How Legislation and the Courts Encourage Parent Alienation Syndrome

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Introduction

The one thing we know with certainty is that children need both a mother and father to grow up to be well-integrated, stable personalities. Otherwise, no matter the circumstances, either by design, or ill fortune, such as the death of a parent, there is a wound or loss within that child that does not heal – even over time.

Divorce and separation, made so easy today with no-fault divorce common in most jurisdictions, has permitted parents to separate for reasons valid or otherwise, and this has made existence much more precarious for children of that marriage. Even though the parents have parted, there should be no separation of a parent from his/her child.

Unfortunately, legislation, policies and judicial decisions have, over the years, perhaps unintentionally, often encouraged one parent to alienate a child from the other parent. Usually this occurs in regard to the father, but this is not always the case. This alienation of a parent leads to permanent harm in that child's life, and can quite correctly be described as child abuse.

It is regrettable that PAS is frequently used as a tool for one parent to achieve sole custody of a child. The opportunity for PAS occurs because of loopholes in both federal and provincial legislation, as well as by judicial decisions.

Legislation facilitating PAS is as follows:

1. Federal Legislation

(a) No-Fault Divorce

In 1986, the *Divorce Act* was amended to provide for no-fault divorce. This legislation provides that a husband or wife may unilaterally walk away from the marriage for any reason, or no reason at all, abandoning both spouse and children. The consent or agreement of the abandoned spouse to this action is irrelevant, even though he/she may not have been at fault in any way in the breakdown of the marriage. Subsequently, a divorce is then easily obtained by the deserting spouse by simply living apart for one year. No questions are asked by the court, and there are no consequences for the abandonment of the marriage and family.

That is, with ease, a spouse can walk away from a marriage and, unfortunately, separate the other parent from his/her child in the process. This is because the divorce industry has put machinery in place to "facilitate" the fall-out from a divorce and it is this machinery that facilitates PAS. The latter is available to a parent who wishes to use the child to harm the other parent.

Children Lose With No-fault Divorce

Despite a deserted spouse's unhappy experience, emotionally and financially, with no-fault divorce, the real losers in this matter are the children of that marriage. Single parenting is not good for children. Marriage serves the all-important function of providing the ideal conditions for rearing children. Within an intact family, children learn their gender identity and roles. Hundreds of studies have been done on children – studies in psychology, the social sciences, economics, and medicine, and in every way, scientists have determined that children do far better when their parents are married and stay married, than in any other social arrangement.[1] Empirical research on family and crime also strongly suggests that crime is closely linked to family structure, which is the strongest predictor of urban violence. [2] That is, the absence of fathers as models and co-disciplinarians contributes to the low self-esteem, anger, violence and peer bonding, through gang membership, of many fatherless boys. [3] The increased incidents of serious violent crime by youths, such as homicide and armed robbery, in fact, are directly linked to this absence of a father's constant presence and influence. This is not to suggest that mothers (the majority of single parent families are headed by mothers) are irresponsible or incapable of caring for their children. Rather, they are often overwhelmed by their difficulties, balancing paid employment with family responsibilities, while living on a reduced income. Exhaustion and lack of home time frequently preclude the disciplining of children, and is the reason for loss of control over them to their peers and youth gangs.

(b) Application of *Criminal Code of Canada* to achieve PAS

Provisions in the *Criminal Code* provide an increased opportunity for parental alienation syndrome. This is due to the fact that it is the policy of most provincial Attorneys General that

an accusation of domestic violence requires both police and Crown lawyers to prosecute under the *Criminal Code* with vigor any spouse alleged to have engaged in domestic violence. It is troubling that, under this criminal process, the complainant can achieve, by court order, total custody of the matrimonial home and custody of the children. This, of course, means that the accused is barred from the home and prevented from exercising custody or access to his/her children without any considerations of the factors a family court, using statute and case law, uses to define the best interests of the child. This criminal charge, therefore, can wreak havoc on the family unit and in particular on the children, as the criminal justice system pays no attention to the best interests of the child. There is no remedy, short of a bail review for the accused. This places one party in a position of immediate superiority over the other party for as along as it takes (perhaps a year) for the criminal charges to be resolved. During this period, the child of the marriage usually has no contact with the accused parent. The period of incarceration or terms of bail usually provide the uninterrupted opportunity for the custodial parent to encourage alienation of the child from the other parent. The stigma attached to the alleged domestic violence and the resulting charges also exacerbates the alienation of the child.

It is troublesome that an accused parent can be arrested for domestic violence and child abuse, even if no evidence is presented. In fact, a custody order can be put in place, plus child support payments ordered, again, with no evidence required – only the accusations of a spouse. The latter, of course, can use these accusations of domestic violence and child abuse for a tactical advantage in the struggle for custody and support. This tactical advantage, however, is not usually as available to men as to women, given the fact that, when domestic violence is instigated, it is presumed, incorrectly by police and the justice system, that the male is responsible and should be removed from the home. In fact, studies indicate that women instigate domestic violence as frequently as men[4].

(c) Federal Child Support Guidelines

The intent of the Federal Support Guidelines which came into effect in 1996, was to promote objectivity and consistency in child support awards in order to lessen conflict and tension between the separated partners. Before the implementation of these Guidelines, courts were able to take into account the level of access by a parent who may have been alienated from his child by the other parent. This had an ameliorating effect on the custodial parent, which prevented him/her from denying access to the separated or divorced spouse. Under the Guidelines, however, the support must continue to be paid, even in circumstances where court-ordered access is not being honoured by a parent. That is, the reality is that court-ordered access is seldom enforced and the parent who has been alienated from his child has no practical remedy, except by way of costly litigation for a court order to enforce the access order. This option, however, is often out of reach for parents financially struggling to maintain two residences and child support as a result of the separation.

In addition, practically speaking, punishing a parent for violating a court order for access is fraught with difficulty, because it also hurts the child.

Similarly, although the *Divorce Act* specifically recognizes the importance of having both parents involved in their child's life, and mandates maximum contact unless it is contrary to that child's "best interests", there is no provision in the *Divorce Act* to protect a parent who has been alienated from his child by his spouse. The general provisions in the *Act,* protecting the rights of parents' access to their children, therefore, are merely illusory.

The point should be made here, however, that even if there were penalties included in the Guidelines and *Divorce Act*, to protect a parent who has been alienated from his child, it would still not address another problem – that of a less than ideal parent being permitted to walk away from marriage without any consequences, under the No-fault Divorce legislation, if that person has little or no interest in having access to his/her child. That is, there is no compelling legal reason, such as a penalty, for a disinterested parent to retain contact with a child of the marriage.

Child Custody

According to Statistics Canada, in 2004, custody was awarded to the wife in 45.0% of cases, while fathers were awarded custody in 8.1% of cases; in 46.5% of the cases, custody was awarded to the mother and father jointly. Under a joint custody arrangement, however, children do not necessarily spend equal amounts of their time with each parent, but rather one parent retains physical custody, usually the mother, and the father is left, often with relatively infrequent access rights, despite the fact both parties are supposed to have equal say over the child's upbringing. Thus, even in cases of joint custody, there is ample opportunity for a parent to alienate the child from the other parent.

Provincial Legislation

(a) The *Family Law Act of* Ontario R.S.O. 1990, Chapter F.3

Provincial legislation can create a double jeopardy scenario, re PAS, in that not only does the federal Criminal Code provide an opportunity for PAS, but provincial legislation also provides this threat. For example, the *Family Law Act of Ontario,* which has been the flagship for family law in Canada, since most family law acts in Canada pattern themselves after it, includes provisions that can easily provide the opportunity for PAS.

This is highly regrettable, since the intention of the *Family Law Act* is to protect spouses on the controversial issues of custody and access arising from their separation. The preamble to this legislation provides for the "equitable sharing by parents of responsibility for their children", but the devil appears to be in the details, since the *Act* also includes provisions that work against the preamble.

For example, the legislation specifically provides in Section 24(1)(b) that a court may direct that one spouse be given exclusive possession of the matrimonial home and may also, under Section 24 (1) (d), direct that all the contents of the matrimonial home remain in the home for the use for the spouse given possession. In making an order for exclusive possession, the courts, under S.24 (3) of the *Act* must consider *inter alia* the "best interests of the child." To determine this best interest, the courts must consider, under S.34(c) the disruptive effects on the child if moved to other accommodation, as well as the child's own views and preferences.

The child is thus placed in a difficult situation. He/she may be concerned by any subsequent rejection by, or a moody reaction from, a parent if he/she does not reject the alienated parent, as required by the custodial parent upon whom the child is dependent. This is especially the case when the parent decides to use his/her child to punish a former partner.

Unfortunately, the Act also provides for *ex parte* restraining orders (which does not allow the other party an opportunity to defend himself) and this is another tool used to promote PAS. The problem with restraining orders obtained in civil jurisdiction (provincial legislation), rather than federal legislation (*Criminal Code*) is that in civil proceedings, the proceedings are privileged and shielded. Also, civil proceedings require a lower standard of proof, i.e. the balance of possibilities. In a criminal proceeding, however, a higher standard of proof is required, that is, "beyond a reasonable doubt." It is noted that the Ontario Provincial Attorney General announced on November 24, 2008, that the *Family Law* Act would be amended to require breaches of restraining orders be prosecuted under the *Criminal* Code rather than under the provincial legislation. This amendment will mean not only a higher standard of proof, but will also define breaches of restraining orders as criminal offences which will result in severe consequences.

(b) *Children's Law Reform Act,* R.S.O. 1990, c. 12

Section 20 of this *Act* includes the general, positive provision that the mother and father of a child are equally entitled to custody of the child. Further, S.4 (a) of S.20 includes the salutary provision that when parents are separated and the child is in the custody of one of them, the other is entitled to access to the child and each shall:

… encourage and support the child's continuing parent-child relationship with the other.

Moreover, S.20 (5) provides that access to a child includes:

… the right [of a parent] to visit and be visited by the child … to make inquiries and be given information as to the health, education and welfare of the child.

These excellent broad provisions are, unfortunately, overridden by specific provisions, such as S.24 (1) which provides that custody and access to a child shall be determined on the basis of the "best interests of the child," which is an important consideration. However, S. 21(2)(a) provides that the determination of "best interest" of a child includes the love, affection and emotions between the child and the person claiming custody; the persons involved in the child's care and upbringing; and in subsection (c) the child's views and preferences. In circumstances of PAS, these particular provisions act as a strong deterrent in obtaining custody and access – especially when children, in order to retain the support and love of the custodial parent upon whom the child is dependent, may be genuinely fearful of repercussions by the custodial parent, if the child expresses any support for the alienated parent.

(c) Abuse Allegations

According to S.4 of this *Act*, in assessing a person's application for custody, the court must consider whether that person has at any time committed violence or abuse.

S.34 (4)(1) provides that denial of access can be justified if the child or spouse might suffer physical or emotional harm if access is exercised, and, if so, the court may order a restraining order against the allegedly abusing parent.

This raises the problem of false allegations. The latter have been described by Senator Anne Cools, an expert on family law, as the "heart of darkness." That is, falsely accusing the other party (usually fathers) of sexual or physical abuse is a lethal weapon in the business of parental alienation and achieving sole custody of a child. Countless accusations of child sexual or physical abuse (over 50 cases in recent years) have been proven in court to be false.

The 1996 Manitoba Civil Justice Provincial Task Force reviewing *inter alia* false allegations so as to obtain sole custody of a child, reported as follows:

> *The task force heard horror stories about the traumatic impact on the accused person, on the immediate family and children affected by malicious false allegations designed to achieve sole custody, prohibit or restrict visiting privileges, and to punish the other parent.*

In short, the provisions of the *Family Law Act* and the *Children's Law Reform Act*, albeit unintentionally, do create and can strengthen opportunities for unscrupulous individuals, either male or female, to manipulate the law to create PAS.

3. The Courts

The courts have recently become much more aware of the problems created by PAS, by either a husband or a wife and are apparently making a genuine effort to remedy the situation (see A.L. and K.D., January 2009, Ontario Superior Court). This is reassuring since previous custody disputes have not taken PAS into consideration.

The fact that courts in a few recent cases have stepped in and removed the offending parent from having custody of the child, and have banned contact of that parent with the child may be a wake-up call to prevent the mischief of PAS.

This understanding of the reality of custody difficulties has not always been prevalent in the courts. For example, in 1991, in *Oldfield v Oldfield* 1991 33 R.F.L. (3d) 237, Mr. Justice Blair of the Ontario Court of General Division denied the father custody, although he had a loving and caring relationship with his children. The judge concluded, however, that the mother may remove the children to France with her, in order that she could live with her boyfriend. He stated at page 238, paragraph 6 as follows:

> *… Is it 'in the best interests of the children' to make an order which effectively defeats this prospect and leaves them in the daily care of a mother who loves them dearly but who is shackled by her discontent? …*

It is interesting that the mother's marriage to her boyfriend never took place.

This decision revealed that the court regarded the mother's personal happiness over the children's need of a close relationship with their father.

To add insult to injury, Mr. Justice Blair in a later decision ordered the father's support payments be increased in order to cover the costs of the children's trips to visit him in Canada!

Another example of insensitivity to the non-custody parents' concerns was the Supreme Court of Canada decision in 1998 when Madame Justice Claire L'Heureux Dubé, who from her many decisions, can be accurately described as a feminist judge, wrote a lengthy judgment in Young v Young [1993] 4 S.C.R. 3 in which she asserted (p.58) that a child's best interests were best served by protecting the position of the custodial parent. According to her, "the role of the access parent is that of a very interested observer, giving love and support to the child in the background." This is scarcely reassuring to a parent alienated from a child. To be defined as merely "an interested observer" is a denial of the important role of both parents in the raising of a child.

4. What Can Be Done to Protect a Parent from PAS

It seems apparent that the provincial legislation discussed above should be amended to include a specific provision to the effect that if it is shown that a parent has alienated a child from his/her other parent, then custody and access be denied that parent, since PAS is clearly not in the child's "best interest." It is not sufficient that protection from PAS be left to the discretion of the judge – but that it be a requirement written directly into the legislation.

In addition, it is imperative that allegations of abuse under the Criminal Code be supported by evidence before charges are laid. That is, statements by a spouse of abuse should no longer be regarded as sufficient to support a complaint under the Code.

Moreover, the federal Support Guidelines should be amended so that child supports payments be adjusted upon evidence of PAS. Similarly the *Divorce Act* should be amended to provide that at the very least, the "no-fault aspect be expedited and available only if both spouses want the divorce, and are able to negotiate mutually agreeable arrangements regarding child custody.

The journey to protect a child from alienation of a parent and to recognize the importance of both parents in a child's life has not been an easy one. However, for the sake of the children, we must never give up on the journey. We must persevere until the child is made safe from all harm, including that of PAS.

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and the Attorney General of Canada et al, (2002), O.R. (3d) (S.C.J.,Div. Crt.) and the Ontario Court of Appeal, *Halpern and the Attorney General of Canada et al*. (2003), 65 .R. (3d.) 161

[2] Sampson, Robert J., (1995). "Unemployment and Imbalanced Sex Ratios: Race Specific Consequences for Family Structure and Crime." In M.B. Tucker and C. Mitchell-Kernan (eds.). *The Decline in Marriage among African Americans*. New York: Russell Sage. p. 249.
Kamarack, Elaine Cuilla, and Galston, William A., A Progressive family Policy For the 1990s. Progressive Policy Institute, September 1990, page 162.

[3] Moynihan Report; The Negro Family: The Case For National Action, 1965, United States Department of Labor Office of Policy Planning and Research, Chapter 4, page 5, reprinted in the book, The Moynihan Report and the Politics of Controversy by Lee Rainwater and William L. Young. The MIT Press, USA 1967, page 81

[4]Archer, John. 2000. "Sex differences in aggression between heterosexual partners: A metaanalytic review." *Psychological Bulletin* 126:651-680;
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