatory material online and continued to threaten Ms. Gulian and her parents.[451] Ms. Gulian brought a claim against Mr. Yenovkian for invasion of privacy.[452] One form of privacy invasion which has been recognized by Canadian courts is the *tort* of public disclosure of private facts.[453] There are four elements which must be satisfied for this tort. First, that the defendant published information about the plaintiff's life which was previously unavailable to the public.[454] Second, that the plaintiff did not authorize the release of this information.[455] Third, that the material published was objectively offensive.[456] Finally, that the material published was unnecessary for the public to be aware of.[457] Another form of privacy invasion which has been recognized in Canadian law is the *tort* of publicly placing a person in false light.[458] The two elements for this tort are that the false material is objectively highly offensive and that the defendant was either aware of the false nature of the statements or recklessly disregarded the consequences that would logically flow from how the plaintiff would be perceived as a result of these statements.[459] The difference between the tort of public disclosure of private facts and the tort of publicly placing a person in false light is that the former deals with statements that are true

[449] *Ibid* at paras 31-37.
[450] *Ibid* at para 39.
[451] *Ibid* at paras 40-42.
[452] *Ibid* at para 160. It is also important to note that the claim for the tort of intentional infliction of mental suffering was effective in this case, however, that was not the novel finding.
[453] *Ibid* at para 168.
[454] *Jane Doe 72511 v N.M.*, 2018 ONSC 6607 (CanLII) at para 99 [*Jane Doe 72511*].
[455] *Ibid*.
[456] *Ibid*.
[457] *Ibid*.
[458] *Yenovkian, supra* note 445 at para 170.
[459] William L Prosser, "Privacy" (1960) 48 Cal L Rev 383 [Prosser].

whereas the later involves statements that are false.[460] In finding that Mr. Yenovkian's behaviour satisfied the tort of publicly placing a person in false light, Justice Kristjanson awarded Ms. Gulian $100,000.[461]

Parental alienation can be likened to a form of "bullying" where a controlling and vengeful alienator parent exploits their child's vulnerabilities, thereby convincing their child to turn against their other parent. The tort of cyberbulling recognized in *Yenovkian v Gulian*, emphasizes the willingness of Canadian courts to acknowledge the harms associated with bullying in the family law context. *Yenovkian v Gulian* also makes it clear that when existing family law remedies are insufficient to provide redress and impose socially appropriate punishment, tort law offers a promising alternative.

Several Canadian decisions have resulted in the creation of novel torts

Caplan v Atas

In *Caplan v Atas*, Justice Corbett of the Ontario Superior Court created a novel tort of harassment in internet communications to acknowledge circumstances where existing tort law is deficient and unable to provide a suitable remedy for individuals suffering significant harm. The factual circumstances in *Caplan v Atas* are complex. Nadire Atas systematically harassed one hundred and fifty (150) individuals and businesses over the course of many years. The plaintiffs initiated actions for private nuisance, harassment and defamatory libel. Four prior interlocutory injunctions did little to prevent Ms. Atas from disseminating a slew of inaccurate and defamatory content through the use of online platforms.[462] She continued to post malicious lies online. Ms. Atas also attempted to prolong the litigation on numerous occasions, including filing for

[460] *Yenovkian, supra* note 445 at para 172.
[461] *Ibid* at para 193. Additionally, $150,000 in punitive damages were awarded to Ms. Gulian.
[462] *Caplan v Atas*, 2021 ONSC 670 (CanLII) at para 31 [*Caplan*].

bankruptcy the night before a summary judgement motion was to be heard, consistently disregarding orders provided by the court, and requesting a litigation guardian under suspicious circumstances.[463] Unfortunately, even a jail term of seventy-four (74) days seemed to have little effect on curbing Ms. Atas' problematic behaviour.[464]

Given the seriousness of Ms. Atas' behaviour, it was clear that traditional remedies would do little to provide the plaintiffs with suitable relief. Justice Corbett acknowledged that in a new age of technological advancements, courts have a *responsibility* to keep pace with this evolution.[465] It was clear that the traditional remedies available to end Ms. Atas' conduct were insufficient.

> Whatever the solution may be that brings an end to her malicious unlawful attacks on other people, it is clear that the law needs better tools, greater inter-jurisdictional cooperation, and greater regulation of the electronic "marketplace" of "ideas" in a world with near universal access to the means of mass communication.[466]

As such, Justice Corbett "created" a new tort of internet harassment.[467] By referencing case law from the United States, Justice Corbett crafted a three-pronged test to determine if an individual has committed the tort of internet harassment.[468] First, the defendant maliciously participated in communications that shock the conscience.[469] In other words, the communications are extremely damaging and outrageous. Second, these communications must have intended to cause the plaintiff harm, emotional distress, anxiety and fear.[470] Third, the plaintiff must have suffered an "injury" as a result of this conduct.[471] The court determined that Ms. Atas' behaviour satisfied the requirements of this test.[472]

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[463] *Ibid* at para 86.
[464] *Ibid* at para 93.
[465] *Ibid* at paras 6, 151.
[466] *Ibid* at para 6.
[467] *Ibid* at para 168.
[468] *Ibid* at para 171.
[469] *Ibid* at para 171.
[470] *Ibid* at para 171.
[471] *Ibid* at para 171.
[472] *Ibid* at para 172.

Importantly, the case of *Caplan v Atas* emphasized the courts' desire to bridge a gap in the law, allowing appropriate recovery for injured victims. At the outset of the decision, Justice Corbett acknowledged that

> [C]ourts … have been challenged to recognize new torts or expand old ones to face the challenges of the internet age of communication. The academic commentators are almost universal in their noting that, while online harassment and hateful speech is a significant problem, there are few practical remedies available for the victims.[473]

Justice Corbett also emphasized that the creation of novel legal recourse might not be best-suited for a trial judge.[474] Instead, guidance about subsequent actions should come from the Legislature. Specifically, Justice Corbett mentioned reform proposals outlined by the Law Commission of Ontario, entitled "Defamation Law in the Internet Age".[475] This report provided the Legislature with tangible options for addressing the problems associated with online harassment. This rationale can be applied to situations outside of online harassment, including family law matters involving parental alienation, which have involved minimal deterring measures by courts and extensive psychological damage to both alienated children and rejected adults.

Ahluwalia v Ahluwalia

In *Ahluwalia v Ahluwalia*, the Ontario Superior Court of Justice introduced the novel tort of family violence.[476] The parties involved in this dispute were married in India approximately twenty years before this action commenced.[477] Shortly after their marriage commenced, the couple immigrated to Canada, hoping to find more lucrative employment and professional opportunities.[478] The transition from India to Canada was difficult and for several years, the parties

[473] *Ibid* at para 99.
[474] *Ibid* at para 173.
[475] *Ibid* at para 101.
[476] *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 (CanLII) at para 48 [*Ahluwalia*]. Note, this case is currently being appealed.
[477] *Ibid* at para 7.
[478] *Ibid* at para 9.

had financial troubles, having to work factory-related jobs.[479] After eight years in Canada, Mr. Ahluwalia found more lucrative employment as a truck owner-operator for Canadian National Trucking Lines (CNTL), while Mrs. Ahluwalia worked on a part-time basis for the Bank of Montreal (BMO).[480] The matrimonial home was purchased in 2014 and was located in Brampton, Ontario.[481] In July 2016, Mr. Ahluwalia and Mrs. Ahluwalia separated.[482] Mrs. Ahluwalia remained in the matrimonial home and Mr. Ahluwalia was responsible for paying child support and spousal support.[483] Evidence at trial established that Mr. Ahluwalia had engaged in a repeated pattern of threatening and violent behaviour.[484] Three very serious assaults occurred in the years 2000, 2008 and 2013.[485] Immediately before each violent assault, Mr. Ahluwalia became jealous that Mrs. Ahluwalia was having romantic relationships with other men. This jealousy resulted in physical abuse and on more than one occasion, Mrs. Ahluwalia was left "black and blue".[486] It is important to note that Mr. Ahluwalia's behaviour was not limited to instances of physical abuse, he also controlled all of the family's finances[487], would go weeks giving his wife the "silent treatment"[488], and would demand that Mrs. Ahluwalia have sex with him whenever he desired.[489] Justice Mandhane determined that the circumstances of this case warranted a deeper exploration of how tort law principles could intersect with instances of family violence. Ultimately, Justice Mandhane determined that this was a case which warranted the creation of a novel tort.[490]

[479] *Ibid* at para 10.
[480] *Ibid* at paras 13-14.
[481] *Ibid* at para 13.
[482] *Ibid* at para 18.
[483] *Ibid* at para 18.
[484] *Ibid* at para 111.
[485] *Ibid* at para 96.
[486] *Ibid* at para 96.
[487] *Ibid* at para 76.
[488] *Ibid* at para 106.
[489] *Ibid* at para 106.
[490] *Ibid* at para 58.

To establish the tort of family violence one of three elements must be satisfied. First, the conduct in the family relationship must be threatening or violent.[491] Second, it must represent a pattern of controlling and coercive behaviour.[492] Third, it must cause the party alleging this tort to fear for his or her own safety or the safety of someone else.[493] These elements of the tort of family violence must be proven on a balance of probabilities.[494] Justice Mandhane acknowledged that the tort of family violence has similarities with existing torts, however, the current tort system does not account for situations where individuals are exposed to a pattern of controlling behaviour from their spouse.[495] Family violence should not be limited to instances of physical assault and battery, and plaintiffs should not invariably be required to break down long-running patterns of abuse into itemized lists of discrete incidents and transactions.

> [C]onditions of fear and helplessness … can be cyclical and subtle, and often go beyond assault and battery to include complicated and prolonged psychological and financial abuse. These uniquely harmful aspects of family violence are not adequately captured in the existing torts. In general, the existing torts are focused on specific, harmful *incidents*, while the proposed tort of family violence is focused on long-term, harmful *patterns* of conduct that are designed to control or terrorize.[496]

Therefore, the tort of family violence is concerned with a pattern of damaging, controlling and coercive behaviour and not simply singular incidents of abuse, viewed in isolation. Examples of conduct which might satisfy the test for the tort of family violence include repeated instances of harassment, financial abuse, psychological abuse, stalking, property destruction, confinement, threatening behaviour and physical abuse.[497] Circumstances where the plaintiff is merely "unsatisfied" in their relationship will not meet the threshold for the tort of family violence.[498] Of

[491] *Ibid* at para 52.
[492] *Ibid* at para 52.
[493] *Ibid* at para 52.
[494] *Ibid* at para 55.
[495] *Ibid* at para 54.
[496] *Ibid* at para 54.
[497] *Ibid* at para 55.
[498] *Ibid* at para 55.

course, the details of a pattern of violence must be substantiated with evidence.[499] When the test for the tort of family violence is satisfied, several factors will be analyzed in order to determine the quantum of damages that should be awarded. These factors include the type of violence, the duration of violence, and the severity of violence.[500] Judges should also have the ability to award aggravated damages and punitive damages in cases of family violence. "Aggravated damages may be awarded for betrayal of trust, breach of fiduciary duty, and relevant post-incident conduct. Punitive damage awards will generally be appropriate given the social harm associated with family violence."[501] Justice Mandhane acknowledged that this case represents a "rare circumstance" where the court "should recognize a new foundation for liability for family violence."[502] Before creating the tort of family violence, Justice Mandhane spent a significant amount of time discussing how the law must do more to acknowledge the plight of victims of familial violence.[503] This comprehensive overview is important for the creation of a tort in family law, as well as the creation of torts more generally. The new amendments to the *Divorce Act* discuss family violence. This is important for two reasons. First, this serves as an indicator that family violence is prevalent in many Canadian relationships.[504] Second, it shows the Canadian public that Parliament is aware of this issue and is attempting to remedy instances of family violence.[505] Allowing victims of abuse to only access the torts of assault and battery fails to account for the reality of family violence and cannot be reconciled with the intent of the new family violence provisions of the *Divorce Act*.[506] Choosing to focus on isolated instances of abuse downplays the insidious nature of spousal

[499] *Ibid* at para 56.
[500] *Ibid* at para 57.
[501] *Ibid* at para 57.
[502] *Ibid* at para 58.
[503] *Ibid* at paras 58-70.
[504] *Ibid* at para 43.
[505] *Ibid* at para 58.
[506] *Ibid* at para 42.

violence and leaves a large number of spousal abuse victims without legal recourse.[507] Importantly, very few Ontario cases over the past two decades have awarded damages after findings of spousal assault are made.[508] In fact, most of the cases which have discussed spousal assault have not awarded a suitable quantum of damages.[509]

Creating a tort of family violence accords with a foundational principle of tort law, namely, to compensate victims who have been "injured".[510] Justice Mandhane described the deleterious consequences of spousal violence on victims of abuse.[511] These consequences include the development of physical and mental illness, substance abuse issues, suicidal ideation, difficulties at work, and difficulties with relationships from both a friendship perspective and an intimate partner perspective.[512] These sequelae of abuse are profound, wide in scope and long in duration. Consequently, spousal support alone is inadequate for compensating the harms of spousal abuse.[513] There are also significant public policy concerns that exist when a legal system fails to compensate victims of spousal abuse.[514] Individuals who leave abusive relationships should have the ability to use the legal system for economic redress. Denying civil justice – which may include, but need not be limited to, compensatory damages – to victims of family violence is not only inconsistent with the intended functions of tort law, it also places an entire class of socially harmful wrongs beyond the reach of the legal system as a whole.[515] Justice Mandhane recognized that family violence is a societal issue and something that all Canadians should be cognizant of and care about.

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[507] *Ibid* at para 59.
[508] *Ibid* at para 60. See Laura Buckingham, "Striking Back: The Tort Action for Spousal Violence" (2007) 23:2 Can J Fam L 273 [Buckingham].
[509] *Ibid* at para 61.
[510] *Ibid* at para 63.
[511] *Ibid* at para 66.
[512] *Ibid* at para 66.
[513] *Ibid* at para 66.
[514] *Ibid* at para 70.
[515] *Ibid* at para 67.

In this spirit, "courts must send a strong message that it is not acceptable to resort to violence in the domestic context."[516]

After finding Mr. Ahluwalia liable for the tort of family violence as a result of a pattern of violent and threatening behaviour and a pattern of controlling and coercive conduct, Justice Mandhane conducted an analysis of the damages that should flow from this finding. Mrs. Ahluwalia was awarded $150,000 in damages.[517] She was awarded $50,000 in compensatory damages as a result of her lost capacity to earn money as well as her health ailments as a result of chronic abuse from her husband, namely, depression, anxiety and post-traumatic stress syndrome.[518] Furthermore, the experience of having to testify at trial further exacerbated Mrs. Ahluwalia's symptoms. [519] Justice Mandhane made an important distinction between compensatory damages and an award for retroactive spousal support. The focus of compensatory damages is to ensure that aggrieved individuals receive proportional and fair compensation for the injuries that flow from spousal violence.[520] The goal of retroactive spousal support is distinct, namely, to compensate Mrs. Ahluwalia (or any other individual) for money that she is owed as a result of her role and time in the marriage.[521] This retroactive spousal support amount was attached to Mr. Ahluwalia's income and had not been paid to Mrs. Ahluwalia for the previous three years. Therefore, a compensatory damages award for spousal violence should not be seen as a "double-dipping" form of spousal support entitlement.[522]

Mrs. Ahluwalia was also awarded $50,000 in aggravated damages based on Mr. Ahluwalia's controlling behaviour.

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[516] *R v Morgan*, 2017 ONSC 5618 at para 41 [*Morgan*].
[517] *Ahluwalia*, *supra* note 476 at para 112.
[518] *Ibid* at para 114.
[519] *Ibid* at para 155.
[520] *Ibid* at para 117.
[521] *Ibid* at para 117.
[522] *Ibid* at para 118.

> The Father preyed on the Mother's vulnerability as a racialized, newcomer woman. He subjected her to cruel and demeaning behaviour. The Father's post-separation conduct was egregious and left the Mother without funds to meet the Children's daily needs … The Father's refusal to pay adequate spousal support is consistent with his overall pattern of financial abuse.[523]

This problematic conduct encompassing a variety of forms of abuse warranted a hefty aggravated damages award. Finally, Mrs. Ahluwalia was awarded $50,000 in punitive damages, in an attempt to punish Mr. Ahluwalia for his egregious conduct.

Caplan v Atas and *Ahluwalia v Ahluwalia* are two additional examples where courts have crafted new torts in order to compensate for the state of the current legal system. These cases leave open the possibility that Canadian courts will acknowledge and accept a tort of parental alienation. Earlier in this thesis, I provided an overview about the prevalence and severity of parental alienation cases in the Canadian justice system. I also provided information about why tort law might be a suitable avenue for courts to pursue in order to deter the damaging and dangerous consequences of parental alienation conduct. When a defendant's/parent's conduct is particularly egregious, a tort of parental alienation might be the best option to address this wrong, compensate the victim(s) of psychological abuse, and deter other parents from pursuing conduct of this nature.

Aggravated damages have been awarded in family law cases

Aggravated damages are assessed separately from general non-pecuniary damages. Aggravated damages compensate the injured party for conduct that is malicious, oppressive and humiliating.[524] Ultimately, conduct of this nature "aggravates" the injured party's suffering and humanity. Examples of aggravating factors include conduct that is degrading, intensely violent, harassing, and/or abuses a position of trust.[525]

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[523] *Ibid* at para 119.
[524] *Norberg v Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 SCR 226 at para 69 [*Norberg*].
[525] *Ibid* at para 70.

In *Shaw v Shaw*, the court dealt with a claim for assault-related damages (as well as property-related claims). Mr. Frank Shaw and Ms. Suzanne Brunelle, formerly known as Mrs. Suzanne Shaw, were married for approximately one year.[526] Their short marriage was plagued with insecurity, jealousy and resentment, culminating in a violent incident in August 2007. Ms. Brunelle was physically dragged out of the matrimonial home, causing injuries to the right side of her body, most pronounced in her right hand.[527] This injury resulted in pain and discomfort for Ms. Brunelle[528], sleep deprivation[529], difficulties with certain activities of daily living[530], reduced energy[531], depression[532], and suicidal ideation.[533] Even though Mr. Shaw was found not guilty on the criminal charge of assault causing bodily harm,[534] Justice Blishen determined that Mr. Shaw intentionally caused the tort of battery, resulting in Ms. Brunelle's injuries.[535] Accordingly, Justice Blishen awarded Ms. Brunelle $50,000 in general damages and $15,000 in aggravated damages.[536] The award for aggravated damages hinged on the fact that "[t]his violence was perpetrated by an individual [Ms. Brunelle] should have been able to trust and rely upon."[537] Importantly, Justice Blishen did not find Mr. Shaw's conduct so egregious to warrant an award for punitive damages.[538]

Similarly, in *Sorrenti v Blair*, the defendant, Mr. Gordon Blair, had a long history of physically abusing his wife, Ms. Joanne Sorrenti.[539] This abuse culminated in a 2010 incident

[526] *Shaw v Shaw*, 2012 ONSC 590 (CanLII) at para 4 [*Shaw*].
[527] *Ibid* at para 61. Justice Blishen examined the credibility of the applicant and the respondent, determining that the applicant had more credibility and was therefore more worth of belief.
[528] *Ibid* at para 82.
[529] *Ibid* at para 89.
[530] *Ibid* at para 103.
[531] *Ibid* at para 96.
[532] *Ibid* at para 90.
[533] *Ibid* at para 90.
[534] *Ibid* at para 11.
[535] *Ibid* at para 76.
[536] *Ibid* at para 110.
[537] *Ibid* at para 110.
[538] *Ibid* at para 114.
[539] *Sorrenti v Blair*, 2013 ONSC 2584 (CanLII) at para 1 [*Sorrenti*].

where Mr. Blair fractured Ms. Sorrenti's right arm.[540] There was significant medical evidence supporting the fact that Ms. Sorrenti's injuries were causally related to Mr. Blair's assault.[541] Evidence was also presented that after the assault, Ms. Sorrenti feared for her safety because of Mr. Blair's constant disregard of court orders.[542] Additionally, Ms. Sorrenti's claims were not disputed by Mr. Blair, in fact, he did not even attend the hearing.[543] Given the concern courts have in the twenty-first century about domestic abuse, Justice Rady awarded Ms. Sorrenti $20,000 in aggravated damages and $55,000 in general damages.[544]

Parental alienation often involves malicious, oppressive and humiliating conduct by one parent at the expense of their former spouse and current child. *Shaw v Shaw* and *Sorrenti v Blair* provide some insight into how courts have dealt with behaviour that aggravates an injured party's suffering. This analysis and head of damages could be incorporated into decisions involving a tort of parental alienation.

Punitive damages have been awarded in family law cases

Punitive damages are traditionally confined to circumstances where a party's conduct is so deplorable that social norms demand the imposition of punishment over and above what is necessary to make the plaintiff whole for the purposes of tort law. The Supreme Court of Canada has recognized that the function of punitive damages is "[r]etribution, denunciation, and deterrence.[545] Punitive damages are rarely awarded in Canadian judgements, and even less so in Canadian family law judgements. The difference between punitive damages and aggravated damages was succinctly stated in *Vorvis v Insurance Corporation of British Columbia*:

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[540] *Ibid* at para 1.
[541] *Ibid* at para 17.
[542] *Ibid* at para 17.
[543] *Ibid* at para 6.
[544] *Ibid* at para 18.
[545] *Whiten v Pilot Insurance Co*., 2002 SCC 18 (CanLII), [2002] 1 SCR 595, [2002] SCJ No. 19 at para 111 [*Whiten*].

> Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory.[546]

In *MacKay v Buelow*, Ms. Catherine-Ann MacKay and Mr. Anthony Buelow were married and the parents of one daughter, Angela MacKay.[547] Shortly after their separation, Mr. Buelow began to intimidate and harass Ms. MacKay. This problematic conduct included physical violence, stalking behaviour, unrelenting phone calls during all hours of the day and night (to both Ms. MacKay and her friends), threats about abducting Angela and taking her to a different county, threats about killing Ms. MacKay with a crossbow, filming Ms. MacKay nude in her bathroom, and threats to disseminate intimate images of Ms. MacKay.[548] Understandably, this egregious behaviour caused Ms. MacKay significant physical and mental agitation and distress. She was diagnosed by a psychiatrist as having post-traumatic stress disorder.[549] The effects of this trauma were so profound that Ms. MacKay changed her name and moved herself and her daughter to a different location.[550] Ms. MacKay claimed damages for assault, harassment, negligence, intentional infliction of mental suffering, breach of privacy, trespass to her person, as well as general damages, aggravated damages and punitive damages.[551] Justice Binks determined that the Ms. MacKay's circumstances satisfied the torts of intentional infliction of mental suffering, trespass to person and invasion of privacy.[552] Ms. MacKay was awarded $25,000 in general damages and $15,000 in aggravated damages.[553] Importantly, Ms. MacKay was awarded another

[546] *Vorvis v Insurance Corporation of British Columbia*, 1989 CanLII 93 (SCC), [1989] 1 SCR 1085 at 1098-1099 [*Vorvis*].
[547] *MacKay v Buelow*, 1995 CanLII 17903 (ON SC) at paras 5-6 [*MacKay*].
[548] *Ibid* at para 8.
[549] *Ibid* at para 15.
[550] *Ibid* at para 10.
[551] *Ibid* at para 12.
[552] *Ibid* at para 16.
[553] *Ibid* at para 16.

$15,000 in punitive damages "because of the calculated, devilishly creative, and entirely reprehensible conduct by the defendant."[554] Additionally, Ms. MacKay was awarded $44,000 in future care costs representing five years of post-traumatic stress syndrome therapy.[555] Over $6,000 was awarded to Ms. MacKay for home renovations as a result of damages caused to her house by Mr. Buelow's violent outbursts.[556]

Similarly, in *Valenti v Valenti,* a claim for damages resulting from an assault was initiated by Mrs. Valenti (along with child support claims and division of property claims).[557] Prior to the hearing of this family law matter, Mr. Valenti pled guilty to the charge of assault causing bodily harm and was sentenced to a five-month prison term.[558] Essentially, Mr. Valenti punched Mrs. Valenti numerous times in the head and face, causing extensive swelling and bruising.[559] She was also forcibly confined to a car for several hours and assaulted many more times.[560] Unfortunately, both children of the marriage saw their mother's injuries and were deeply traumatized by her condition.[561] In fact, Mrs. Valenti's daughter witnessed part of the assault itself.[562] Mrs. Valenti's road to recovery was long and arduous. At the time of trial, she continued to suffer from post-traumatic stress syndrome, depression, anxiety, and thoughts of suicide.[563] Justice Métivier awarded Mrs. Valentini $10,000 for pain, suffering and loss of enjoyment of life[564] and $2,500 in aggravated damages "for inflicting injury in a climate that can only have been one of terror."[565]

[554] *Ibid* at para 17.
[555] *Ibid* at para 19.
[556] *Ibid* at para 20.
[557] *Valenti v Valenti*, 1996 CanLII 8082 (ON SC) at para 3 [*Valenti*].
[558] *Ibid* at para 66.
[559] *Ibid* at para 67.
[560] *Ibid* at para 68.
[561] *Ibid* at para 67.
[562] *Ibid* at para 67.
[563] *Ibid* at paras 75, 77.
[564] *Ibid* at para 78.
[565] *Ibid* at para 79.

Justice Métivier also awarded Mrs. Valenti $2,500 in punitive damages to mark the court's express denouncement of Mr. Valenti's conduct.[566] Specifically, "[t]he deterrence of this kind of conduct can only occur when such abuse is treated with the outrage it deserves."[567] Interestingly, Justice Métivier also awarded Mrs. Valenti's son $2,500 for pain and suffering and $1,000 in order to purchase items that were damaged in his room during Mr. Valenti's assault.[568] It is important to note that Mrs. Valenti's son had dramatic behavioural issues as a result of his father's violent behaviour. Specifically, he got in trouble with the law and dropped out of school.[569]

Even though the purpose of aggravated damages and punitive damages are distinct, both of these heads of damages recognize the need to address the harm suffered by an individual at the hands of outrageous conduct. Parental alienation cases routinely shock the conscience of family courts and often involve malicious, high-handed and egregious conduct. As such, the underpinning rationale of both aggravated damages and punitive damages awards can and should be seen in parental alienation disputes.

Several objections will likely be advanced about the tort of parental alienation, however, these objections should not prevent pursuing this avenue of recourse

There are a number of policy objections raised by family law scholars and practitioners regarding the tort of parental alienation: First, that permitting the rejected parent to recover a monetary damage award from the alienating parent will result in a reduction in child support and consequently, a negative impact on the child's quality of life.[570] Second, that a monetary award for the rejected parent will not solve the problem(s) of parental alienation.[571] Third, that the tort of

[566] *Ibid* at para 80.
[567] *Ibid* at para 80.
[568] *Ibid* at para 82.
[569] *Ibid* at para 81.
[570] Varnado, *supra* note 296 at 161.
[571] *Ibid* at 160.

parental alienation has limited utility and will potentially open the floodgates to a large body of litigation.[572] Below, I have provided information that acknowledges the veracity of these objections while emphasizing that protecting the relationship between a rejected parent and an alienated child, and deterring attacks on that relationship by former spouses, should be prioritized over any difficulties that may arise with the cost and enforcement of a parental alienation tort. Ultimately, a tort of parental alienation will serve to deter future instances of parental alienation, even if it is unlikely to repair a parent-child relationship that has already been thoroughly destroyed through alienation. This deterrent function is related to, but conceptually distinguishable from, the proposed tort's equally important punitive function.

One of the major concerns which will likely be raised in response to a novel tort of parental alienation is that this tort will shift the focus of parental alienation disputes from the alienated child to the rejected parent, deviating from the best interests of the child standard which is supposed to govern family law matters involving children. As such, parental alienation disputes will no longer centre on repairing damaged relationships between the alienated child and the rejected parent but instead, will focus on punishing the alienator parent and compensating the rejected parent, leaving the alienated child as a sort of secondary consideration. Additionally, critics espousing this view may also assert that allowing a tort of parental alienation cases will increase the toxicity of an alienating environment (i.e. "now, not only does your mother hate you, she is trying to take my money away"). These concerns are somewhat persuasive; however, Canadian family law legislation and case law have confirmed that the best interests of the child aligns with fostering and cultivating a healthy relationship between a child and *all* of his or her parents.[573] Parental alienation represents an attempt by one parent to destroy a meaningful and beneficial relationship

[572] *Ibid* at 157-158.
[573] *Divorce Act, supra* note 51, s 16(6); *CLRA, supra* note 102, s 24(6).

between parent and child, violating the best interests of the child standard. Emotional abuse is never in the best interests of a child and this type of relationship destruction calls for both a restorative response (aimed at repairing the relationship, where possible) and a more traditional compensatory-punitive response (aimed at compensating the rejected parent, punishing the alienator parent, and communicating society's strong disapproval of parental alienation with a view to deterrence). Focusing on the best interests of the child, while completely ignoring damage caused to parents would preclude aggrieved parents from raising several existing streams of recourse, including arguments about spousal violence, the torts of battery, assault and false imprisonment, as well as the tort of intentional infliction of emotional distress.[574] In other words, if the best interests of the child principle is used to stop parents from bringing claims for parental alienation, it should also be used to stop parents from bringing a wide variety of other marriage-related tort claims – a proposal that should clearly be rejected. Arguments could be raised that the torts "routinely" seen in Canadian family law cases deviate from a focus on the best interests of the child because they address an injury to one of the child's parents. This argument is untenable, as it would, if taken to its logical conclusion, leave no room at all for victims of family-related wrongs to seek civil justice. In regard to the argument that a tort of parental alienation will increase the dysfunction and negativity in an alienating environment, further harming the emotional health of children, it is important to note that alienating environments are already exceedingly dysfunctional and damaging. It is difficult to see how a tort will make alienating environments worse for children.

[574] See all of the cases mentioned in Chapter 2 of this thesis including: *Wilkinson v Downton*, [1897] 2 QB 57; *Clark v Canada*, 1994 CanLII 3479 (FC), [1994] 3 FC 323; *McLean v Danicic*, 2009 CanLII 28892 (ON SC); *Attia v Garanna*, 2010 ONSC 1261, 2010 CarswellOnt 1168; *Costantini v Constantini*, 2013 ONSC 1626 (CanLII); *Dhaliwal v Dhaliwal*, 1997 CarswellOnt 5774, [1997] O.J. No. 5964 (OCJ); *Cant v Cant*, 1984 CanLII 2157 (ON SC); *Lajoie v Kelly*, 1997 CanLII 22783 (MB QB); *Seneca College v Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 SCR 181; *Yenovkian v Gulian*, 2019 ONSC 7279 (CanLII); *Caplan v Atas*, 2021 ONSC 670 (CanLII); *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 (CanLII).

Another objection likely to be encountered for the tort of parental alienation is that a financial award to a rejected parent will not solve the problems associated with parental alienation disputes. This rationale is problematic. Analogous reasoning could be used in a variety of different disputes. For instance, in personal injury actions, often the plaintiff has suffered catastrophic injuries. Even worse, in certain circumstances, the plaintiff dies as a result of his or her injuries. Barring exceptional circumstances, the plaintiff is entitled to compensation proportional to the scope of his or her injuries.[575] By following the aforementioned reasoning, an argument could be advanced that "money will not heal the physical and emotional harms that the plaintiff has suffered or bring the plaintiff back from death". This reasoning is inconsistent with foundational principles of the common law – namely, the presumption that any injury can be remedied with an award of monetary compensation, even if the injury cannot *literally* be undone. If the plaintiff survives the accident, the funds secured in a personal injury judgement can be used for the plaintiff's past medical expenses, future medical services, attendant care services, future care costs, out-of-pocket expenses, and any necessary counselling services (to name a few of the associated expenses).[576] If the plaintiff does not survive the accident, claims can be made by the estate of the deceased and/or by family members of the deceased.[577] Claims made by the estate include damages for pain and suffering occurring between the date of the accident and the date of death as well as aggravated and punitive damages against the individual responsible for causing the plaintiff's death.[578] Claims made by family members of the deceased fall under three main categories: loss of care, guidance

[575] Paul Dufays, "Introducing Provisional Damages for Personal Injuries in Canada" (1997) 17:1 *Dalhousie Journal of Legal Studies* 2 at 9 [Dufays].
[576] Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages* (Toronto: Irwin Law Inc., 2014) at 364 [Cassels & Adjin-Tettey].
[577] *Ibid* at 365.
[578] D Bruce Garrow et al., "Damages for Personal Injury or Wrongful Death in Canada" (2004) 69:2 J Air L & Com 233.

and companionship, nervous shock and a variety of dependency claims.[579] Dependency claims include loss of housekeeping services, child care, financial support and inheritance.[580] The number of avenues available for accident victims (and their family members) to seek financial redress reflects the intention of the Legislature and the courts to compensate injured victims and their families to ensure that these individuals have the requisite care to remain "comfortable". Of course, medical services and compassionate care will not "cure" a quadriplegic, much in the same way that monetary damages will not fully compensate the family of a victim killed in a car crash. The true value of a life is not something quantifiable, but our legal system presumes otherwise in the interest of providing some semblance of justice. Even though money will not solve all of the issues involved in these cases, it can help mitigate some of the trauma – and, even in cases where there is no possibility of economic loss, monetary damages is our system's primary civil remedy for injustice. Similarly, in parental alienation disputes, a tort award will not heal the relationship between the alienated child and the rejected parent, however, monetary damages represent an attempt to improve the plight of an emotionally wounded parent. A tort of parental alienation sends a message to parents that psychological warfare should not be used as a parenting tactic.

Another potential objection to the tort of parental alienation is that this tort will be used as an additional mechanism for deceptive spouses to exact revenge against their former partner. The rationale behind this argument is that a tort of parental alienation provides another avenue for an alienator parent to punish their former spouse, leading to a legal system riddled with frivolous tort lawsuits. Once again, this is a potentially legitimate criticism of a tort of parental alienation, however, judges and juries have an obligation to differentiate between lawsuits that are meritorious

[579] Cassels & Adjin-Tettey, *supra* note 576 at 241.
[580] *Ibid.*

versus lawsuits that are vexatious.[581] Preventing the creation of a tort because of a fear of baseless claims undermines the role of judges and juries in the Canadian legal system. Furthermore (and analogous to the rationale provided above) this assertion is purely speculative. This information can only be determined retrospectively after a parental alienation tort has been used by courts for several years with associated data analyzed. The possibility of a deluge of meritless claims is not, on its own, a reason to take a potential tort off the table.

Traditionally, when a new cause of action is proposed, members of the legal community and related interest groups become concerned about the potential for this new cause of action to open the "floodgates" of litigation, diverting judicial resources and slowing down an already backlogged system. Essentially, critics of a tort for parental alienation will likely argue that introducing a new tort for parental alienation disputes will make access to justice more onerous and cumbersome. Undoubtedly, access to justice is a significant concern in the Canadian legal system, spanning multiple dimensions.[582] The costs of legal representation are astronomical and unattainable for litigants who earn an average salary[583], however, access to justice concerns do not end there. If an individual is able to accrue the necessary funds to retain a lawyer, they can look forward to years of bills generated from numerous procedural steps. All of this will occur before the aggrieved party can appear in court to have their issues heard and resolved. Even though our current legal system is inefficient, litigants are entitled to bring meritorious claims and have their "day in court". Alienating a child is serious. The emotional heartache suffered by the rejected parent is serious. Preventing injured individuals from using the court system to remedy legitimate

[581] See *Rules of Civil Procedure*, RRO 1990, Reg 194, r 2.1, 21.01(3)(d), 25.11(d), 53.01(2), 56.01(1)(e), 57.01(1)(f)(i), 61.06(1)(a).
[582] Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall Law Journal 957 at 962 [Farrow].
[583] Adil Abdulla, "Incomplete Justice: The Costs of Partial Indemnity" (2022) 38:1 Windsor Yearbook on Access to Justice 46 at 62 [Abdulla].

grievances runs counter to the purpose of a legal system.[584] In fact, a tort of parental alienation might actually reduce the burden faced by the family courts by warning alienator parents that their emotionally abusive behaviour has consequences. If parents are aware that parental alienation behaviour is attached to civil liability, this knowledge might serve as an effective deterrent for this behaviour. Furthermore, the rationale of "do not create a tort because this will put more strain on an already strained system" could have been used to block the creation of every Canadian tort and a plethora of other causes of action. It is also impossible to state with certainty that a tort of parental alienation will "open the floodgates" to a stream of additional parental alienation cases. As such, this prediction is purely speculative. The only conclusive mechanism for measuring if a tort of parental alienation results in more litigation would be to analyze parental alienation case numbers several years after the induction of this tort. Speculation should not be used as a reason for rejecting the creation of a potentially valuable, beneficial and necessary parental alienation tort.

Another potential criticism for the tort of parental alienation is that alienated parents (and the lawyers who represent alienator parents) must be aware that a tort exists for their circumstances, the likelihood of success for this tort, and the amount of money it will cost for this argument to be advanced. Rejected parents will also need to be aware of the procedural steps that must be taken for this tort to be pled and introduced in court. In other words, can a parental alienation tort be advanced with a petition for divorce, a claim for spousal support and an equalization claim for family property or does the parental alienation tort need to be dealt with by the court in a separate proceeding? Similar to the limitations provided above, this rationale should not be used as a reason to prevent the creation of a tort for parental alienation. A lawyer's role is to not only have an understanding about the area(s) of law that he/she practices but also how to keep their client

[584] Hart Schwartz and Anthony Sangiuliano, "The Pragmatic Limits of Access to Justice" (2016) 76:1 Supreme Court Law Review 193 at 200 [Schwartz & Sangiuliano].

informed about advancements and changes in areas of law that intersect with their client's case. If the tort of parental alienation becomes a part of Canadian common law, it is a lawyers' obligation to become aware of this tort, its components as well as when to advance tort claims procedurally. An argument about a lawyer's lack of knowledge should not be used to prevent instances of legitimate recovery.

Conclusion

Parental alienation is a very serious problem in Canada. The extensive number of parental alienation cases seen by the Canadian judiciary are clear evidence of this problem.[585] My thesis has attempted to provide a potential option for deterring and punishing parental alienation behaviour through the use of tort law.

In the first chapter of this thesis, I wrote about the remedies that are frequently used once a finding of parental alienation is made, and suggested that the existing remedies are insufficient, the result being that Canadian family law is ill-equipped to grapple with the complex and increasingly common problem of parental alienation. These commonly-used remedies include parental education programs, orders for reconciliation therapy, and changes to the custody arrangement. I explained the utility of these measures along with criticisms for where these remedies fall short. Rarely, family courts choose to use punitive measures to deter parental alienation conduct. In these unusual instances, Canadian courts have chosen to reduce the monthly spousal support amount of the alienator parent, impose a fine to the alienator parent, and sometimes, arrest the parent for contempt of court.[586] In the first chapter of this thesis, I also discussed the gendered dimensions of parental alienation disputes and how a significant amount of attention has been given to the gender polarity of this familial phenomenon. Feminist-leaning scholars assert that parental alienation cases often co-occur with instances of domestic violence and other forms of manipulation and control.[587] They argue that domestic violence is often overlooked in parental alienation cases and women are "punished" for protecting their children from abusive fathers.[588]

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[585] A search on CanLII using the term "parental alienation" generated 1,156 hits from January 1, 2012 to December 31, 2022.
[586] For spousal support reduction see *Bruni v Bruni*, 2010 ONSC 6568 (CanLII). For imposition of a fine see *L(AG) v D(KB)*, 2009 CanLII 943 (ON SC). For contempt of court see *McMillan v McMillan*, 1999 CanLII 14982 (ON SC).
[587] Sheehy & Boyd, *supra* note 27.
[588] *Ibid*.

Accordingly, these researchers encourage courts to take a more critical approach when presented with an argument that a mother has alienated her child from his or her father.[589] On the opposite end of the spectrum, some scholars argue that more women than men engage in parental alienation tactics as a way to "get back at" their former spouse.[590] These researchers encourage courts to pay close attention to the gender of the alienating parent, thereby understanding the trauma faced by "rejected fathers".[591] Somewhere in the middle of this discourse exists scholars who choose to pay little attention to the gender of the alienator parent and instead, focus on the rights of children in the family law system.[592] I have chosen to spend this thesis focussing on the problems that exist in parental alienation disputes, removed from the gender of the alienator parent. The information provided in Chapter One of this thesis intimated that the Canadian legal system is not doing enough to remedy broken relationships between alienated children and rejected parents.

The second chapter of this thesis explored the intrinsic value of parenting. Specifically, I elaborated on the connection between parenting and what it means to live a "good life". From a philosophical perspective, the value of human existence and the steps that individuals can take to become fulfilled are common points of discussion.[593] Parenting is often cited as one of the ways that an individual can become "whole" thereby participating in a life-giving pursuit. Ultimately, parenting allows the parent to develop a significant fiduciary relationship with their child which confers everlasting love and happiness. When an alienated child is ripped suddenly out of the life of a rejected parent, this monumental loss is currently not acknowledged or accounted for in Canadian family law decisions. The merits of any particular account of the value of parenting are

[589] *Ibid.*
[590] Leo Sher, "Parental alienation: The impact on men's mental health" (2015) 29:3 Int J Adolesc Med Health 1 at 3 [Sher].
[591] *Ibid.*
[592] Jennifer J Harman, "Parents behaving badly: Gender biases in the perception of parental alienating behaviors" (2016) 30:7 J Fam Psychol 866 [Harman].
[593] See several theories advanced by Aristotle (eudaimonia), Plato (knowledge), Kant (goodness), and Aquinas (faith).

beyond the scope of this thesis. The salient point is that parenting and the parent-child relationship are universally regarded as being of unique and enormous value *to the parent*. The experience of parenting is one of the few experiences that is truly ontogenic. It is, therefore, entirely appropriate for the law to protect the parent-child relationship, including by punishing those who willfully and maliciously deprive others of that relationship. The parent-child relationship, is, of course, a relationship. It matters to the child, but it matters to the parent, too.

The final chapter of this thesis explored the potential for tort law to provide redress to rejected parents. Tort law focusses on compensating victims who have been injured, while at the same time deterring individuals from repeating this injurious behaviour and sometimes, punishing outrageous conduct. Given the lasting psychological and emotional damage caused to both the alienated child and rejected parent, tort law should be made available as an avenue for rejected parents to seek redress (civil recourse), which should be recognized by Canadian courts. I explored the use of the torts of intentional infliction of nervous shock, assault, battery, cyberbullying, as well as uncategorized torts. Finally, I analyzed instances where Canadian courts have crafted novel torts to respond to particularly egregious conduct, which would have otherwise left deserving plaintiffs without sufficient recovery. I argued that parental alienation disputes share many similarities with mental distress cases and assault-related cases and that courts are willing to create new ways to hold "violent" individuals accountable for their behaviour. I also provided some insight into policy objections which are likely to be encountered if Canadian courts adopt a tort for parental alienation cases and ways to counteract these objections.

Treating parental alienation disputes under the umbrella of Canadian tort law will not solve all of the problems associated with these cases, however, tort law provides an avenue for injured

rejected parents to have their stories heard and their pain acknowledged and compensated, so that other parents do not have to experience the same suffering.

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