ABA

VIRTUAL JURIES: WHY AND HOW?

LEGAL CRISIS MANAGEMENT

AN ALTERNATIVE DEPOSITION METHOD

VOL. 47 NO. 4
SUMMER 2021

Litigation

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION
LITIGATION SECTION

Crisis

Leave No Child Behind

Parental Alienation in Family Courts

ASHISH JOSHI

The author is a senior editor of LITIGATION and the author of *Litigating Parental Alienation—Evaluating and Presenting an Effective Case in Court* (ABA 2021).

On the chessboard of divorce, children can be pawns, played by one parent to align against the other.

It's called parental alienation. PA has been written about in the Anglo-American jurisprudence for at least 200 years. Well recognized today within the psychological and pediatric professional communities, PA is a form of child abuse that does not discriminate based on gender. Both mothers and fathers engage in alienating behaviors. American family courts have acknowledged the phenomenon; categorized it as emotional child abuse; and provided appropriate legal and mental-health interventions, including changes of custody, specialized reunification programs, financial sanctions, and in some severe cases, incarceration of the guilty parent.

Late last year, we met to discuss the handling of PA by American family courts. Dr. Richard Warshak, an internationally renowned expert and a past clinical professor of psychiatry at the University of Texas Southwestern Medical Center, is the author of *Divorce Poison: How to Protect Your Family from Bad-Mouthing and Brainwashing* (HarperCollins 2010). Judge Elizabeth Gleicher, a recipient of the State Bar of Michigan Champion of Justice Award, sits on the Michigan Court of Appeals. Judge Kristina Karle, a former prosecutor with experience in domestic violence and child abuse cases at the Monroe County, New York, District Attorney's Office, presides in the Ontario County, New York, court. This transcript has been edited for length and clarity.

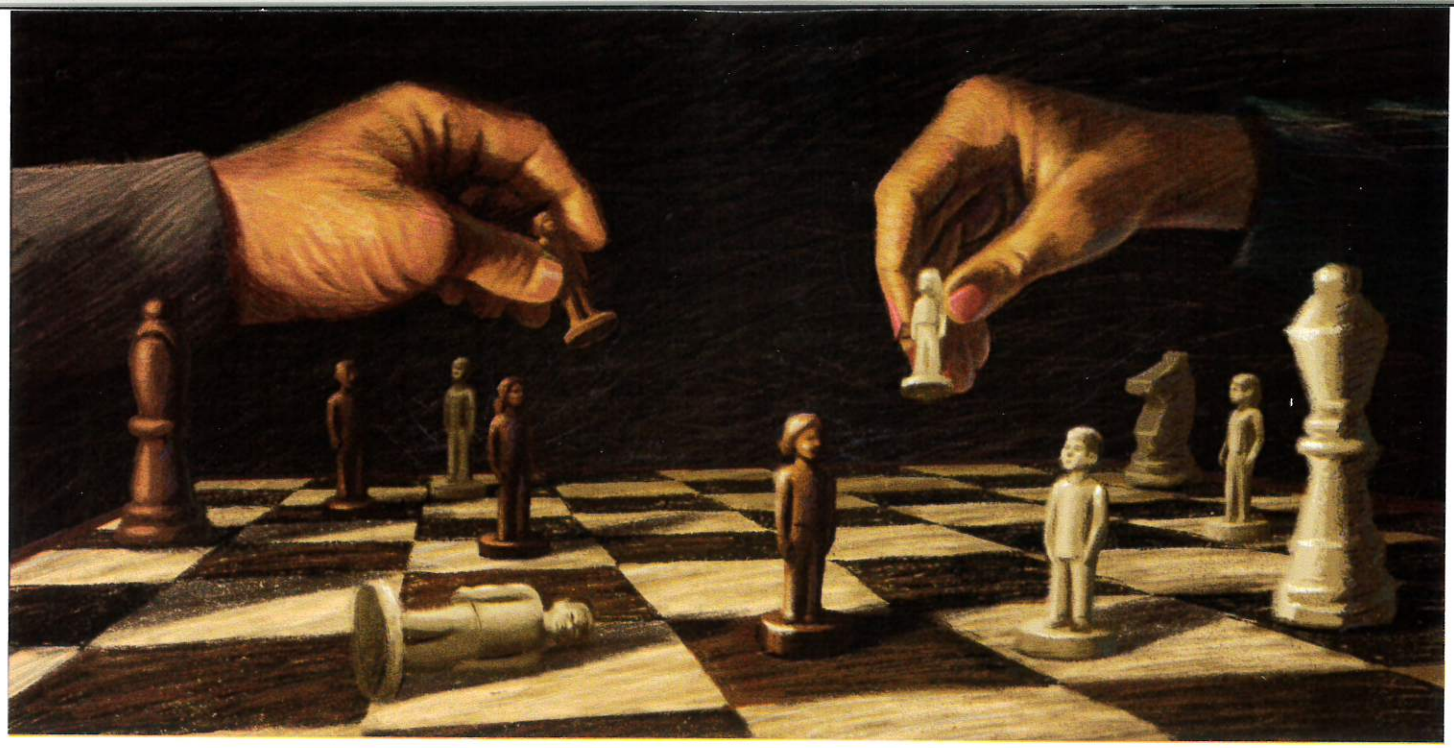
Mr. Joshi: How do we define PA?

Dr. Warshak: We should distinguish between what we call parental alienation and the alienating behaviors themselves. PA is the state of the child's relationship with a parent whom the child unreasonably rejects. Alienating behaviors refer to the activities that can damage a child's relationship with a parent and contribute to the child's rejection of that parent.

Mr. Joshi: And how do the courts view PA?

Judge Karle: When I first started handling these cases, I felt that judges were reluctant to believe that parental alienation really occurs. We've made significant progress, but there's always more work to be done. As judges, we must approach each case open and willing to learn, to be educated by lawyers who present evidence and ideas with which we may be unfamiliar.

Judge Gleicher: I came to the appellate bench with no background in family law. I began my service as a skeptic of new, untested, or unvetted science or pseudoscience. I sort of reflexively put the thought of PA as a syndrome into that bucket. What I learned from reading the actual evidence and the records in cases is that there are families in crisis because of the conduct of one parent that, unfortunately, has a huge and terrible impact on the relationship of the child or children with the other parent. Whatever we choose to call it, judges are the front line to save those parent-child relationships.



Dr. Warshak: American courts have long recognized the phenomenon of the vindictive parent poisoning the child's affections for the other parent or interfering with the child's contact with the other parent. But as PA became increasingly recognized, there was concern that too many parent-child conflicts were being labeled as alienation and that multiple factors were being overlooked that contributed to the problem. While some courts remain wary, there now is universal acceptance that PA is a real problem and that children can be manipulated by one parent to turn against the other.

Mr. Joshi: One of the reasons for the move toward almost universal acceptance of PA by the family courts is the published research.

Dr. Warshak: We have many studies about the harmful impact of parental conflict on children, including on children who are subjected to a type of parenting where they're expected to share the feelings of one parent and are punished in some way—usually psychologically—if they don't align themselves with, and show allegiance and loyalty to, that parent. When it comes to spending time with a parent, children may believe it's their choice whether to see that parent, and they feel they don't need to respect the rules that have been set for their family. There are also longer-term problems of children, when they get older, coming to realize what they missed out on and that they might have played a role in disrupting their relationship with a parent.

Judge Karle: We focus on the impact that this has on the children, but there are also devastating effects on the targeted parents. We always hope that there will be reunification, but it will never be the same.

Dr. Warshak: The degree of suffering by a parent who loses a child in this way is just heartbreaking.

Mr. Joshi: Last year, the Michigan Court of Appeals issued a published opinion—*Martin v. Martin* [331 Mich. App. 224, 952 N.W.2d 530 (2020)]—affirming findings of PA and the interventions put in place by the trial judge. What tips would you offer to litigators to ensure that a proper record is made for successful appellate review?

Judge Gleicher: First, keep in mind that the best interests of the child is the cornerstone of the legal determination that's going to be made, both by the trial court and later by the appellate court. Keep a focus on what evidence comes in and connect it to the child's best interests. That's critical. Most of the cases come to an appellate court in the context of a motion for a change of custody. That can be very time- and record-consuming. But the key remains the child's best interests. The second necessity is a very rich, full, and detailed factual record. Factual findings are reviewed for whether they're clearly erroneous. To the extent they rest on a deep well of facts, they're much less likely to be challenged, reversed, or discarded on appeal. Documentary evidence—phone records, text messages, social media evidence, evidence provided by third parties about the conduct of the parent and the child—is extremely important.

Mr. Joshi: As a trial judge, what are your thoughts?

Judge Karle: I get frustrated when attorneys don't have the commitment and preparation for a hearing or a trial. Number one, be prepared. These are complicated cases. You must be thoroughly ready. When I was a prosecutor, I went where the evidence led. Follow and present that documented evidence. Meet with your clients. Put together a history, grounded in documents, text messages, pictures, to give the trial judge the ability to make a decision about the dynamics of PA, whether it exists in the particular case, whether there is actual child abuse that explains why the child doesn't want to see a parent. People may lie; evidence

Illustration by Jim Starr

doesn't. Attorneys need to be educated on the dynamics of child abuse, and they need to be prepared to educate the court. Reach out to experts in the field. Have the exhibits ready. Have a theme or case theory, and a strategy.

Mr. Joshi: What are some commonly held myths or fallacies that can compromise judicial outcomes?

Dr. Warshak: First, that a child's rejection of a parent is a normal by-product of divorce, that it's transient and short-term, and that it will heal without intervention. That's just not so.

Second, that children will be traumatized if we expect them to spend time away from the parent with whom they are aligned and with the parent they claim to hate. No peer-reviewed study has documented harm to severely alienated children from the reversal of custody. No study has reported that adults who, as children, complied with expectations to repair their damaged relationship with the parent later regret having been obliged to do so. So, no matter how dramatically children demand to control the parenting time schedule and no matter how much they might threaten to act out if they're required to spend time with a non-abusive parent, parents and courts don't traumatize children when they refuse to appease those demands.

Third, that the stated wishes of alienated adolescents should dominate the outcome of the custody case. A poor rationale for giving deference to a teenager's expressed desires is the belief that teens who are close to the age of legal majority know what's best for them. Compared to other children, adolescents are more capable of mature reasoning and are less suggestible, but their judgments are highly vulnerable to outside influences. That's why prudent parents worry about the company their teens keep. Often, teenager preferences are unstable and capricious. Those dynamics make adolescents vulnerable to an unhealthy alliance with one parent against the other. Yet, their cognitive maturity relative to younger children helps them convince custody evaluators and judges that their wish to disown a parent is a well-reasoned and proportionate response to that parent's behavior.

The ABA published a study of a thousand cases that found that even when children threatened to defy the court or hurt themselves, these threats disintegrated after the court issued an order for a change of custody. That should not be too surprising—adolescents comply with many rules and expectations they don't like. So courts owe it to children to expect, and enforce, their compliance with legal authority. Don't give children the idea that their demands place them above the law or beyond the reach of the court.

Mr. Joshi: In litigating PA cases in family courts across the country, I've found that sometimes judges are reluctant to remove and separate the child from the alienating parent, particularly if the child appears to be well adjusted in school or in social spheres.

Judge Karle: Those are important factors to look at. But, from my history as a child abuse and domestic violence prosecutor, I had countless cases in which a child was regularly abused, yet excelled at school, got straight As. They could control their grades; they could not control the abuse. One child was sexually abused by her gymnastics coach, yet excelled at gymnastics and at school, even though she was being victimized almost daily. We have to be very careful not to just reject concerns about high-performing children, thinking that if they are doing great in school, no abuse could be occurring. We've got to dig deeper.

Mr. Joshi: Is there a danger of judicially enabled PA when a judge, perhaps inadvertently, sides with an alienating parent and permits the alienation to continue and get further entrenched?

Judge Karle: Yes. PA is a form of child abuse. My number one priority as a judge generally and as a family court judge specifically is to protect each child from further abuse. One of my greatest fears as a judge is the incorrect assessment of parental alienation and leaving a child who has truly suffered abuse unprotected and not believed. The rivaling fear I have is depriving a child of a loving and nurturing parent and a healthy childhood, and rewarding an alienating parent.

These are complicated cases. You must be thoroughly ready.

So, as judges, what can we do? What can I do to try to get it right every day? First, I must understand that this type of child abuse really exists. I tell jurors in criminal cases that they must keep an open mind and not form any immediate judgments. I have to remind myself of that every day and critically evaluate the evidence of why the child is rejecting a parent in a particular situation.

What else? Rapid and effective enforcement of court orders. Every day, courts issue orders yet don't demand that the litigants follow them. There should be consequences. As judges, we have to hold true to that. For continuous misconduct, parents may find themselves at risk of losing custody.

Judge Gleicher: In one recent case, the term "parental alienation" was not used at all in the trial court. Thanks to my previous experiences, I understood that's exactly what was happening. The trial court criticized the targeted parent—the mother—by saying that during her testimony, she vacillated between laughing, crying, tense and calm, seemingly independent of anything

occurring in the courtroom. That was a major ground for the trial court's criticism of her.

I pointed out that everybody had been targeting the mother through the whole proceeding, claiming she had mental health problems. There had been a very concerted effort on the part of the father to alienate those children, to vilify the mother. Unfortunately, it was a big success with the trial court.

Part of the problem for appellate judges is that we're supposed to be educated based on only the record before us. We're not to do outside reading, go to outside websites, review articles that haven't been put into the record. So, unless the parties have created a record that educates us, the framework for getting our work done keeps us ignorant.

That's so vitally important for trial counsel to remember, especially if they find themselves on the losing side. There is another chance, and it's going to be dependent on educating the appellate judges.

Mr. Joshi: What are the payoffs and pitfalls for the family judges when appointing a guardian ad litem or attorney to represent minor children?

Judge Gleicher: I find that they are usually not only unhelpful but also create roadblocks to getting to the truth. In Michigan, the standard for a trial court appointing a guardian ad litem is whether the child's best interests are inadequately represented during the proceeding. I would highlight the term "best interests," because when the child comes to court saying, "I don't want to visit with" a parent, and abuse or neglect has been eliminated, could it ever be in that child's best interests to be empowered with a lawyer?

It's stunning to me, as an outsider to the family court world, that this is even permitted. We know in the criminal law context that the decisions that adolescents make—even 17-and-a-half-year-olds—are not subject to the same review as those of adults. So why, in the family law context, do we suddenly forget those lessons and say to adolescent children we're going to give you a lawyer so you can bring your craziness right into court and you can have an equal voice with everybody else. It just makes no sense.

Judge Karle: It's a piece of the puzzle. It can be useful, but it certainly cannot be dispositive. I see so many judges who, out of fear of making a bad decision, will not do anything contrary to what the attorney for the child requests based on the child's preference. That's really dangerous business, because their job is not to advocate for the child's best interest; their job is to advocate for what the child wants, as if the child were an adult client. We don't let eight-year-olds drive a car or get an apartment or make important decisions with respect to their health. How can we allow them to make a decision about whether they see a parent?

Of course, it's important to hear what the child is saying, because sometimes that helps with actually showing that there is alienation. But our job as judges is not to let an attorney for the child tell us what the child wants and just march to the beat of that drum.

Mr. Joshi: Is court-ordered psychotherapy effective?

Dr. Warshak: It can be, depending on the skill of the therapist and on the severity of the alienation, but even the most skilled therapist is going to have very little chance of success working with a child who never spends any time with the rejected parent. It's not that the therapy can't be effective, but usually it would take so long that the child would be aged out before developing the insight necessary to overcome the alienation.

When the alienation is not as severe or the alienating parent is more amenable to modifying behavior, therapy can be effective, particularly if the therapist has access to all members of the family. The therapist can work with an alienating parent to help that parent recognize the damage being done to the children and learn other ways to cope with anger or disappointment besides vindictive, alienating behavior.

But in cases when the alienating parent is unlikely to effectively support the child's relationship with the other parent, and when the children are moderately to severely alienated, traditional therapy often is a poor option. In those instances, if the court determines that it's in the child's best interest to be in the custody of the rejected parent, a more helpful alternative to psychotherapy is a brief specialized program—like Family Bridges—that eases the transition for the child and teaches the child and parent the tools they need to live together in harmony.

Mr. Joshi: Any parting thoughts?

Dr. Warshak: We're now seeing an increasing recognition that severely alienated children and their parents can be helped and that it's important to respond rapidly to the early signs. I hope we'll see a greater proliferation of specialized programs for families with severely alienated children—with wider availability, perhaps scholarships, to bring that help within the reach of those who need it.

I think we'll also learn which children, under which circumstances, will do best with a reversal of custody, and which ones will do well with a specialized intervention.

Finally, what I'd like to see is greater awareness in society of PA, with a corresponding ethos that discourages parents from, and condemns them for, engaging in alienating behavior. I hope we develop some new programs to help alienating parents modify their toxic behavior.

We've been able to succeed with some severely alienated children to help them reunite with a rejected parent. We've had less success with parents who are just hell-bent on deeming the other parent as unnecessary in their child's life. ▪