

## NOTES / AANTEKENINGE

### INVESTIGATING PARENTAL ALIENATION AS A FORM OF DOMESTIC VIOLENCE, CHILD ABUSE AND HARASSMENT: A LEGAL HYPOTHESIS

#### 1 Introduction

“Parental Alienation Syndrome” is the term created by a psychiatrist, Gardner, to explain the phenomenon where, to get sole custody, one parent attempts to brainwash their child into rejecting the other parent – a situation often encountered during (but not limited to) custody disputes (Gardner *Family Evaluation in Child Custody Mediations. Arbitration and Litigation* (1989) 233; Gardner *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals* (1998) 73–74; Turkat “Parental Alienation Syndrome: A Review of Critical Issues” 2002 18 *J. Am. Acad. Matrimonial Law* 131 133–134; Nichols “Towards a Child-centered Approach to Evaluating Claims of Alienation in High-conflict Custody Disputes” 2014 112 *Michigan LR* 663 664–665; and Berg “Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts” 2011 29 *Law & Ineq* 5 and 7). Parental alienation is a broader term, which encompasses parental alienation syndrome and incorporates the neglect, physical and emotional abuse of a child (Berg 2011 29 *Law & Ineq* 8). Parental alienation tends to focus on the conduct of the parent, whereas parental alienation syndrome is more concerned with the conduct of the child (McGlynn “Parent and Child-custody and Control of Child: Parental Alienation: Trash Talking the Non-custodial Parent is Not Okay” 2001 77 *North Dakota LR* 525 533).

Despite the controversy surrounding parental alienation syndrome regard to the syndrome not being recognised as a disorder by either the former American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (hereinafter “*DSM-IV*” (1994) or the *DSM 5* (2013)), this does not mean that the phenomenon is consequently discredited. By 2002 there were already more than 100 peer-reviewed articles on the topic, over 40 court decisions and, as Gardner himself notes (Turkat 2002 18 *J. Am. Acad. Matrimonial Law* 133; and Gardner “Does DSM-IV have Equivalents for the Parental Alienation Syndrome (PAS) Diagnosis?” 2002 <http://www.fact.on.ca/Info/pas/gard02e.htm> (accessed 2015-08-01)):

“It is important to note that DSM-IV does not frivolously accept every new proposal. Their requirements are very stringent with regard to the inclusion of newly described clinical entities. The committees require many years of

research and numerous publications in peer-review scientific journals before considering the inclusion of a disorder, and justifiably so. Gille de La Tourette first described his syndrome in 1885. It was not until 1980, 95 years later, that the disorder found its way into the DSM. It is important to note that at that point, Tourette's Syndrome became Tourette's Disorder. Asperger first described his syndrome in 1957. It was not until 1994, 37 years later, that it was accepted into DSM-IV and Asperger's Syndrome became Asperger's Disorder."

There is also empirical research from a 12-year study undertaken of 700 families examining this phenomenon (Warshak "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" 2003 37 *Fam. L.Q.* 273, 284 and 275–286; and see also Walker "The Extreme Consequence of Parental Alienation Syndrome –The Richard Lohstroh Case of a Child Driven to Kill his Father – Will Courts Move Towards Allowing Children to Use Parental Alienation Syndrome as a Defense to the Crime of Murder of Their Own Parent?" 2006 27 *Women's Rts. L. Rep.* 153 157). (Despite the non-inclusion in the *DSM-IV* or *DSM 5*, it is noteworthy that this phenomenon has been included in the American Psychological Association's "Guidelines for Child Custody evaluations in Divorce Proceedings" 1994 49 *Amer.Psychol.* 677; Warshak 2003 37 *Fam. L.Q.* 290; and see Turkat 2002 18 *J. Am. Acad. Matrimonial Law* 148, where it is also argued that not all disorders were included in the former *DSM-IV*, but that there was a diagnosis of "Not otherwise Specified" that would include parental alienation syndrome (PAS), as all the criteria listed have been met and it has been utilised by many mental health practitioners in the United States).

This note, however, does not focus on the role of parental alienation syndrome in the law, but avoids the controversy concerning PAS as a syndrome by concentrating on parental alienation conduct instead. The purpose is, therefore, to examine such behaviour in the context of domestic violence and harassment, which are subject to legal sanction and legal consequences. Although this behaviour may also amount to a specific crime, such as *crimen iniuria*, defeating or obstructing the course of justice, or defamation, that forms a separate discourse and is not addressed here. The first part of this note examines parental alienation as a form of psychological violence and abuse. As a wealth of literature already exists in the United States, this phenomenon is examined in the context of family law and tort law (law of delict) in the USA. Finally, this note provides an alternate hypothesis whereby parental alienation conduct is explored under the legal framework of domestic violence and harassment legislation.

## **2 Parental alienation as a form of psychological abuse**

Parental alienation causes behavioural, emotional or physical harm (Varnado "Inappropriate Parental Influence: A New App for Tort Law and Upgraded Relief for Alienated Parents" 2011 61 *De Paul LR* 113 124; and Berg 2011 29 *Law & Ineq* 8 and 13). It is arguably a form of psychological violence and abuse that occurs in the family context, where the child is used as an instrument or agent of one parent against the other (see Schwartz

“The Kids are Not All Right: Using the Best Interest Standard to Prevent Parental Alienation and a Therapeutic Intervention Approach to Provide Relief” 2015 56 *B.C. LR* 803 812 fn 52, for a discussion regarding empirical research that parental alienation is one of the most serious types of “emotional abuse” and a species of psychological violence; and see also *Hendrickson v Hendrickson* 2000 ND 1, 603 N.W. 2d 896 903).

Several techniques are utilised in parental alienation. They include *inter alia* false allegations of child abuse, false statements relating to the targeted parent, or the devaluation of such parent through criticism of lifestyle or character, distorting history, limiting conversations or visits with the child, or causing situations that will conflict with the targeted parent’s rights of visitation (Hatch “§25 Proof of Parental Alienation in Action for Modification of Custody of Child” (2012 updated 2014) 127 *AMJUR POF* 3d 237 <http://www.westlaw.com> (accessed 2015-07-01); Darnall “Parental Alienation: Not in the Best Interest of the Children” 1999 75 *N.D. LR* 323 329; and Varnado 2011 61 *De Paul LR* 120–123). According to Gardner, PAS manifests as a cluster of eight identifiable symptoms such as (1) “a campaign of denigration” against the targeted parent; (2) support for the alienating parent; (3) unwarranted and absurd rationalisations for the denigration; (4) the child is a perfect imitation of the alienating parent in certain situations; (5) the absence of guilt over cruelty to and exploitation of the alienated parent; (6) the absence of ambivalence; (7) there is the presence of independent thinking; and (8) animosity towards the family and friends of the targeted parent (Gardner *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals* 76–109; Turkat 2002 18 *J. Am. Acad. Matrimonial Law* 136; Walker 2006 27 *Women’s Rts. L. Rep* 155; Berg 2011 29 *Law & Ineq* 7–8; and Nichols 2014 112 *Michigan LR* 665 and fn 8).

While the psychological harm suffered by a child which is attributable to the techniques utilised in situations of deliberate parental alienation, may not be included in the current *DSM 5* as a recognised syndrome, the behaviour displayed by the child caught up in a situation of parental alienation may qualify under a different mental disorder, such as Parental-Child Relational Problems (V61.20 (Z62.820 715)) or even Oppositional Defiant Disorder (313.81). These are included in the *DSM 5* (462–466). The former category focuses on a parent-child relationship problem where there is impaired functioning relating to affective, behavioural or cognitive areas. The specific cognitive problems that would appear to overlap with areas of parental alienation relate to the “scape-goating” of the other parent, unwarranted estrangement and hostility and negativity, while affective problems include apathy or anger towards the other party, such as the parent, in the relationship (*supra* 715). It is, therefore, clear that an impairment in the parental relationship can lead to significant psychological consequences for an individual (*supra* 715). Both the child and the targeted parent who is subject to the loss of a child, which can cause extreme mental anguish (Varnado 2011 61 *De Paul LR* 126), are arguably the victims of psychological violence.

The next section examines how parental alienation is dealt with in the United States of America, which is the frontrunner in terms of how courts have dealt with this issue.

### 3 The position in the United States of America

#### 3.1 Family law context

In custody cases in the USA, the courts in most jurisdictions consider the best-interests-of-the-child standard which is determined by a number of factors, but which usually highlights the factors pertaining to the “moral fitness” of a parent and each party’s willingness to encourage a good relationship between the child and the other parent (*Grigsby v Grigsby* 39 So.3d 453 456 Fla Dist. Ct App 2010; and Varnado 2011 61 *De Paul LR* 124 129). Parental alienation creates a “singular relationship” that excludes the other parent and is contrary to the “friendly parent concept” (Walker 2006 27 *Women’s Rts. L. Rep* 155; and Dore “The ‘Friendly Parent’ Concept: A Flawed Factor for Child Custody” 2004 6 *Loyola Journal of Public Interest Law* 41 41–42).

Three subcategories of parental alienation syndrome have been identified: mild, moderate and severe (Walker 2006 27 *Women’s Rts. L. Rep* 155–156). In the case of mild or moderate PAS, sufficient time with the target parent is suggested, or that custody arrangements be amended, or that mediation or counselling take place (Walker 2006 27 *Women’s Rts. L. Rep* 155–156; McGlynn 2001 77 *North Dakota LR* 537–538 and 540; and *Soller No v G* 2003 (5) SA 430 (W) 430 444 par 49–50 and 448–450 par 72–75). In situations of severe PAS, the child tends to have such an “obsessive hatred” towards the alienated parent that it may create a hostile environment, making life intolerable for the alienated parent. The child may even set out to destroy the parent or his or her property (Walker 2006 27 *Women’s Rts. L. Rep* 156).

Family courts may therefore respond to allegations of parental alienation by either actually effecting or threatening to effect a custody change, non-action, or an order to prevent one parent from denigrating the other (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 *Journal of Law & Family Studies* 153 166–171).

Beverly opines that

“[i]n addition to the constitutional basis for parental rights, numerous states have supported, through statutes, the fundamental notion that parents not only have the obligation, but also the right, to have stable and meaningful contact with, and control of, their children ... unless there is some potential imminent harm to the child” (Beverly 2013 15 *Journal of Law & Family Studies* 159).

As far as court actions are concerned, certain family courts have in fact utilised PAS in reaching decisions in a number of cases (*In re Miller* 20 A3d 854 (NH 2011); *Bond v MacLeod* 921 NYS 2d 671, 673-674 (NY App.Div.

2011); *Adler v Espinosa* (Minn.Ct. App. Oct 7, 2008; No. A07-1771 2008 WL 4471303); *Noland-Vance v Vance* 321 S.W.3d 398, 409 (Mo. Ct. App. 2010); and *Hibbard v Hibbard* 139 Conn. App 10 55 A 3d 301 (2012)). Case law is indicative of the fact that cases of PAS are not gender-biased. For example in *Capra v Capra* (2007 WL 3146810) the mother was granted sole custody and in *Tarlan v Sorenson* (2001 WL 185098; and *Goodyear-PeKarna v PeKarna* 2006 WL 1738278 <http://www.westlaw> (accessed 2015-08-01)), the fathers were awarded sole custody. (See also Berg 2011 29 *Law & Ineq* 7.)

If one examines the *Hibbard* case as an example, the father was awarded custody where the techniques used by the mother in an attempt to alienate the child from the father included the failure to allow visitation rights as well as making false allegations of abuse. The parties were initially awarded joint legal custody, with the primary residence being with the plaintiff mother (*Hibbard v Hibbard supra* 303). The defendant alleged that the plaintiff had failed to comply with visitation orders, and filed a motion to hold her in contempt. It was held that, if the mother should continue to have custody with her intent on eliminating the father from the child's life, such conduct would result in the "eventual loss to the child of her father" (*Hibbard v Hibbard supra* 303–304). The trial court awarded sole custody to the defendant, who was the father. The judgment was affirmed on appeal (*Hibbard v Hibbard supra* 304 and 311; see also *Hendrickson v Hendrickson* 2000 ND 1 603 NW 2d 896; and also discussed in McGlynn 2001 77 *North Dakota LR* 525). It is submitted that the extent of parental alienation is therefore evident beyond custody battles that have been settled, and the behaviour and conduct perpetuated thereafter should not be ignored as merely a remnant of a family law issue, which is currently the predominant position.

Some of the most important reasons for the limited or lack of consequences in family law courts may be attributed, firstly, to the controversy surrounding the recognition of parental alienation as a syndrome; and, secondly, to the fact that it does not meet the requisite scientific standards for recognition of widespread acceptance and sufficient reliability (Nichols 2014 112 *Michigan LR* 2014 666 and 671–679; Dore 2004 6 *Loyola Journal of Public Interest Law* 52; Beverly 2013 15 *Journal of Law & Family Studies* 153; Bruch "Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases" 2001 35 *Fam. L.Q* 527 550–551; see also the decisions of *Frye v United States* 293 F 1013 (DC Cir 1923) 1014; *Daubert v Merrell Dow Pharm., Inc* 509 US 579 588–594 (1993); *Kumho Tire Co v Carmichael* 526 US 137 (1999), which deal with the issues of scientific reliability and acceptance, and Warshak's contrary view that it does in fact meet the standards for wide acceptance; and see Warshak 2003 37 *Fam. L.Q* 286). Thirdly, the alienation does not always occur during custody cases and may occur afterwards, necessitating a modification of the custody order, which the courts are often cautious to do in the absence of a violation of the order (Varnado 2011 61 *De Paul L Rev* 132 and 138). Fourthly, the targeted parent is usually the parent who is paying maintenance and cannot afford the costs of expensive litigation and, lastly, family law neither provides deterrence measures against such

behaviour (Varnado 2011 61 *De Paul L Rev* 131–132 and 138), nor takes into consideration the harm caused to the targeted parent.

It is clear that in the absence of alternate considerations, the alienating parent may get away with his or her behaviour. One reason that may perhaps be attributed to this issue is that the focus of parental alienation under family law is often placed on PAS as a syndrome and the best interests of the child, thereby distracting from the fact that parental alienation behaviour by the alienating parent, regardless of severity, may in fact be subject to sanction under different fields of law. Limiting parental alienation to one field of law only, allows a parent who is engaging in abhorrent conduct to escape from the consequences of such conduct. Parental alienation is a form of ongoing psychological abuse that can extend after divorce proceedings, and such conduct is definitely not in the best interests of a child.

### 3.2 *Law of tort*

The law of tort (delict) proffers an alternative field of law for consideration of the issue of parental alienation. Beverly advocates that courts should recognise a cause of action for the intentional alienation of a child as a form of tort (delictual action), not only for compensation for the victim parent, but also as a form of deterrent against behaviours that denigrate the other parent, and also to serve as a form of punishment as a disincentive to the causing of harm (Beverly 2013 15 *Journal of Law & Family Studies* 156 and 175–179). Under the law of tort, in the absence of laws that specifically cover cases of parental alienation, collateral actions for the loss of consortium or statutes that provide for a cause of action where there is interference with regard to child custody, are possibilities that can be pursued in the context of parental alienation instead (Beverly 2013 15 *Journal of Law & Family Studies* 172–176).

Civil contempt-of-court actions may be filed by the non-custodian parent (Hatch §20 (2012 updated 2014) 127 AMJUR POF 3d 237 <http://www.westlaw.com> (accessed 2015-07-01)). A tort (delict) is committed where a defendant intentionally interferes with the plaintiff's rights where the plaintiff has a custody order for custody or visitation rights, which action includes situations where there is the wilful disobedience of a court order, violent abduction or wrongful detention (see Hatch §22 127 AMJUR POF 3d 237). Significantly, Hatch mentions that, where there is a "pattern of behaviour that would ultimately undermine the relationship between the father and the children, interfering with the father's parental rights and constituting serious emotional abuse", it will amount to the tortious interference of custody rights (Hatch §22 127 AMJUR POF 3d 237; and see also *Clark v Clark* 2003 WL 21259026 (Ky. 2003) <http://www.westlaw.com> (accessed 2015-07-01)).

Courts also recognise a "rubric of harms" under the law of tort, which include emotional harm, anxiety, diminished enjoyment or loss of tranquillity or autonomy (Grey "Neuroscience, Emotional Harm, and Emotional Distress Tort Claims" 2007 7(9) *The American Journal of Bioethics* 65 66). A "stand-

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alone emotional distress claim” entails that emotional harm is inflicted intentionally or negligently without the need to assert that physical harm was also inflicted (Grey 2007 7(9) *The American Journal of Bioethics* 66):

“The intentional infliction of emotional distress claim requires the plaintiff to show that the defendant engaged in extreme and outrageous conduct, which means that the act is intolerable and goes beyond all bounds of civilized society”.

Only nominal proof is required, which entails that a reasonable person would also have suffered the likelihood of such distress. Medical testimony is generally not required to prove the cause or severity of the distress. The courts adopt a cautious attitude and may require the presence of both an objective test (would most people have suffered the same severe distress in that situation) and a subjective test (severe emotional distress was in fact suffered by the plaintiff). (See the discussion in Grey 2007 7(9) *The American Journal of Bioethics* 66–67, where Grey suggests that neuroimaging (brain imaging) may be a solution to evaluate emotional distress).

However, the intentional infliction of emotional distress action is not adequate either. Such actions have not been successful in USA courts unless an “abduction” or “concealment” of the child has occurred, and it is also difficult to prove “extreme and outrageous conduct” (Varnado 2011 61 *De Paul LR* 145–150; *Larson v Dunn* (Minn 1990) 460 NW 2d 39 41 47; and *Davis v Hilton* (Fla 2001) 780 So 2d 974–976).

As can be seen from the aforementioned discussion, the law of tort is limited and can be utilised only for some forms of parental alienation, and does not encompass the broader conduct inherent in techniques of parental alienation. Varnado has suggested a new tort action, known as “inappropriate parental influence” to cater specifically for cases of parental alienation (2011 61 *De Paul LR* 151–157). She states in support of her idea that a “lack of precedent is no reason for denying a remedy to an alienated parent. After all, the law is not designed to be static, but instead should be changed, adapted, and supplemented to keep pace with the needs of an ever-evolving society and the contemporary conditions and relationships within it” (151).

It is clear that there are two victims in a situation of parental alienation, namely, the child and the targeted parent. This brings us to the next section, which explores parental alienation from a different perspective, namely, parental alienation in the context of child abuse towards the child in such a situation, and as a form of domestic violence or harassment towards the target parent in South Africa.

## **4 Consideration of parental alienation as a form of child abuse, domestic violence and harassment in South Africa**

### *4 1 Parental alienation as a form of child abuse*

Parental alienation has been discussed as a form of psychological abuse. What needs to be established is whether there is legislation in place that would incorporate instances of psychological abuse, perpetrated against a child in a parental alienation situation. The Children's Act 38 of 2005 merits further scrutiny in this regard. This Act provides in Chapter 1, section 1, that abuse to a child means "any form of harm or ill-treatment deliberately inflicted on a child, and includes ... (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally". It further provides in section 6(4)(a) that "an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided". In a situation of parental alienation, however, such approaches may not be successful if a parent is actively engaging in conduct to alienate the child from the target parent. In section 7 of this Act, the best interests of the child dictate that a child be raised in a "stable family environment" and that a child should be protected from any psychological or physical harm caused by *inter alia* abuse, exploitation or harmful behaviour toward another person (s 7(1)(k)(i) and (ii)). Section 305(7) in fact provides for a fine or imprisonment not exceeding 20 years or both. The law therefore takes a harsh stance as far as the conduct towards the child is concerned. This penalty, however, does not take into account the harm caused to the other parent and is why alternative legal means to effectively recognise, deter and combat parental alienation, and protect the targeted parent who is also a victim in the situation, are also needed.

The Constitution, 1996 protects the rights of children and provides in section 28(2) that "a child's best interests are of paramount importance in every matter concerning the child". (See also Article 3 of the United Nations Convention of the Rights of the Child (1989) and s 9 of the Children's Act 38 of 2005, which specifically singles out and affirms that a child's best interests are of paramount importance. S 7(1) of the Children's Act must also be read together with s 28(2) of the Constitution). After the Children's Act was enacted, a list of factors was provided in section 7(1) that must be taken into account in the determination of the best interests of a child. These factors include *inter alia* the nature of the relationship between the parents and child (s 7(1)(a); the attitude and capacity of the parents, s 7(1)(b) and (c); the emotional and physical security of the child, s 7(1)(g); the need to be raised in a stable family or caring environment, s 7(1)(k); and the need to be protected from any psychological or physical harm that could be caused by abuse, neglect, exploitation or exposing such child to exploitive, harmful or violent behaviour, s 7(1)(l)(i), or exposing the child to harmful or violent behaviour towards another person, s 7(1)(l)(ii), or any family violence that relates to the child or another family member of such child, s 7(1)(m)).



Section 28(1)(e) of the Constitution also reiterates that every child has the right to be protected from abuse, neglect, maltreatment or degradation (see also *G v G* 2003 (5) SA 396 (ZH) 400). In the determination of such interests, the courts would need to establish which parent is “better able to promote and ensure the child's physical, moral, emotional and psychological welfare” (*Soller No v G* 445 par 54–55; see also *G v G supra* 405A–H; and *McCall v McCall* 1994 (3) SA 201 (C) 204J–205G). The problems relating to the best interests of the child were highlighted in the Constitutional Court judgment of *S v M* (2008 (3) SA 232 (CC); 2007(2) SACR 539 (CC)), which also deals with the issue of parents who are criminally charged. It was held that where a breakup in a family is certain to occur the State should minimise the negative effect on children as far as possible, and the best effort possible should be made to avoid the destruction of family life (see par 20; see also Boezaart *Child Law in South Africa* (2009) 281 fn 96; 282–284 for a discussion dealing with the limitation of rights and the meaning of paramountcy – also as set out in the *S v M* case *supra* par 26 – that elucidates upon the meaning of paramountcy as not being absolute, and that the concept, is in fact, indeterminate; see also Barrie “The Best Interests of the Child: Lessons from the First Decade of the New Millennium” 2011 1 *TSAR* 126; and Boezaart “The Position of Minor and Dependent Children of Divorcing and Divorced Spouses or Civil Union Partners” in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 171ff).

It has been alleged that the alienating parents who initiate parental alienation, suffer from a mental disorder or deficiency in their psychological makeup (Varnado 2011 61 *De Paul LR* 122–123; and Walker 2006 27 *Women's Rts. L. Rep* 156). Such considerations also need to be taken into account when dealing with the serious issue of parental alienation, and what resultant measures should be taken in order to provide a child with a stable, caring environment that is free from psychological or harmful behaviour.

#### 4 2 *Parental alienation as a form of domestic violence*

Psychological abuse is contra-indicated in the Domestic Violence Act 116 of 1998. The preamble of the Domestic Violence Act provides recognition for domestic violence as “a serious social evil” that can take on many different forms. The harms that are defined as domestic violence include forms of abuse that are *inter alia* psychological or emotional abuse, harassment, intimidation and stalking, which cause actual or imminent harm to the well-being or health and safety of the victim (s 1). “Emotional, verbal and psychological abuse” refers to a “pattern of degrading or humiliating conduct”, and includes the repetition of threats, insults, ridicule or obsessive possessiveness, which may “constitute a serious invasion of the complainant's privacy, liberty, integrity or security” (s 1). The respondent can be any person who is, or was, in a domestic relationship with the complainant. A protection order may be issued to prohibit the commission of any act constituting domestic violence, or “the enlisting of help of another person to commit any such act” (s 7). While it is evident that the focus in the

preamble is on violence against women and children, the definition of “complainant” is not restricted to such persons and would include male victims of domestic violence. A domestic relationship includes a relationship between parties who were married to each other, and/or where they are the parents of a child (s 1). It is therefore clear that the former ex-spouse or partner (target parent) of the parent perpetrating the parental alienation is included within the ambits of this legislation, and that serious emotional abuse, which forms a pattern of conduct, is also encompassed within the ambits of this legislation. Where the acts are perpetrated directly by the alienating parent, such conduct will fall squarely within such legislation. Where the child is used as an instrument to perpetrate abuse, the situation is less clear, as one would need to adopt a very broad interpretation to include a child as an instrument of a partner to fall within the meaning of this legislation, unless one considers such instrumentality in the context of enlisting the help of another person to commit the act in terms of section 7. Under the *aegis* of criminal law, a parent can, of course, be held criminally liable for a specific crime, where he or she uses a young child to perpetrate an act on his or her behalf in terms of the rule accepted by the courts, known as the *qui facit per alium facit per se* rule, which in essence means that a person who performs an act through another is deemed to have perpetrated such act himself/herself (Burchell *Principles of Criminal Law* 4ed (2013) 465–466).

A particular conundrum may also present itself with the issuing of protection orders in a situation where a child may be in the sole custody of the parent who is enlisting the child’s aid in perpetrating the harm. A protection order may aggravate visitation rights should such an order be issued, unless sole custody is then transferred to the parent who formed the target of the parental alienation. Contraventions relating to protection orders and suspended warrants of arrest (s 7 and 12) may result in a fine and/or imprisonment not exceeding five years in the case of section 7.

### 4.3 *Parental alienation as a form of harassment*

It is submitted that certain acts of parental alienation may also fall within the ambits of harassment legislation. The Protection from Harassment Act 17 of 2011 regulates harassment in South Africa, which, as defined in section 1, “means directly or indirectly engaging in conduct that the respondent knows or ought to know (a) causes harm, or inspires the reasonable belief that harm may be caused to the complainant”.

The provision includes stalking-type behaviour, sexual harassment, electronic, verbal and other means of communication (see s 1(a) of the definitions). The harm is broadly defined and includes “any mental, psychological, physical or economic harm” caused (s 1(b)). Where parental alienation is caused directly by the alienating parent, such as sending harassing emails or verbal harassment, or caused indirectly through the instrumentality of the child, it would appear that such instances may in fact be covered by this legislation. Section 2 and 11(1)(a) and (b) provide for the issuing of a protection order and a suspended warrant of arrest, with both

being issued at the same time, so that, if the order is contravened, the harasser may be arrested. It is therefore clear that psychological harm is specifically recognised, and parental alienation conduct, which causes psychological, physical or economic harm, will be covered by these provisions. While short sentences can be imposed as a penalty, a breach of section 1 can extend to imprisonment or a fine (s 2(2)).

While both domestic violence and harassment legislation make provision for protection orders in these situations, it is not perhaps the most effective way to deal with such instances of parental alienation, as indicated earlier, especially where it may interfere with visitation rights. It also does not take into account the actual emotional harm caused to the target victim, which may be measurable in terms of damages. In the law of delict, emotional harm is recognised and included as a form of bodily injury, and damages can be awarded for the infliction of psychological harm (*Barnard v Santam Bpk* 1998 (4) All SA 403 (A) 406; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (2) All SA 56 (A) 59; and see also *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A) 145I-J). Section 12(2) of the Constitution of the Republic of South Africa, 1996, also includes the protection of bodily and psychological integrity.

## 5 Conclusion

In cases of parental alienation there are two victims: the child and the target parent. Owing to the nature of parental alienation, a number of fields of law may in fact be applicable to address the harms caused by parental alienation. As Varnado (2011 61 *De Paul LR* 126) aptly states:

“Forcing parental alienation into one area of law is a mistake. Relief for parental alienation should not be an ‘either/or’ proposition. Because of the dual nature of an alienated parent’s injuries harm to his relationship with his child, on the one hand, and emotional distress on the other – neither family law nor tort law, standing alone, has the capacity to offer complete relief. This is not due to any failure on the part of either source of law, but rather their respective focuses. For example, preserving and repairing relationships lies at the heart of family law. Thus family law can redress an alienated parent’s first harm (his damaged relationship with his child), but it cannot remedy the second (his emotional distress).”

Parental alienation conduct is arguably a form of family violence that negates the best-interests-of-a-child standard required by the Constitution, the Children’s Act and the Convention of the Rights of the Child. Such action by the alienating parent not only adversely affects the emotional security and stability of a child, and fails to provide the necessary care and protection for the child’s well-being, but also falls foul of the need for a child to be protected from psychological or physical harm. Before adequate measures can be taken to combat this insidious form of abuse, recognition of parental alienation and awareness of what this phenomenon entails, is essential.

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