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L'aliénation parentale dans les litiges de garde d'enfant en droit québécois
La alienación parental en los litigios de custodia en Quebec

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Article abstract

This article is a study of all Quebec custody cases dealing with parental alienation in 2016. It explores the definitions, findings and implications of parental alienation in legal disputes, in light of the models of parental alienation and parental alienation syndrome described in the academic literature. This research confirms feminists' skepticism toward the use of parental alienation in custody litigation. It concludes that alienation has varying and inconsistent definitions in law, that there is a considerable disconnect between scientific knowledge and judges' understanding of alienation, and that the concept of parental alienation in law is ambiguous and over-inclusive, seemingly to the detriment of mothers. There is a dire need for clearer and stricter guidelines on the use of parental alienation to ensure the accuracy, coherence, and fairness of the case law.

Parental Alienation in Quebec Custody Litigation

Suzanne Zaccour*

This article is a study of all Quebec custody cases dealing with parental alienation in 2016. It explores the definitions, findings and implications of parental alienation in legal disputes, in light of the models of parental alienation and parental alienation syndrome described in the academic literature. This research confirms feminists' skepticism toward the use of parental alienation in custody litigation. It concludes that alienation has varying and inconsistent definitions in law, that there is a considerable disconnect between scientific knowledge and judges' understanding of alienation, and that the concept of parental alienation in law is ambiguous and over-inclusive, seemingly to the detriment of mothers. There is a dire need for clearer and stricter guidelines on the use of parental alienation to ensure the accuracy, coherence, and fairness of the case law.

L'aliénation parentale dans les litiges de garde d'enfant en droit québécois

Le présent article analyse toutes les décisions de garde traitant d'aliénation parentale rendues au Québec en 2016. Il explore les définitions et les conséquences de l'aliénation parentale dans les disputes relatives à la garde d'enfant au regard des modèles d'aliénation parentale et de syndrome d'aliénation parentale décrits dans la littérature scientifique.

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Cette recherche confirme le scepticisme des autrices féministes envers l'utilisation de l'aliénation parentale en droit. En effet, un fossé existe entre les connaissances scientifiques et la compréhension judiciaire de ce phénomène. L'aliénation parentale oscille entre diverses définitions juridiques contradictoires, ambiguës et d'application trop large qui semblent opérer au détriment des mères. Des règles plus strictes quant à l'utilisation du concept d'aliénation parentale dans la jurisprudence québécoise en amélioreraient la cohérence, la justesse et la légitimité.

La alienación parental en los litigios de custodia en Quebec

En el presente artículo se analizan los casos de custodia decididos en Quebec en 2016 que tratan de alienación parental. Se exploran las definiciones e implicaciones de la alienación parental en estos litigios a la luz de los modelos de alienación parental y del síndrome de la alienación parental descritos en la literatura académica. Esta investigación confirma el escepticismo de autoras feministas hacia la utilización de la alienación parental en conflictos de custodia. De hecho, la alienación parental recibe definiciones jurídicas variables e inconsistentes. Existe una brecha importante entre los conocimientos científicos y la interpretación judicial de la alienación, la cual es ambigua y de aplicación muy extensa. Dicha ambigüedad parece ir en detrimento de las madres. Se requieren reglas más estrictas sobre la utilización de la alienación parental en la jurisprudencia para asegurar su coherencia, exactitud y legitimidad.

In the last thirty years, the concept of parent-child alienation has generated significant interest in the legal, psychological, and political spheres. Every aspect of this concept, from its name and definition to its prevalence and remedies, is deeply contested. As controversies rage in academia and the political arena, parental alienation ("**PA**") and parental alienation syndrome ("**PAS**") have made their way into custody litigation. Although the use — or misuse — of alienation evidence in courts in the United States has been documented[1], research on PA litigation in Canada is still scarce. Through the study of all PA decisions rendered in 2016 in Quebec, this article provides a snapshot of PA jurisprudence and explores the repercussions of the polysemy of this concept. How is PA defined and proven in law ? How does the legal translation of alienation interact with academic controversies ?

This study concludes that PA is poorly defined and weakly delimited in Quebec custody decisions, causing PA jurisprudence to appear incoherent, blurry and over-inclusive. Moreover, the case law suggests that the

1. Lenore E.A. Walker, Kristi L. Brantley and Justin A. Rigsbee, "A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court", *Journal of Child Custody*, vol. 2, nº 2, 2004, p. 47 ; Lewis Zirogiannis, "Evidentiary Issues With Parental Alienation Syndrome", (2001) 39 *Family Court Review* 334 ; Carol S. Bruch, "Parental Alienation Syndrome and Parental Alienation : Getting It Wrong in Child Custody Cases", (2001) 35 *Fam. L.Q.* 527 ; Holly Smith, "Parental Alienation Syndrome : Fact or Fiction ? The Problem with Its Use in Child Custody Cases", (2016) 11 *U. Mass. L. Rev.* 64.

lack of precision and the over-incisiveness of PA often work to the detriment of mothers. After an introduction to PA and PAS, this text provides a descriptive and normative analysis of PA jurisprudence in Quebec in 2016. **Part 3.1** offers an overview of PA jurisprudence, noting the gendered distribution of PA allegations and findings, the normalization of PA and the lack of rigor in the integration of extralegal knowledge in the judges' analyses. **Parts 3.2** to **3.4** focus on the definition, proof, and implications of alienation in each category of findings on PA. The study concludes that the parent-focused, broad, inconsistent and ambiguous definitions of PA justify preoccupations about the quality, fairness, and accuracy of PA jurisprudence. This situation calls for clearer guidelines and stricter delimitations of the use of PA in legal disputes.

1 Parental Alienation : Definitions and Controversies

In the 1980s, Richard Gardner observed from his practice as a psychiatrist that an increasing number of children were rejecting their father in the context of custody disputes. He called "parental alienation syndrome" the diagnosable disorder resulting from the programming of a child by the preferred parent, coupled with the child's own contributions to the vilification of the rejected parent. He observed that most alienators were mothers who, seeing that courts were increasingly granting custody to fathers, engaged in the sometimes relentless brainwashing of their child to gain an advantage in the custody dispute[2]. Among the alienating techniques that ranged from sophisticated subterfuges to the passive or even unconscious reprobation of the child's affection for the father, he emphasized the frequency and power of false allegations of sexual violence[3]. He described the syndrome as ranging in severity, with severely alienated children exhibiting most of the eight symptoms of PAS :

— Denigration : the child denigrates the alienated parent ;

— Frivolous rationalization : the child has no reasonable explanation for her rejection of the alienated parent ;

2. Richard A. Gardner, "Parental Alienation Syndrome vs. Parental Alienation : Which Diagnosis Should Evaluators Use in Child-Custody Disputes ?", *The American Journal of Family Therapy*, vol. 30, nº 2, 2002, p. 93.

3. Richard A. Gardner, "Recent Trends in Divorce and Custody Litigation", *Academy Forum*, vol. 29, nº 2, 1985, [Online], [www.fact.on.ca/Info/pas/gardnr85.htm] (June 14th, 2018) ; Richard A. Gardner, *The Parental Alienation Syndrome*, 2nd ed., Cresskill, Creative Therapeutics, 1998 ; Richard A. Gardner, "Differentiating Between Parental Alienation Syndrome and *bona fide* Abuse-neglect", *American Journal of Family Therapy*, vol. 27, nº 2, 1999, p. 97 ; Richard A. Gardner, *True and False Accusations of Child Sex Abuse*, Cresskill, Creative Therapeutics, 1992 ; R.A. Gardner, *supra*, note 2.

— Lack of ambivalence : "[t]he hated parent is viewed as 'all bad' and the loved parent is 'all good'[4]" ;
— The "independent-thinker" phenomenon : the child insists that she is not influenced by the alienating parent ;
— Reflexive support : the child constantly sides with the alienator in the parental conflict ;
— Absence of guilt : the child feels no guilt for rejecting or being cruel toward the alienated parent ;
— Borrowed scenarios : the child describes her grievances toward the alienated parent using adult vocabulary ; her discourse mirrors the alienator's ;
— Spread of animosity : the child rejects the alienated parent's extended family, friends, and even pets[5].

Gardner's PAS started being used in court as an explanation for a child's refusal to see a parent, generally the father. In cases of severe alienation, Gardner exhorted judges to proceed to the "immediate transfer [of the child] to the home of the so-called hated parent[6]" or to residential therapeutic programs where the child could be "deprogrammed[7]". The concept of PAS has been used to dismiss evidence of fathers' domestic violence and to hastily conclude that allegations of violence against the child were false, calling for "a concerted brainwashing effort to change the child's beliefs that they have been abused[8]". Courts also adopted punitive interventions that included jailing recalcitrant alienators and alienated children[9].

Gardner's theory attracted considerable critique, specifically regarding its lack of scientific validity[10] and sexist bias. Many experts reject the

4. R.A. Gardner, "Recent Trends in Divorce and Custody Litigation", *supra*, note 3.
5. *Id.* ; R.A. Gardner, *supra*, note 2 ; R.A. Gardner, *The Parental Alienation Syndrom*, *supra*, note 3.
6. R.A. Gardner, "Recent Trends in Divorce and Custody Litigation", *supra*, note 3.
7. Richard A. Gardner, *Therapeutic Interventions for Children with Parental Alienation Syndrome*, Cresskill, Creative Therapeutics, 2001.
8. Joan S. Meier, "A Historical Perspective on Parental Alienation Syndrome and Parental Alienation", *Journal of Child Custody*, vol. 6, 2009, p. 232, at page 238.
9. Joan B. Kelly and Janet R. Johnston, "The Alienated Child : A Reformulation of Parental Alienation Syndrome", (2001) 39 *Family Court Review* 249.
10. Richard A. Warshak, "Bringing Sense to Parental Alienation : A Look at the Disputes and the Evidence", (2003) 37 *Fam. L.Q.* 273 ; Janet R. Johnston and Joan B. Kelly, "Commentary on Walker, Brantley, and Rigsbee's (2004) : 'A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court'", *Journal of Child Custody*, vol. 1, nº 4, 2004, p. 77 ; C.S. Bruch, *supra*, note 1 ; Carol S. Bruch, "Parental Alienation Syndrome : Junk Science in Child Custody Determinations",

qualification of parental alienation as a "syndrome" since determining whether the child's rejection of a parent is unjustified requires not "a clinical diagnosis, but rather a factual determination[11]". Critics also point to inconsistent definitions of PAS[12] and to Gardner's lack of academic rigor[13] in defining and quantifying PAS[14]. The description of PAS as a form of child abuse[15] with serious long-term consequences is also contested[16]. These disagreements have led legal commentators to suggest that judges should "close the gate" on PAS[17] or that courts admitting PAS evidence are using "junk science[18]". Feminist advocates have also opposed Gardner's theory, seeing it as "simply one more attempt to blame mothers without considering fathers' abuse of power and control[19]". The idea that evil mothers program children to fear their father reinforces myths around family violence, marginalizes concerns for the child's safety, and puts domestic violence victims in a difficult position[20].

From Parental Alienation Syndrome to Parental Alienation

To make PAS more scientifically sound and less gender-biased, Joan Kelly and Janet Johnston have proposed a reformulation of Gardner's

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(2001) 3 *Eur. J.L. Reform* 383 ; Richard Bond, "The Lingering Debate Over the Parental Alienation Syndrome Phenomenon", *Journal of Child Custody*, vol. 4, nº 1/2, 2007, p. 37 ; L.E.A. Walker, K.L. Brantley and J.A. Rigsbee, *supra*, note 1 ; Lenore E. Walker and David L. Shapiro, "Parental Alienation Disorder : Why Label Children with a Mental Diagnosis ?", *Journal of Child Custody*, vol. 7, nº 4, 2010, p. 266 ; J.S. Meier, *supra*, note 8 ; Janet R. Johnston and Joan B. Kelly, "Rejoinder to Gardner's Commentary on Kelly and Johnston's 'The Alienated Child : A Reformulation of Parental Alienation Syndrome'", (2004) 42 *Family Court Review* 622.

11. Nicholas Bala *et al.*, "Alienated Children and Parental Separation : Legal Responses in Canada's Family Courts", (2007) 33 *Queen's L.J.* 79, 86.
12. Rebecca M. Thomas and James T. Richardson, "Parental Alienation Syndrome : 30 Years On and Still Junk Science", (2015) 54 *Judges' J.* 22 ; C.S. Bruch, *supra*, note 1.
13. Michele A. Adams, "Framing Contests in Child Custody Disputes : Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights", (2006) 40 *Fam. L.Q.* 315, 326.
14. C.S. Bruch, *supra*, note 1.
15. *Id.*
16. L.E.A. Walker, K.L. Brantley and J.A. Rigsbee, *supra*, note 1, at page 58.
17. James Williams, "Should Judges Close the Gate on PAS and PA ?", (2001) 39 *Family and Reconciliation Courts Review* 267.
18. C.S. Bruch, *supra*, note 10.
19. L.E. Walker and D.L. Shapiro, *supra*, note 10, at page 275.
20. See for example Simon Lapierre and Isabelle Côté, "Abused Women and the Threat of Parental Alienation : Shelter Workers' Perspectives", *Children and Youth Services Review*, vol. 65, 2016, p. 120 ; Amy Neustein and Michael Lesher, *From Madness to Mutiny. Why Mothers are Running from the Family Courts – And What Can be Done About it*, Lebanon, University Press of New England, 2005 ; L.E.A. Walker, K.L. Brantley and J.A. Rigsbee, *supra*, note 1.

theory[21]. They define the alienated child as one who "expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent[22]". Alienated children "express their rejection of that parent stridently and without apparent guilt or ambivalence, and […] strongly resist or completely refuse any contact with that rejected parent[23]". Despite resemblances with Gardner's PAS, the qualification of PA as a syndrome is explicitly rejected, as is the single focus on the role of the evil alienator[24].

Kelly and Johnston emphasize that "[t]here are multiple reasons that children resist visitation, and only in very specific circumstances does this behavior qualify as alienation[25]". This new definition affects the prevalence of alienation : indoctrinating behaviors are the norm in high-conflict custody-litigating families, but only a small proportion of children reject a parent and become alienated[26]. Thus, "alienating behavior by a parent is neither a sufficient nor a necessary condition for a child to become alienated[27]". Acknowledging the limits of the evidence regarding the long-term consequences of parental alienation, Kelly and Johnston are more cautious than Gardner in their proposed interventions[28] : "Only in those relatively rare situations where the aligned parent is found to be psychotic or severely character-disordered, a serious abduction risk, and has corresponding serious parenting deficits do we consider a change of custody warranted. Even then, to obtain custody the rejected parent should be assessed as providing a better alternative[29]". Although the new model generates less resistance, some feminist commentators believe that PA and PAS remain "more similar than different[30]". An additional concern is the

21. J.B. Kelly and J.R. Johnston, *supra*, note 9.
22. *Id*., 251.
23. *Id*., 254.
24. *Id*., 249.
25. *Id*., 251.
26. Janet R. Johnston, "Children of Divorce Who Reject a Parent and Refuse Visitation : Recent Research and Social Policy Implications for the Alienated Child", (2005) 38 *Fam. L.Q.* 757. In her study, one fifth of the children of high-conflict, litigating couples rejected a parent.
27. J.B. Kelly and J.R. Johnston, *supra*, note 9, 249.
28. J.R. Johnston and J.B. Kelly, "Commentary on Walker, Brantley, and Rigsbee's (2004) : 'A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court'", *supra*, note 10, at pages 86 and 87.
29. *Id*., at page 87.
30. J.S. Meier, *supra*, note 8, at page 246. The author qualifies PA as "old wine in new bottles" ; Newer models of PA are also described as "improved science but more bad policy" : C.S. Bruch, *supra*, note 1, 541 ; or as successive heads of the PAS hydra that

persisting lack of consensus on the definition of alienation and its method of assessment[31]. Quebec experts Catherine Quigley and Francine Cyr note that the choice of interventions, the methods of diagnosis and the conceptual basis of parental alienation are still fiercely debated[32].

The extent of the controversies and unresolved issues in dealing with alienation raises the question of PA's definition and use in legal disputes. Canadian research in this area is still limited, even though "parental alienation claims and court findings associated with them have virtually (between 2002 and 2016) exploded in Canada[33]". In 2010, Nicholas Bala, Suzanne Hunt, and Carolyn McCarney published the first empirically based study of the responses of the Canadian family justice system to allegations of parental alienation[34]. The authors observe the increasing popularity of allegations of alienation, and find these allegations to be most often substantiated and supported by expert evidence. They explain differences in findings of alienation against mothers and fathers with the fact that mothers are generally the custodial parent. John-Paul Boyd's study of cases of parental alienation in British Columbia[35] rather depicts alienation claims as inflammatory and mostly unsubstantiated. The author observes that mothers' claims of PA are more often substantiated than fathers' allegations. Finally, in 2018, Linda C. Neilson published an empirical analysis of 357 Canadian alienation cases, 40 % of which involved claims of family violence[36]. Neilson notes systemic bias "against mothers/primary care givers and against domestic violence evidence in the cases

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keep spouting up every time one is chopped : Amy Neustein and Michael Lesher, "Evaluating PAS : A Critique of Elizabeth Ellis's 'A Stepwise Approach to Evaluating Children for PAS'", *Journal of Child Custody*, vol. 6, 2009, p. 322, at page 322.

31. Michael Saini *et al.*, "Empirical studies of alienation", in Kathry Kuehnle and Leslie Drozd (eds.), *Parenting Plan Evaluations : Applied Research for the Family Court*, New York, Oxford University Press, 2012, p. 399.

32. Catherine Quigley and Francine Cyr, "La gestion psychojuridique des situations familiales à haut niveau de conflit", in Karine Poitras, Louis Mignault and Dominique Goubau (eds.), *L'enfant et le litige en matière de garde. Regards psychologiques et juridiques*, Québec, Presses de l'Université du Québec, 2014, p. 241, at page 246.

33. Linda C. Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, 2017 CanLIIDocs 2.

34. Nicholas Bala, Suzanne Hunt and Carolyn McCarney, "Parental Alienation : Canadian Court Cases 1989-2008", (2010) 48 *Family Court Review* 164 ; See also N. Bala *et al.*, *supra*, note 11.

35. John-Paul Boyd, "Alienated Children in Family Law Disputes in British Columbia", 2015, [Online], [www.crilf.ca/Documents/Parental%20Alienation%20-%20July%202015.pdf] (June 8th, 2018).

36. Linda C. Neilson, "Parental Alienation Empirical Analysis : Child Best Interests or Parental Rights ?", 2018, [Online], [www.fredacentre.com/wp-content/uploads/2018/02/Parental-Alienation-Linda-Neilson.pdf] (June 8th, 2018).

that endorse parental alienation theory[37]". She also observes judges abandoning child-centered analysis in favor of attributing parental blame and insisting on the promotion of the father-child relationship[38]. No published study describes the use or definition of parental alienation in Quebec jurisprudence specifically.

2 The Study

This research provides a snapshot of the use of alienation theories and concepts in Quebec jurisprudence in 2016, and observes how models and controversies interact with courts' definitions and understandings of parental alienation. The study is based on decisions identified, in the database SOQUIJ, with the following search words : "alienation OR aliéné OR aliénant OR alienated OR alienating" AND "garde OR custody" AND "child OR enfant[39]". Results were filtered by date (January 1st 2016 to December 31st 2016) and by classification (results marked as "family" cases).

The search returned 105 results, for a total of 89 relevant cases. Sixty-three are custody decisions dealing with or discussing alienation ; this set of cases supports the observations, quantitative analysis, and arguments presented throughout this paper. The remaining 26 cases are decisions mentioning PA only in a quote from a previous judgment, appeals[40], or cases tackling purely financial questions[41], procedural matters[42], or contempt of court[43]. These cases are excluded from the statistics presented below, but inform some of the qualitative observations made in **Part 3.1** ("General Observations").

The exploration of the selected cases is guided by the following research questions :

— How is PA defined in PA jurisprudence ? Does its definition in law correspond to one or several definitions in the literature ? Do judges focus on the child or on the alienator ?

37. *Id*., p. 46.
38. *Id*., p. 45.
39. SOQUIJ automatically considers variants such as plurals, masculine and feminine forms and conjugations.
40. *Droit de la famille — 161960*, 2016 QCCA 1300 ; *Droit de la famille — 162708*, 2016 QCCA 1816 ; *Droit de la famille — 162895*, 2016 QCCA 1914.
41. For example, *Droit de la famille — 162650*, 2016 QCCS 5239 ; *Droit de la famille — 163040*, 2016 QCCS 6101.
42. For example, *Droit de la famille — 163332*, 2016 QCCS 6617 ; *Droit de la famille — 161687*, 2016 QCCS 3278.
43. *Droit de la famille — 161598*, 2016 QCCS 3104.

— Is PAS still used in Quebec jurisprudence, or has it been entirely replaced by PA ? Are there disputes over the admissibility and the scientific validity of PA or PAS evidence ?

— How do the controversies regarding the consequences of PA and the required interventions translate into the jurisprudence ?

— How is PA proven in court ? Do alienators exhibit relentless programming or trivial flaws ? What distinguishes normal conflict from alienation ?

The analysis of the case law relies entirely on the written decisions. An important limitation is that judges do not necessarily detail all the steps of their analysis, all the relevant facts of the case, or to what extent their conclusion relies on their subjective perception of the parties' behavior and demeanor. Nonetheless, the choice of the factual and analytical elements included in the decision and the judge's explanation of their analysis provide acceptable indications of what mattered in the case.

3 Results

This study of the alienation cases sorted by outcome of the allegation of PA reveals three crucial flaws in parental alienation jurisprudence. First, the cases show an excessive use of the concept of alienation, in situations at odds with the basic definitions of PA and PAS developed in the academic literature. Second, broad, incoherent and parent-focused definitions of PA lead to contradictions and confusion in the jurisprudence. Finally, the ambiguity and over-inclusiveness of PA appears to specifically penalize mothers. **Part 3.1** presents an overview of PA jurisprudence, revealing the popularity of PA, its gendered nature, and its disconnect from science. **Part 3.2** focuses on how PA is defined, assessed and addressed in cases with a positive finding of alienation. **Part 3.3** turns to ambiguous, "quasi-alienation" cases, while **Part 3.4** explores the process by which judges arrive to the finding that there is no parental alienation in a case.

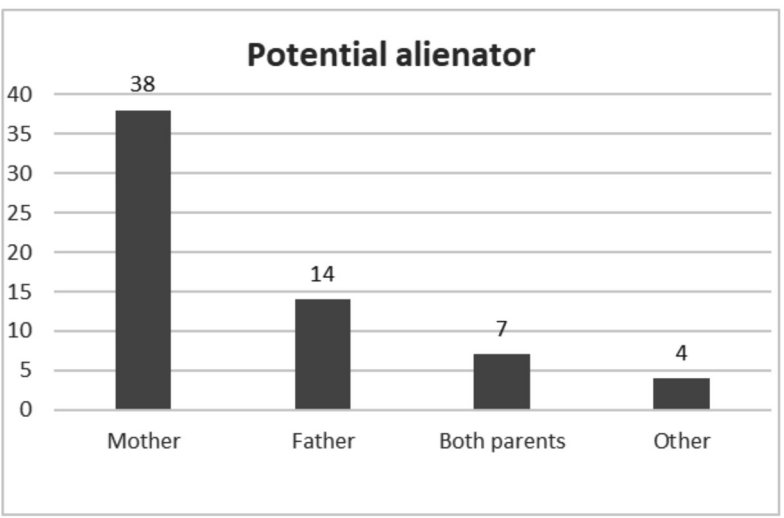
3.1 General Observations

Alienation allegations arise in the context of "high-conflict" families, where parents are frequent litigators, and courts have to intervene or reassess the situation repeatedly[44]. Parties often disagree not only on custody,

44. See for example *Droit de la famille — 161887*, 2016 QCCS 3642 ; *Droit de la famille — 16735*, 2016 QCCS 1426 ; *Droit de la famille — 1660*, 2016 QCCS 143 ; *Droit de la famille — 161232*, 2016 QQCS 2417 ; *Droit de la famille — 161167*, 2016 QCCS 2289.

but also on financial matters[45]. Issues of domestic or child violence are mentioned in about a quarter of the cases[46], though they might be present in a greater proportion[47]. Although financial disputes and allegations of violence are often isolated from the alienation analysis[48], they inform on the extent of the conflict that often exists in these families[49].

In most cases, one parent alleges that the other is alienating. In four cases, the potential alienator is another family member. In seven cases, both parents are considered as possible alienators, for a total of 70 potential findings of alienation.



45. See for example *Droit de la famille — 161518*, 2016 QCCS 2933 ; *Droit de la famille — 16531*, 2016 QCCS 1036 ; *Droit de la famille — 16735*, *supra*, note 44 ; *Droit de la famille — 16757*, 2016 QCCS 1466 ; *Droit de la famille — 163385*, 2016 QCCS 6709.
46. This estimation can only be imperfect, as Courts frequently fail to distinguish domestic violence from family conflict.
47. See L.C. Neilson, *supra*, note 36, at page 47, and S. Lapierre and I. Côté, *supra*, note 20, on the chilling effect of parental alienation claims on disclosure of domestic or parental violence.
48. For counter-examples, see *Droit de la famille — 16192*, 2016 QCCS 331 ; *Droit de la famille — 161167*, *supra*, note 44 ; *Droit de la famille — 16221*, 2016 QCCS 378 ; *Droit de la famille — 162891*, 2016 QCCS 5798 ; *Droit de la famille — 16531*, *supra*, note 45 ; *Droit de la famille — 162271*, 2016 QCCS 4308.
49. See for example *Droit de la famille — 162271*, *supra*, note 48 : "Father insistence that the Court address his claim for the Fido telephone accounts dating back to 2011 indicates the degree of animosity he continues to feel towards Mother. The Court shall not deal which such a trivial claim in light of the serious nature of these proceedings."

Judges do not always make explicit findings on allegations of PA, and five cases lack even an implicit finding[50]. The other cases are distributed as follows :

— 29 negative findings of PA ("no-PA cases") : cases where the Court finds that there is no alienation (44 %).

— 20 positive findings of PA ("PA cases") : cases where the Court states that the child is alienated and/or that the parent is alienating (31 %).

— 16 "quasi-PA cases" : cases that fall somewhere in between the two previous categories, with no finding of PA strictly speaking (25 %). This category includes cases where the Court finds a situation resembling PA, signs of PA, or a risk of PA.

The fact that many of these findings are implicit, or fall outside of the binary of "PA" or "no-PA", in addition to the coexistence of PA allegations with other serious concerns, already hints at the complexity of PA jurisprudence.

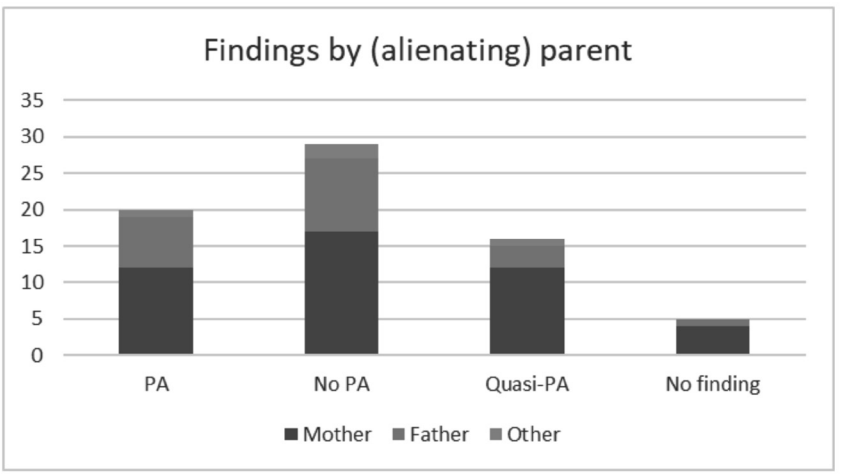
3.1.1 The Gender of Parental Alienation

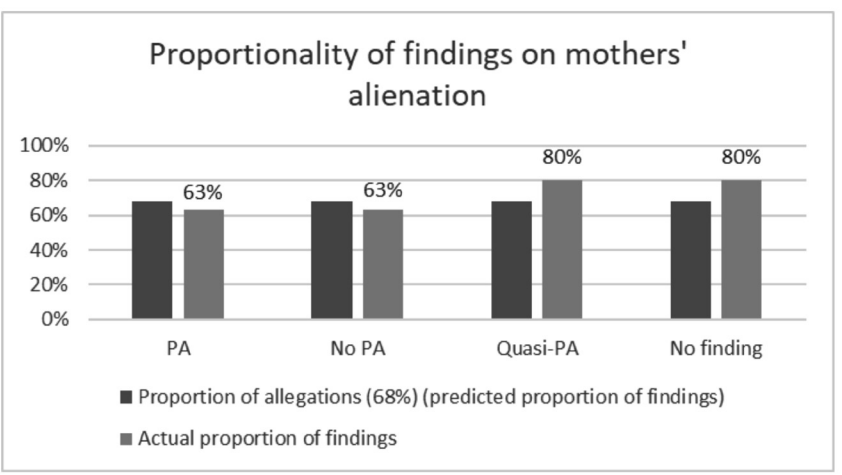
Comparing how often mothers and fathers are alleged or considered as potentially alienating reveals a clear gender imbalance, with the mother-figure[51] being the potential alienator in 68 % of the cases. The gender dimension of PA allegations is transposed to the findings : mothers are more likely to be found alienating.

Do judges more frequently believe fathers, or does the disproportion in PA findings simply reflect the disproportion in PA allegations ? When comparing the proportion of allegations against a parent with the proportion of findings against that same parent, we find that mothers are only slightly under-represented in findings of PA and of no-PA. However, mothers are more clearly overrepresented in ambiguous categories : cases with no finding and quasi-PA cases. This disproportion suggests that findings on mothers' alienation are less clear-cut. In quasi-PA cases, mothers are faced with an intervention based on a PA concern without quite being alienators.

50. *Droit de la famille — 161162*, 2016 QCCS 2284 ; *Droit de la famille — 162424*, 2016 QCCS 4722 ; *Droit de la famille — 162225*, 2016 QCCS 4148 ; *Droit de la famille — 16761*, 2016 QCCS 1470 ; *Droit de la famille — 163326*, 2016 QCCS 6611.

51. The mother or grandmother, excluding one case where both parties are women.





3.1.2 The Normalization of Parental Alienation

Despite academic controversies, the cases studied here provide five indications that PA has been normalized and popularized in Quebec jurisprudence. First, the number of alienation cases — 63 — is important for a 12-month period[52]. By contrast, Bala, Hunt and McCarney found 175 cases

52. The 89 cases with a mention of PA represent approximatively 3 % of decisions on SOQUIJ that are classified as "family" cases and include the words "enfant" (or "child") and "garde" (or "custody"). The cases from this study classified by SOQUIJ as custody decisions represent 8 % of this category.

between 1989 and 2008 across Canada, with 36 cases in 2008, suggesting either a rapid increase in the popularity of PA, or the authors' underestimation of the prevalence of PA cases[53]. Second, the Quebec Court of Appeal's engagement with PA also points to its normalization. Not only did the Court of Appeal mention PA three times in 2016[54], it also engaged with alienation in 60 custody decisions since 1974[55]. Third, in appeal and trial cases alike, there is no sign that the admissibility of PA evidence was put into question, or that PA was considered a controversial argument. Fourth, judges demonstrate their awareness of PA theories by occasionally raising the issue of PA without it being alleged or mentioned by an expert[56]. Finally, PA is even mentioned in cases without any PA allegation or concern, as one of the general criteria to evaluate whether a shared custody arrangement is possible[57]. A search on CanLII identifies 39 Quebec decisions between 2003 and 2016 by various judges who, citing a precedent or a doctrinal author, present either "the presence of a parental alienation syndrome" or "the absence of a parental alienation syndrome" as a factor to be considered in evaluating the possibility of shared custody — apparently no more controversial than the child's age or the proximity of the parents' residences.

3.1.3 The Science of Parental Alienation

What roles do science and experts have in defining PA and constraining the judges' findings ? The cases studied here suggest a limited and inconsistent use of PA models, theories, and definitions. Moreover, while experts

53. N. Bala, S. Hunt and C. McCarney, *supra*, note 34, appear to have searched for cases only in English. They also used more restrictive search words, requiring that a word derived from "alienation" be used within 10 words of "parent" or "child", even though these people can also be designated by a pseudonym. The authors also excluded cases with no finding, a choice that risks artificially inflating the proportion of substantiated allegations by ignoring cases where the judge disregards a frivolous PA allegation. Nonetheless, even excluding cases without an explicit finding, there are more alienation cases in Quebec in 2016 than in Canada in 2008.
54. *Droit de la famille — 161960*, *supra*, note 40 ; *Droit de la famille — 162895*, *supra*, note 40 ; *Droit de la famille — 162708*, *supra*, note 40. In these cases, PA is mentioned in the background ; the Court of appeal is not making general statements on PA law.
55. *Bockler* c. *Bockler*, [1974] C.A. 41 is the first mention of "alienation" of a child ; *Droit de la famille — 1549*, [1992] R.J.Q. 855 is the first mention of "parental alienation".
56. See for example *Droit de la famille — 161724*, 2016 QCCS 3334, par. 55 ; *Droit de la famille — 162587*, 2016 QCCS 5063, par. 26 and 27 ; *Droit de la famille — 16622*, 2016 QCCS 1223.
57. *Droit de la famille — 161294*, 2016 QCCS 2521, par. 19 ; *Droit de la famille — 162615*, 2016 QCCS 5148, par. 47 ; *Droit de la famille — 16749*, 2016 QCCS 1437, par. 19.

play a crucial role in several cases, judges also make PA findings without any expert evidence.

3.1.3.1 Models and Definitions

Judges rarely choose a model of PA, or even define the concept. Although the label "PA" is predominant, some cases refer to "PA" and "PAS" interchangeably. The influence of Gardner's model is mostly felt in the few cases that do define PA : the case may name him, use the label "PAS[58]", borrow from his eight symptoms in defining the common signs of PA, or use vocabulary associated with his work, such as "indoctrination" or "programming" of the child[59]. Even then, there is rarely any dialogue between stated definitions of PA and the judge's analysis of the case before them. Judges engage with Gardner's work only indirectly, through other cases and legal materials[60]. An example of this indirect approach is a case that cites Gardner's eight symptoms almost textually, while saying that they are criteria developed in the jurisprudence :

> L'aliénation parentale, quant à elle, peut se constater de différentes façons. *Au fil du temps certains critères se sont dégagés de la jurisprudence.* Le Tribunal fait siens les propos du juge De Wever, pour évaluer la présence d'une aliénation parentale modérée ou sévère.
>
> 1) une campagne de dénigrement de l'enfant à l'égard du parent rejeté ;
>
> 2) l'enfant parle du rejet du parent en utilisant des raisons qui ne tiennent pas la route ;
>
> 3) un manque d'ambivalence chez l'enfant ;
>
> 4) un manque de culpabilité chez l'enfant qui se croit justifié de dénigrer son parent ;
>
> 5) l'animosité de l'enfant s'étend à l'entourage du parent aliéné ;
>
> 6) l'enfant se présente comme l'allié du parent aliénant ;
>
> 7) l'emprunt par l'enfant de propos tenus par le parent aliénant ;
>
> 8) l'enfant se présente comme penseur indépendant à l'abri de toute influence[61].

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58. *Droit de la famille — 162621*, 2016 QCCS 5162 ; *Droit de la famille — 163175*, 2016 QCCS 6403 ; *Droit de la famille — 16192*, *supra*, note 48 ; *Droit de la famille — 16899*, 2016 QCCS 1789.
59. *Droit de la famille — 16192*, *supra*, note 48.
60. *Droit de la famille — 162621*, *supra*, note 58, par. 90 ; *Droit de la famille — 163175*, *supra*, note 58 ; *Droit de la famille — 16192*, *supra*, note 48, par. 133.
61. *Droit de la famille — 163175*, *supra*, note 58, par. 37 (emphasis added). Translation :
> Parental alienation can be identified in different ways. Through the years, certain criteria have emerged from the jurisprudence. The Court makes it own the words of De Wever J., to evaluate the presence of a moderate or severe parental alienation :

This approach may make room for errors[62] and disengage judges from the debates going on in the academic literature. PA also seems to acquire an ambiguous position between a scientific fact and a legal test.

3.1.3.2 Expert Testimony

The limited role of science in PA cases and the ambiguous position of PA as a half-scientific, half-legal hybrid is confirmed by the role of expert testimony. Expert testimony, when available, is often determinative[63]. However, judges frequently make findings of PA in the absence of expert evidence.

In addition to testifying on whether they see PA, experts can also define its gravity with general assertions regarding the long-term consequences of PA on children, particularly with respect to their future romantic relationships. For example, in one case, "[un] changement de garde s'avère nécessaire afin d'éviter un *avenir perturbé* à l'enfant. L'expert rapporte que *les enfants victimes d'aliénation parentale sévère ont tendance à entrer en relation avec des conjoints violents ou à s'adonner aux drogues dures*. Ils deviennent des êtres *fortement carencés* avec *un grand mal de vivre*[64]". In another case, the expert emphasises the importance of changing the child's perception of her father: "Sinon, dit-elle 'nous pouvons craindre pour Y *de grosses difficultés dans l'établissement futur de toute relation affective*, et notamment dans son futur couple ou dans son rôle éventuel de future mère'[65]". Considering the lack of reliable data on the long-term

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1) a campaign of denigration of the child toward the rejected parent; 2) the child discusses the rejection of the parent using reasons that make no sense; 3) the child's lack of ambivalence; 4) a lack of guilt of the child, who believes they are justified in denigrating their parent; 5) the child's animosity extends to the alienated parent's friends and family; 6) the child presents his or herself as the ally of the alienating parent; 7) the child borrows the discourse of the alienating parent; 8) the child presents him or herself as an independent thinker, without any external influence.

62. *Droit de la famille — 16192*, *supra*, note 48, par. 133, states that the alienated child "affirms being influenced by the alienating parent", even though the opposite is true.
63. See for example *Droit de la famille — 16592*, 2016 QCCS 1151, par. 95.
64. *Droit de la famille — 162621*, *supra*, note 58, par. 84 and 85 (emphasis added). Translation: "A change in custody is necessary to spare the child from a troubled future. The expert states that the children who are victims of severe parental alienation tend to form relationships with violent partners or to consume hard drugs. They become people with significant deficiencies and a profound discontentment with life."
65. *Droit de la famille — 161887*, *supra*, note 44, par. 29 (emphasis added). Translation: "If we don't, she says, 'we can fear for Y big difficulties in the future formation of any affective relationship, and notably with her future partner or in her potential role of future mother'".

consequences of PA on children, these experts seem to contribute to a dramatization of PA concerns in the jurisprudence.

Cases finding PA, quasi-PA, and no PA signal different degrees of importance of expert evidence. Half of the findings of PA are supported by an expert diagnosis, compared to 31 % of quasi-PA cases[66]. This difference may reflect the more ambiguous nature of quasi-PA cases, where judges have more flexibility to evaluate PA based on a "common-sense" approach. In no-PA cases, all findings are coherent with the state of the expert evidence, either because an expert makes the finding that there is no PA (six cases, eight findings)[67], because an expert testifies without commenting on PA (six cases)[68], or because there is no expert evaluation (13 cases)[69]. Two cases state that there can be no finding of PA absent an expert report[70], in direct contradiction with half of the PA cases and 69 % of the quasi-PA cases. These findings markedly differ from Bala, Hunt and McCarney's observations that PA cases rely heavily on expert evidence[71].

3.2 PA Cases

This section explores the definition and proof of alienation, as well as its implications, in the 17 cases making one or more findings of alienation (for a total of 20 results). The study of PA cases reveals two approaches to alienation : a parent-focused and a child-focused perspective. Under the parent-focused perspective, the alienating parent's actions and behavior are considered, while the child-focused approach looks for symptoms or

66. Excluding cases where an expert evaluation is ordered.
67. *Droit de la famille — 161486*, 2016 QCCS 2906 (both parents' alleged alienation) ; *Droit de la famille — 161583*, 2016 QCCS 3067 ; *Droit de la famille — 161136*, 2016 QCCS 2244 (both parents' alleged alienation) ; *Droit de la famille — 162437*, 2016 QCCS 4734 ; *Droit de la famille — 16844*, 2016 QCCS 1620 ; *Droit de la famille — 16923*, 2016 QCCS 1868.
68. *Droit de la famille — 161956*, 2016 QCCS 3779 ; *Droit de la famille — 161929*, 2016 QCCS 3707 ; *Droit de la famille — 16735*, *supra*, note 44 ; *Droit de la famille — 163385*, *supra*, note 45 ; *Droit de la famille — 161188*, 2016 QCCS 2336 ; *Droit de la famille — 162271*, *supra*, note 48.
69. *Droit de la famille — 161575*, 2016 QCCS 3055 ; *Droit de la famille — 162622*, 2016 QCCS 5163 ; *Droit de la famille — 162698*, 2016 QCCS 5375 ; *Droit de la famille — 162424*, *supra*, note 50 ; *Droit de la famille — 161542*, 2016 QCCS 2990 ; *Droit de la famille — 16593*, 2016 QCCS 1152 ; *Droit de la famille — 161303*, 2016 QCCS 2548 ; *Droit de la famille — 162282*, 2016 QCCS 4333 ; *Droit de la famille — 16756*, 2016 QCCS 1465 ; *Droit de la famille — 16221*, *supra*, note 48 ; *Droit de la famille — 16896*, 2016 QCCS 1771 ; *Droit de la famille — 161170*, 2016 QQCS 2290 ; *Droit de la famille — 16473*, 2016 QCCS 908.
70. *Droit de la famille — 161929*, *supra*, note 68 ; *Droit de la famille — 162282*, *supra*, note 69.
71. N. Bala, S. Hunt and C. McCarney, *supra*, note 34, 169.

signs of alienation in the child. Although both perspectives coexist, the parent-focused approach dominates — a perspective that amplifies the prevalence of PA in custody disputes. The study of PA cases confirms the over-inclusiveness and inconsistency of definitions of alienation in law, as well as its gendered consequences.

3.2.1 The Parent-focused Perspective

Alienation can be proved by reference to the preferred parent's actions, remarks and behavior, such as interfering with the other parent's time with the child or denigrating the rejected parent. The case law indicates that alienation can also be done unconsciously and without malice[72], which allows courts to attribute blame and attach serious consequences to a finding of PA without proof of malevolent intent or behavior. Behaviors that are found alienating fall under three categories : active alienation, behavior at trial, and passive alienation or other residual behaviors.

The first category is the most important in terms of number of cases. Alienation is often found based on deliberate actions to interfere with the length or quality of the other parent's time with the child[73], such as calling constantly[74] or ignoring court-ordered access[75]. Moving[76] or planning to move away from the father is also found problematic[77]. The alienating parent frequently refuses to communicate information about the child[78]. In one case, the judge finds that the mother has fabricated a sexual abuse allegation against the father[79]. The alienating parent is also frequently found to have denigrated the other parent or the step-parent in the presence of the child[80], or involved the child in the separation conflict by discussing

72. *Droit de la famille — 161912*, 2016 QCCS 3681 ; *Droit de la famille — 162769*, 2016 QCCS 5528 ; *Droit de la famille — 163308*, 2016 QCCS 6595.
73. *Droit de la famille — 16192*, *supra*, note 48 ; *Droit de la famille — 162271*, *supra*, note 48 ; *Droit de la famille — 161556*, 2016 QCCS 3017 ; *Droit de la famille — 162450*, 2016 QCCS 4765 ; *Droit de la famille — 16506*, 2016 QCCS 988.
74. *Droit de la famille — 16592*, *supra*, note 63.
75. *Droit de la famille — 161556*, *supra*, note 73.
76. *Droit de la famille — 161472*, 2016 QCCS 2863.
77. *Droit de la famille — 162450*, *supra*, note 73.
78. *Droit de la famille — 161167*, *supra*, note 44 ; *Droit de la famille — 162271*, *supra*, note 48 ; *Droit de la famille — 161556*, *supra*, note 73 ; *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 162450*, *supra*, note 73.
79. *Droit de la famille — 162271*, *supra*, note 48.
80. *Droit de la famille — 161472*, *supra*, note 76 ; *Droit de la famille — 162271*, *supra*, note 48 ; *Droit de la famille — 16506*, *supra*, note 73 ; *Droit de la famille — 161232*, *supra*, note 44 ; *Droit de la famille — 161556*, *supra*, note 73 ; *Droit de la famille — 162450*, *supra*, note 73 ; *Droit de la famille — 16899*, *supra*, note 58 ; *Droit de la famille — 16592*, *supra*, note 63 ; *Droit de la famille — 163175*, *supra*, note 58.

"adult topics" such as custody or child support[81]. Encouraging or allowing the child to call the step-parent "dad" or "mom" is also found to be proof of alienation[82], as is interrogating the child on what happened during the other parent's access[83] or coaching them[84].

Alienating behavior at trial is rarer, and consists in denigrating the other's parental capacity before the Court[85] or asking the court to reduce or revoke the other parent's access to the child[86].

Residual behaviors of a more passive nature are also found to demonstrate alienation, for example not encouraging the child to see the other parent or not telling the child that the other parent loves them[87], accepting the child's rejection of the alienated parent[88], not increasing the other parent's access instead of paying for a babysitter[89], and not having the development of the child's relationship with the other parent as a priority[90]. Courts likewise take note of a fusional relationship between the alienating parent and the child or too much involvement of the alienator in the child's life[91]. The alienator's feelings are also discussed : having a negative perception of the other parent[92], not liking them or resenting them[93] and thinking

81. *Droit de la famille — 16192*, *supra*, note 48 ; *Droit de la famille — 161472*, *supra*, note 76 ; *Droit de la famille — 161232*, *supra*, note 44 ; *Droit de la famille — 16506*, *supra*, note 73 ; *Droit de la famille — 16428*, 2016 QCCS 827 ; *Droit de la famille — 162271*, *supra*, note 48 ; *Droit de la famille — 161556*, *supra*, note 73 ; *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 163175*, *supra*, note 58 ; *Droit de la famille — 16531*, *supra*, note 45.
82. *Droit de la famille — 161167*, *supra*, note 44 ; *Droit de la famille — 162621*, *supra*, note 58.
83. *Droit de la famille — 161232*, *supra*, note 44 ; *Droit de la famille — 162271*, *supra*, note 48.
84. *Droit de la famille — 162271*, *supra*, note 48.
85. *Droit de la famille — 16592*, *supra*, note 63 ; *Droit de la famille — 163175*, *supra*, note 58.
86. *Droit de la famille — 161167*, *supra*, note 44 ; *Droit de la famille — 161556*, *supra*, note 73.
87. *Droit de la famille — 162621*, *supra*, note 58.
88. *Droit de la famille — 161887*, *supra*, note 44.
89. *Droit de la famille — 162450*, *supra*, note 73.
90. *Id*.
91. *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 16192*, *supra*, note 48 ; *Droit de la famille — 161556*, *supra*, note 73 ; *Droit de la famille — 163175*, *supra*, note 58.
92. *Droit de la famille — 161167*, *supra*, note 44 ; *Droit de la famille — 162450*, *supra*, note 73.
93. *Droit de la famille — 162271*, *supra*, note 48 ; *Droit de la famille — 16987*, 2016 QCCS 1972.

that the other parent is not important[94] are taken as signs of alienation. Finally, one case finds alienation in the mother's anxiety and overprotectiveness, even though the mother was victimized by the father[95].

Discussion

From a parent-focused perspective, alienation is found in a broad range of behaviors in terms of frequency, maliciousness, deliberateness, and gravity. The threshold on what constitutes alienation is low and gendered. While active forms of alienation are found equally in cases targeting either parent, the other types of alienating behaviors only involve female alienators.

Evidencing the low threshold on a finding of alienation, the court in *Droit de la famille — 16899* finds both parents to be alienating despite the expert's nuanced portrayal of the mother[96]. A parent-focused approach allows the judge to find PA based on past denigration even though the children want a shared custody arrangement. In *Droit de la famille — 16531*, the finding of PA by the father rests on a single action : telling the children that the mother is suing him. Although it is not hard to agree with the judge's decision to leave custody with the mother (the father only wants custody to avoid paying child support[97]), his finding that there is severe alienation[98] based on only one interaction and in the absence of expert evidence is questionable. The concern with these cases is not only one of over-inclusiveness, but also of incoherence ; a similar case leads to a finding that there is no PA[99], and *alienated* parents often engage in worse "alienating" behavior[100]. In fact, most high-conflict families engage in some form of denigration or alienating behavior, while few children are alienated as a result[101].

94. *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 161556*, *supra*, note 73.
95. *Droit de la famille — 16192*, *supra*, note 48.
96. *Droit de la famille — 16899*, *supra*, note 58.
97. *Droit de la famille — 16531*, *supra*, note 45.
98. *Id*.
99. *Droit de la famille — 162437*, *supra*, note 67.
100. Compare the behaviour of alienated fathers in *Droit de la famille — 161232*, *supra*, note 44 (denigrating the mother and influencing the child to demand the supervision of her access) ; and *Droit de la famille — 16473*, *supra*, note 69 (kidnapping the children and seriously damaging the mother-daughter relationship by telling the daughter that the mother could harm her).
101. J.R. Johnston, *supra*, note 26.

A definition of alienation that is parent-centered and has a low threshold is problematic in several respects. It contradicts the basic definition of PA and PAS. It favors whichever parent thinks to allege alienation (generally the father), by placing the focus on the potential alienator's behaviors, when such behaviors are likely to be reciprocal. It creates inconsistencies between the cases where PA is under consideration and those where it is not. Finally, if applied consistently, such a definition could lead to findings of PA in most, if not all, cases, leaving the PA label to be of little use or specific relevance in any given situation.

When the argument made in court is the alienating behavior, courts judge harshly the parent who asks for a reduction in or revocation of the other parents' access. Unilaterally reducing the father's access is viewed as very problematic[102]; however, going through the courts is not acceptable either. In *Droit de la famille — 161167*, the finding of PA rests mainly on the mother's opposition to the father's request for supervised access[103]. The Court blames the mother for believing that the father hasn't changed and is the same man as he was 10 years before, even if the father says that he has only redefined himself in the last year. Moreover, instead of finding the mother's concerns understandable and even, to some extent, admitted by the father who only requests supervised access, the Court finds that the mother is rigid, while the father's acceptance of supervision demonstrates his good faith. The father's violence toward the mother and his alcohol problem, both of which contributed to the child's rejection of him, do not lead the Court to conclude that the child's rejection is justified or that the mother's distrust is understandable. Rather, it is the mother who is to blame for preventing the child from getting to know her "new" father. Paradoxically, the fact that the mother asks for no access plays an important role in the Court's decision to grant access.

Findings of alienation resting on the mother's feelings and resentment also fail to consider whether these emotions are justified or understandable[104]. For victims of domestic violence, this means that in addition to keeping the father's violence secret from the child, even years after the separation[105], they may have to appear to accept, ignore or forgive the father's violence. An exaggerated emphasis on the mother's emotions and arguments, rather than on deliberately alienating actions or on the child's behavior, raises the question not only of whether the standard is fair, but

102. *Droit de la famille — 161472*, *supra*, note 76; *Droit de la famille — 161556*, *supra*, note 73.
103. *Droit de la famille — 161167*, *supra*, note 44, par. 42 and 43.
104. *Id*.
105. See *Droit de la famille — 16192*, *supra*, note 48.

also of how realistic it is in the context of high-conflict families where animosity is the norm.

Also worrisome is the fact that merely asking for the permission to move can be read as actively interfering with the father's access. In *Droit de la famille — 162450*, the Court presents the mother's desire to move for professional reasons as selfish[106] and even implies that she should not want a higher salary because she already earns as much as the father[107]. The leap between wanting to move for insufficient professional reasons and alienation raises concerns regarding mothers' autonomy and mobility post-separation under the threat of PA allegations. In the same case, following a custody decision to the letter is also presented as alienating. The Court is very critical of the mother's decision to hire a babysitter instead of saving money by granting the father more access. Although out-of-court collaboration is certainly preferable, the fact that adhering to a judgment on custody can amount to alienation again sets the bar quite low, especially when the expert finds that the mother "contribue au maintien d'un dialogue fluide entre le père et les enfants" de façon "discrète et positive[108]".

In short, some of the cases finding alienation set the threshold for alienating behavior so low that it could probably, if applied consistently, be triggered by every litigated case. Granted, a parent's animosity, rigidity, requests, plans to move, or single alienating remark should all be considered in reaching a decision on custody. However, a finding of alienation based on these elements, in the absence of deliberate alienating behavior or rejection by the child, defines PA too broadly. A standard of friendliness, good communication, and generous collaboration may be ideal, but it is not realistic in high-conflict cases, and expects too much of custodial mothers. The overall consistency, persuasiveness, and fairness of adult-centered PA decisions would be improved by focusing on behaviors that are voluntary, repeated, or malicious ; and by considering whether a parent's animosity is justified.

3.2.2 The Role of the Alienated Parent

In an approach consistent with Kelly and Johnston's family systems model, judges consider the alienated parent's contribution to the rejection of the child ; however, they fail to consider realistic estrangement as a plausible alternative to parental alienation. In *Droit de la famille — 16192*,

106. *Droit de la famille — 162450*, *supra*, note 73, par. 3 and 4.
107. *Id.*, par. 46.
108. *Id.*, par. 40 and 41. Translation : "contributes to maintaining a fluid dialogue between the father and the children" in a "discrete and positive" manner.

the father was mostly absent from the child's early life, and later rushed the situation with aggressive litigation[109]. Instead of evaluating whether the child is estranged rather than alienated, the Court finds that the alienated parent's role in the child's rejection is consistent with, and even necessary to, a finding of PA : "Une attitude aliénante n'influencera l'enfant que si le parent aliéné y contribue par son propre comportement[110]".

In *Droit de la famille — 161167*, the child's rejection of her father is considered exaggerated[111], even if she witnessed his domestic violence and abusive alcohol consumption. Paradoxically, the severity of the father's contributing behavior plays to the father's advantage, reinforcing rather than putting into question the PA diagnosis on three levels. First, the father's "lifestyle" made him an "ideal target" for alienation[112]. Second, the father's recognition of his own flaws is found to show good faith, while the mother's insistence on them shows rigidity and animosity. Third, the fact that the father has changed leads the judge to conclude that the child has a false perception of her father, even though the child's negative experiences with him are real.

Thus, even though judges do not conduct the one-sided analysis that defines Gardner's model, their sensitivity to the contributing role of the alienated parent does not put into question the finding of PA. The lack of awareness or consideration of realistic estrangement as a concurrent explanation for the child's rejection of a parent increases the risks of inaccurate findings and reinforces the far-reaching nature of PA allegations.

3.2.3 The Child-focused Perspective

In addition to describing the parents' actions, judges and experts may base their finding of PA on the child's behavior. Although the child-focused perspective is less important than the parent-focused one, several signs of alienation found within the child are discussed : refusing to see or have a normal relationship with the alienated parent[113] ; having unreasonable or unfounded reproaches against the alienated parent[114] ; having adult recriminations or the same recriminations as the alienator against

109. *Droit de la famille — 16192*, *supra*, note 48, par. 139.
110. *Id.*, par. 143.
111. *Droit de la famille — 161167*, *supra*, note 44.
112. *Id.*, par. 36.
113. *Id.* ; *Droit de la famille — 16987*, *supra*, note 93 ; *Droit de la famille — 16192*, *supra*, note 48.
114. *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 16192*, *supra*, note 48.

the alienated parent[115]; appearing coached or rejecting a parent to please the other[116]; being allied to or supporting unconditionally the preferred parent[117]; being disengaged or lacking emotionality[118]; rejecting the paternal uncle and aunt[119]; having a fusional relationship with the alienating parent[120]; and calling the stepfather "dad[121]".

In more than a third of the cases, however, the child demonstrates none of these signs of alienation[122]. A conflict of loyalty may be observed, or the child's behavior may not be discussed at all. In most of the remaining cases, the child presents only one to three of the signs discussed, with only two children exhibiting half or most of these signs.

Discussion

The signs of alienation identified by courts adopting a child-focused perspective largely overlap with Gardner's 8 symptoms of alienation. Some confusion remains regarding what defines the alienated child. Both being emotional[123] and showing no emotion[124], and both being ambivalent[125] and lacking ambivalence[126] are accepted by courts as signs of alienation, while Gardner's as well as Kelly and Johnston's models discuss the child's lack of guilt and ambivalence. The problem is not that children react differently

115. *Droit de la famille — 16428*, *supra*, note 81; *Droit de la famille — 16987*, *supra*, note 93; *Droit de la famille — 161887*, *supra*, note 44; *Droit de la famille — 16192*, *supra*, note 48.
116. *Droit de la famille — 16592*, *supra*, note 63; *Droit de la famille — 16428*, *supra*, note 81; *Droit de la famille — 162271*, *supra*, note 48; *Droit de la famille — 162621*, *supra*, note 58; *Droit de la famille — 161472*, *supra*, note 76.
117. *Droit de la famille — 16192*, *supra*, note 48; *Droit de la famille — 16592*, *supra*, note 63; *Droit de la famille — 16506*, *supra*, note 73; *Droit de la famille — 161887*, *supra*, note 44; *Droit de la famille — 162621*, *supra*, note 58.
118. *Droit de la famille — 16592*, *supra*, note 63; *Droit de la famille — 162621*, *supra*, note 58; *Droit de la famille — 161887*, *supra*, note 44.
119. *Droit de la famille — 161887*, *supra*, note 44.
120. *Droit de la famille — 16192*, *supra*, note 48; *Droit de la famille — 16428*, *supra*, note 81; *Droit de la famille — 161887*, *supra*, note 44; *Droit de la famille — 161556*, *supra*, note 73.
121. *Droit de la famille — 161167*, *supra*, note 44.
122. *Droit de la famille — 161232*, *supra*, note 44; *Droit de la famille — 16531*, *supra*, note 45; *Droit de la famille — 16899*, *supra*, note 58; *Droit de la famille — 162541*, 2016 QCCS 4922; *Droit de la famille — 162271*, *supra*, note 48; *Droit de la famille — 162450*, *supra*, note 73; *Droit de la famille — 16506*, *supra*, note 73.
123. *Droit de la famille — 161887*, *supra*, note 44.
124. *Droit de la famille — 16592*, *supra*, note 63; *Droit de la famille — 162621*, *supra*, note 58.
125. *Droit de la famille — 161472*, *supra*, note 76; *Droit de la famille — 161556*, *supra*, note 73.
126. *Droit de la famille — 16192*, *supra*, note 48; *Droit de la famille — 161887*, *supra*, note 44.

to being alienated—it may be that these children are simply at different stages in the process. Rather, it is that judges rarely define PA or state which and how many signs of alienation they are looking for to make a finding. The shifting and generally implicit definition of PA not only causes contradictions and uncertainties, but also leaves them unaddressed.

Both leading models of PA(S) rely on the child: Gardner diagnoses PAS based on eight symptoms found in the child and assumes the alienating parent's responsibility, while Kelly and Johnston adopt a multivariant and holistic perspective that still defines alienation as a child's unjustified rejection of a parent. Given the importance of the child's denigration, refusal to see the access parent and unjustified reproaches as the starting point to an inquiry into whether a child is alienated, it is surprising that so few cases base the finding of PA on the child's behavior. One of these elements is present in only six cases[127], meaning that most "alienated" children lack these basic indicators of PA[128]. For example, one judge emphasizes that the children "have an excellent relationship with their father[129]", a description that has little in common with that of a child who "expresses, freely and persistently, unreasonable negative feelings and beliefs [...] toward a parent[130]" or is "obsessed with deprecation and criticism of a parent[131]". This contrast confirms the prevalence of the parent-focused approach to PA, in contradiction with prevailing models in the literature, and shows that PA overreaches in the jurisprudence.

There is support in the literature for the proposition that courts need to intervene before children become fully alienated and repairing the parent-child relationship becomes impossible to achieve through legal means[132]. The critique of dubious findings of PA does not imply that the Court should

127. *Droit de la famille — 16192*, *supra*, note 48; *Droit de la famille — 16592*, *supra*, note 63; *Droit de la famille — 162621*, *supra*, note 58; *Droit de la famille — 161167*, *supra*, note 44; *Droit de la famille — 161887*, *supra*, note 44; *Droit de la famille — 16987*, *supra*, note 93.

128. *Droit de la famille — 162450*, *supra*, note 73; *Droit de la famille — 163175*, *supra*, note 58; *Droit de la famille — 161472*, *supra*, note 76; *Droit de la famille — 161232*, *supra*, note 44; *Droit de la famille — 16506*, *supra*, note 73; *Droit de la famille — 16531*, *supra*, note 45; *Droit de la famille — 16899*, *supra*, note 58.

129. *Droit de la famille — 162450*, *supra*, note 73, par. 69 (our translation); see also *Droit de la famille — 16899*, *supra*, note 58; *Droit de la famille — 161472*, *supra*, note 76; *Droit de la famille — 161232*, *supra*, note 44; *Droit de la famille — 16506*, *supra*, note 73.

130. J.B. Kelly and J.R. Johnston, *supra*, note 9, 251.

131. R.A. Gardner, "Rencent Trends in Divorce and Custody Litigation", *supra*, note 3.

132. J.R. Johnston and J.B. Kelly, "Commentary on Walker, Brantley, and Rigsbee's (2004): 'A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court'", *supra*, note 10, at page 87; Peter G. Jaffe, Dan Ashbourne and

have refused to attempt to improve the family dynamics. However, a desire to intervene should not justify the use of a controversial concept that manifestly does not fit the situation at hand. As PA is used in increasingly diverse and wide-ranging situations, it can only lose its specificity, precision, and ultimately usefulness to the judge's analysis, while maintaining its powerful and controversial consequences.

3.2.4 Consequences of a Finding of Alienation

Following a finding of alienation, judges rarely hesitate to intervene with detailed orders and significant changes to the custody arrangement, without mentioning the controversial nature of such changes. The alienated parent gets what they asked for in 11 cases (12 results)[133]. The other cases result in a compromise or agreement (six results)[134], with only two cases with a victory[135] or partial victory (for one of the children)[136] for the alienator[137]. Significant changes in the custody arrangement often follow from these results. In four cases, the alienated parent goes from access to full custody[138], and in one case, from shared to full custody[139]. In two cases (three results), there is a change from full custody for the alienator to shared custody[140], even though PA is said to be a counter-indication to shared custody[141].

In addition to changes in custody, courts often make detailed orders to attempt to reduce friction and litigation between the parties or to improve

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Alfred A. Mamo, "Early Identification and Prevention of Parent-Child Alienation : A Framework for Balancing Risks and Benefits of Intervention", (2010) 48 *Family Court Review* 136.

133. *Droit de la famille — 16592*, *supra*, note 63 ; *Droit de la famille — 162621*, *supra*, note 58 ; *Droit de la famille — 163175*, *supra*, note 58 ; *Droit de la famille — 161472*, *supra*, note 76 ; *Droit de la famille — 16428*, *supra*, note 81 ; *Droit de la famille — 16531*, *supra*, note 45 ; *Droit de la famille — 16899*, *supra*, note 58 ; *Droit de la famille — 161167*, *supra*, note 44 ; *Droit de la famille — 162271*, *supra*, note 48 ; *Droit de la famille — 161556*, *supra*, note 73 ; *Droit de la famille — 162450*, *supra*, note 73.
134. *Droit de la famille — 161232*, *supra*, note 44 ; *Droit de la famille — 16987*, *supra*, note 93 ; *Droit de la famille — 16506*, *supra*, note 73 ; *Droit de la famille — 161887*, *supra*, note 44.
135. *Droit de la famille — 16192*, *supra*, note 48.
136. *Droit de la famille — 16506*, *supra*, note 73.
137. Additionally, there is one case with insufficient information to draw conclusions on who wins.
138. *Droit de la famille — 161472*, *supra*, note 76 ; *Droit de la famille — 16428*, *supra*, note 81 ; *Droit de la famille — 161556*, *supra*, note 73 ; *Droit de la famille — 162450*, *supra*, note 73 ; *Droit de la famille — 162621*, *supra*, note 58.
139. *Droit de la famille — 163175*, *supra*, note 58.
140. *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 16899*, *supra*, note 58.
141. *Droit de la famille — 16899*, *supra*, note 58 ; *Droit de la famille — 161188*, *supra*, note 68.

the child's well-being. The Court may recommend[142] or order[143] therapy for the child, the alienating mother, or the family. The Court may also make an order to respond to the parents' communication problems[144] and direct them to make important decisions together[145]. Parents are often ordered not to denigrate each other[146]. Orders authorizing a parent to attend the child's medical appointments[147] or soccer practices[148] show the extent to which the relationships between the parents is micro-managed by the Court. In two cases, the Court explicitly allows the parents to ask for a reassessment in seven or nine months[149].

The changes in custody can be ordered against the child's wishes, as they are found not to be freely expressed or in their best interest[150]. The child's desire is only determinative in two extreme cases : one where the child is 16 years old[151], and one where repeated attempts to force contact with the alienated parent have already failed[152]. It is difficult to reconcile judges' decision to force contact with other cases stating that a teenager's choice is determinative[153]. For example, one case, citing the Court of

142. *Droit de la famille — 161556*, *supra*, note 73 ; *Droit de la famille — 16428*, *supra*, note 81 ; *Droit de la famille — 161472*, *supra*, note 76 ; *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 162621*, *supra*, note 58.
143. *Droit de la famille — 162450*, *supra*, note 73 ; *Droit de la famille — 16192*, *supra*, note 48 ; *Droit de la famille — 162621*, *supra*, note 58 ; *Droit de la famille — 161167*, *supra*, note 44.
144. *Droit de la famille — 162450*, *supra*, note 73 ; *Droit de la famille — 16192*, *supra*, note 48 ; *Droit de la famille — 163175*, *supra*, note 58 ; *Droit de la famille — 161232*, *supra*, note 44 ; *Droit de la famille — 16592*, *supra*, note 63 ; *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 16899*, *supra*, note 58.
145. *Droit de la famille — 162450*, *supra*, note 73 ; *Droit de la famille — 163175*, *supra*, note 58 ; *Droit de la famille — 16899*, *supra*, note 58.
146. *Droit de la famille — 16192*, *supra*, note 48 ; *Droit de la famille — 161887*, *supra*, note 44 ; *Droit de la famille — 16899*, *supra*, note 58 ; *Droit de la famille — 162271*, *supra*, note 48 ; *Droit de la famille — 161167*, *supra*, note 44 ; *Droit de la famille — 16592*, *supra*, note 63 ; *Droit de la famille — 163175*, *supra*, note 58 ; *Droit de la famille — 161232*, *supra*, note 44.
147. *Droit de la famille — 161232*, *supra*, note 44.
148. *Droit de la famille — 163175*, *supra*, note 58.
149. *Droit de la famille — 161232*, *supra*, note 44 ; *Droit de la famille — 161167*, *supra*, note 44.
150. *Droit de la famille — 161556*, *supra*, note 73 ; *Droit de la famille — 16592*, *supra*, note 63 ; *Droit de la famille — 162621*, *supra*, note 58 ; *Droit de la famille — 163175*, *supra*, note 58 ; *Droit de la famille — 16428*, *supra*, note 81 ; *Droit de la famille — 161167*, *supra*, note 44 ; *Droit de la famille — 162621*, *supra*, note 58.
151. *Droit de la famille — 16506*, *supra*, note 73.
152. *Droit de la famille — 16192*, *supra*, note 48.
153. See for example *Droit de la famille — 16946*, 2016 QCCS 1907, par. 28 ; *Droit de la famille — 161821*, 2016 QCCS 3528, par. 39.

Appeal and Michel Tétrault, states that "La jurisprudence situe à environ treize ans l'âge où l'opinion de l'enfant devient *déterminante* (chaque cas en étant un d'espèce et une moyenne étant difficile à établir), que l'on soit ou pas en présence d'un syndrome d'aliénation parentale[154]". In another case, the judge decides not to order an expert evaluation because "même si l'aliénation parentale était prouvée, l'opinion de l'enfant serait quand même déterminante[155]". The judge writes that "la jurisprudence unanime est à l'effet qu'en matière de garde et d'accès, l'opinion d'un enfant de 13 ans ou plus est déterminante, que l'on soit ou pas en présence d'un syndrome d'aliénation parentale[156]". The description of the jurisprudence as "unanimous" starkly contrasts with *Droit de la famille — 162621*, where the judge finds that the desires of the alienated child have little to no weight[157]. While different schools of thought on the appropriateness of intervention in cases of severe alienation could explain the inconsistencies, the lack of justification for adopting one approach over the other and the lack of acknowledgement of the controversial nature of PA interventions further confuses the jurisprudence. Thus, judges' heavy interventions in PA cases, coupled with the dubious nature of some of the findings of PA, reinforce preoccupations that PA is going too far in Quebec jurisprudence.

3.3 Quasi-PA Cases

This section analyses the 16 cases with a finding falling between "PA" and "no PA." In quasi-PA cases, the parent-focused approach strongly dominates. Indeed, these cases often sanction behaviors that are found to resemble alienation or risk causing alienation, without the child actually being alienated. However, instead of being limited to preventive cases where judges judiciously intervene to spare the child from becoming alienated, quasi-PA cases show judges intervening heavily based on approximative and ambiguous understandings of PA that mostly impact female "quasi-alienators."

154. *Droit de la famille — 16946*, *supra*, note 153, par. 28. Translation: "The case law sets at around thirteen years the age at which the child's opinion becomes *determinative* (each case being a special case and the average being hard to establish), whether or not there is a parental alienation syndrome."

155. *Droit de la famille — 163196*, 2016 QCCS 6433, par. 21. Translation: "even if parental alienation was proven, the child's opinion would still be determinative".

156. *Id.*, par. 20. Translation: "the jurisprudence is unanimous to the effect that regarding custody and access, the opinion of a child aged 13 or above is determinative, whether or not there is a parental alienation syndrome".

157. *Droit de la famille — 162621*, *supra*, note 58, par. 94.

3.3.1 The Parent-focused Perspective

Quasi-PA cases are less detailed than PA cases. In four cases, there is either no information on the alienating behavior[158], or only a general finding that the parent seems alienating[159]. When information is provided, behavior that is found alienating ranges from repeated, intentional and malicious actions[160] to simple overprotectiveness and anxiety[161].

Like in PA cases, alienating parents are mainly found to interfere with the other parent's relationship with the child by disregarding court orders or agreements[162], refusing to communicate information regarding the child[163], denigrating the alienated parent[164], involving the child in the separation conflict[165], or letting another man be the father figure[166]. However, the argument made before the Court receives more attention in quasi-PA cases. Offering no or little access, or asking the Court to put an end to the father's access, is an important factor in three cases[167]. Painting a dark portrait of the other's parental capacity is also found to be problematic[168], even for the mother who alleges domestic violence[169]. Findings based on more passive behaviors relate to not encouraging contacts with

158. *Droit de la famille — 161642*, 2016 QCCS 3183.
159. *Droit de la famille — 161518*, *supra*, note 45 ; *Droit de la famille — 163308*, *supra*, note 72 ; *Droit de la famille — 16920*, 2016 QCCS 1854.
160. *Droit de la famille — 16757*, *supra*, note 45.
161. *Droit de la famille — 1660*, *supra*, note 44.
162. *Droit de la famille — 162769*, *supra*, note 72 ; *Droit de la famille — 163070*, 2016 QCCS 6131 ; *Droit de la famille — 16622*, *supra*, note 56 ; *Droit de la famille — 16757*, *supra*, note 45 ; *Droit de la famille — 162587*, *supra*, note 56 ; *Droit de la famille — 161912*, *supra*, note 72 ; *Droit de la famille — 161591*, 2016 QCCS 3069 ; *Droit de la famille — 161724*, *supra*, note 56.
163. *Droit de la famille — 161724*, *supra*, note 56 ; *Droit de la famille — 163070*, *supra*, note 162 ; *Droit de la famille — 162587*, *supra*, note 56 ; *Droit de la famille — 16735*, *supra*, note 44.
164. *Droit de la famille — 162587*, *supra*, note 56 ; *Droit de la famille — 16621*, 2016 QCCS 1224 ; *Droit de la famille — 16735*, *supra*, note 44.
165. *Droit de la famille — 16735*, *supra*, note 44 ; *Droit de la famille — 163175*, *supra*, note 58 ; *Droit de la famille — 16621*, *supra*, note 164 ; *Droit de la famille — 161591*, *supra*, note 162.
166. *Droit de la famille — 161724*, *supra*, note 56 ; *Droit de la famille — 163070*, *supra*, note 162.
167. *Droit de la famille — 16622*, *supra*, note 56 ; *Droit de la famille — 162587*, *supra*, note 56 ; *Droit de la famille — 16735*, *supra*, note 44.
168. *Droit de la famille — 162769*, *supra*, note 72 ; *Droit de la famille — 163070*, *supra*, note 162 ; *Droit de la famille — 162587*, *supra*, note 56.
169. *Droit de la famille — 162587*, *supra*, note 56.

the other parent[170], sleeping with the child[171], or being too present and too friendly with the child[172]. Being overprotective or anxious[173] are also found to be signs of alienation. Emotions take an important role in defining mothers' alienation, as they are criticized for holding a negative vision of the father, blaming the father for the family's problems, and being curt, angry, bitter or resentful[174].

As for the role of the alienated parent, judges sometimes formulate reproaches toward them[175]. However, like in PA cases, realistic estrangement is not explicitly considered, and the alienator's behavior is generally at the center of the analysis.

Discussion

Quasi-alienation cases confirm and reinforce the preoccupations that arose in the study of PA cases. The mother's rigidity and refusal to offer more access are judged as harshly as actively interfering with access[176]. The mother's position in court also receives excessive attention, not only when the mother opposes access by a good and non-abusive father[177], but also when the mother's reticence is understandable. Paradoxically, when both parents agree that the father has been inadequate and that the mother is a good mother, it is the father who can be presented in a more positive light : "À l'audience, Madame et sa mère ont complètement dénigré Monsieur. Monsieur, au contraire, reconnaît les capacités parentales de Madame. Il reconnaît son comportement irresponsable, immature et inopportun dans sa prime jeunesse et la relation malsaine qu'il a eu avec la mère de ses garçons[178]".

170. *Droit de la famille — 162295*, 2016 QCCS 4399 ; *Droit de la famille — 161591*, *supra*, note 162.
171. *Droit de la famille — 162587*, *supra*, note 56.
172. *Droit de la famille — 16735*, *supra*, note 44.
173. *Id.* ; *Droit de la famille — 1660*, *supra*, note 44.
174. *Droit de la famille — 161912*, *supra*, note 72 ; *Droit de la famille — 16735*, *supra*, note 44 ; *Droit de la famille — 163070*, *supra*, note 162 ; *Droit de la famille — 162769*, *supra*, note 72 ; *Droit de la famille — 16622*, *supra*, note 56.
175. See for example *Droit de la famille — 161912*, *supra*, note 72, par. 52.
176. *Droit de la famille — 163070*, *supra*, note 162 ; *Droit de la famille — 161912*, *supra*, note 72 ; *Droit de la famille — 162587*, *supra*, note 56.
177. *Droit de la famille — 16735*, *supra*, note 44.
178. *Droit de la famille — 162769*, *supra*, note 72, par. 27 and 28. Translation : "At trial, the mother and her mother completely denigrated the father. The father, on the contrary, recognizes the mother's parental capacities. He recognizes his irresponsible, immature, and inadequate behaviour in his youth and the unhealthy relationship that he has with the mother of his sons."

The decision in *Droit de la famille — 16622*[179] is particularly worrisome, and mirrors concerns raised by the PA case *Droit de la famille — 161167*. The child's grandparents separated because of the grandfather's violence and alcohol abuse. The grandfather used his contacts with the child to insult the grandmother and spy on her ; he offered the child no supervision or guidance and was drunk during the visits ; and he sometimes called the child ten times a day to ask intrusive questions about the grandmother's life, babble incoherently, and exhort the child to hurt her grandmother. The Court finds that the girl, who has developmental problems and needs stability and structure, is doing better since access with the grandfather stopped. The grandmother asks for the grandfather to have no access to the child. The only reasons supporting the Court's finding that there may be alienation are that the grandmother is bitter toward the grandfather and takes a rigid position regarding access, in the context of a conflictual relationship. The Court finds the grandmother's rigidity unacceptable, but also proves her right by deciding that it would be risky to impose contacts before the end of the school year. The Court suspends all access for the next four and a half months, authorizes only supervised contacts and phone calls, and grants the supervisors and the grandmother the unilateral power to put an end to the access if the grandfather's problematic behavior persists. This case raises several questions : What level of friendliness toward their abusive ex-husbands must women demonstrate to avoid raising suspicions of PA ? Was the Court only prepared to consider interrupting all access by the grandfather if the grandmother had argued for him to have access ? Was the grandmother, in some way, punished for being right in her assessment of the grandfather's character and parenting capacity ?

A final concern is that, like in PA cases, emotions, resentment, overprotectiveness, arguing for no contact, and similar forms of passive alienation only target female alienators. It is problematic that courts do not evaluate whether the mother's (or grandmother's) distrust or resentment is warranted, especially when she experienced domestic violence. It is also unrealistic to expect mothers in high-conflict cases taking place in an adversarial legal system to present a friendly or even neutral portrayal of the father figure, especially when he has serious flaws confirmed by the Court. In short, like in PA cases, the parent-focused perspective in quasi-PA cases supports the concern that PA reaches too far, and that custodial mothers are sometimes faced with unrealistic standards of friendliness and good cooperation.

179. *Droit de la famille — 16622*, *supra*, note 56.

3.3.2 The Child-focused Perspective

Only a few quasi-PA cases focus on the child's behavior. The degree to which the child rejects the "quasi-alienated" parent ranges from a boy living in shared custody without speaking to his father[180] to a 4-year-old who does not appear to reject the alienated father[181]. The most frequent sign of alienation found by courts is resisting contact with the alienated parent[182], although some children rather fear telling the custodial parent that they want to spend more time with the access parent[183]. In two cases, the children are found to unreasonably fear or despise the father and to present a borrowed discourse, indicating that their negative feelings toward the alienated parent comes from the alienator[184]. A fusional relationship between the child and the mother is found to be problematic in one case, despite the mother's good intentions[185]. In another case, the child considers the mother's partner as her father[186]. Finally, one young child uses elaborate subterfuges to interfere with the father's access[187].

Discussion

Signs of alienation are less visible and less numerous here than in PA cases. In several cases, there is either no information on the child's feelings toward the alienated parent[188], or information that contradicts habitual signs of PA[189]. For example, the children may love both parents and have a good relationship with them[190], or be as young as two years old[191] — too

180. *Droit de la famille — 16757*, *supra*, note 45.
181. *Droit de la famille — 16920*, *supra*, note 159.
182. *Droit de la famille — 162769*, *supra*, note 72 ; *Droit de la famille — 16757*, *supra*, note 45 ; *Droit de la famille — 161642*, *supra*, note 158 ; *Droit de la famille — 161591*, *supra*, note 162.
183. *Droit de la famille — 161912*, *supra*, note 72 ; *Droit de la famille — 16621*, *supra*, note 164.
184. *Droit de la famille — 162295*, *supra*, note 170 ; *Droit de la famille — 161591*, *supra*, note 162.
185. *Droit de la famille — 161912*, *supra*, note 72.
186. *Droit de la famille — 162769*, *supra*, note 72.
187. *Droit de la famille — 1660*, *supra*, note 44.
188. *Droit de la famille — 162587*, *supra*, note 56 ; *Droit de la famille — 162769*, *supra*, note 72.
189. *Droit de la famille — 161642*, *supra*, note 158 ; *Droit de la famille — 16622*, *supra*, note 56 ; *Droit de la famille — 161724*, *supra*, note 56.
190. *Droit de la famille — 16735*, *supra*, note 44.
191. *Droit de la famille — 161518*, *supra*, note 45.

young to be alienated[192]. In one case, the child even prefers to live with the alienated mother[193].

These contradictions are not necessarily problematic, as judges are finding risks of PA or a situation resembling PA. Nonetheless, quasi-PA findings still have important consequences. While some judges explain why they act on PA allegations even though the child is not alienated[194], not all cases engage in this justification. The lack of expertise, coupled with the scarce signs of alienation in some cases, extends even more the realm of PA[195]. More explicit definitions of PA could reduce contradictions and improve the coherence (between cases as well as in relation to the literature) of PA jurisprudence.

3.3.3 Consequences of a Quasi-PA Finding

Quasi-PA findings, made against the mother or grandmother in 12 cases and against the father in four, are almost as damaging as PA findings. Judges disregard the wishes of children even older than 12[196]. The rejected parent wins 10 of the 16 cases[197], three of them involving a change from access or shared custody to full custody[198]. Five cases result in a compromise[199], and the alienator wins in one case, where the child is too old (almost 14) for the situation to be corrected[200].

These results are supported by three kinds of justification. In "preventive" cases, the judge acts before a situation of PA develops or orders an expert evaluation to verify the presence of PA[201]. In three cases, the risk

192. J.B. Kelly and J.R. Johnston, *supra*, note 9, 260.
193. *Droit de la famille — 16621*, *supra*, note 164.
194. *Droit de la famille — 161912*, *supra*, note 72 ; *Droit de la famille — 16735*, *supra*, note 44.
195. See for example *Droit de la famille — 16622*, *supra*, note 56.
196. See *Droit de la famille — 161912*, *supra*, note 72 ; *Droit de la famille — 162295*, *supra*, note 170.
197. *Droit de la famille — 16735*, *supra*, note 44 (mother's alienation) ; *Droit de la famille — 162295*, *supra*, note 170 ; *Droit de la famille — 161724*, *supra*, note 56 ; *Droit de la famille — 163308*, *supra*, note 72 ; *Droit de la famille — 161591*, *supra*, note 162 ; *Droit de la famille — 16621*, *supra*, note 164 ; *Droit de la famille — 161518*, *supra*, note 45 ; *Droit de la famille — 16920*, *supra*, note 159 ; *Droit de la famille — 163070*, *supra*, note 162 ; *Droit de la famille — 161912*, *supra*, note 72.
198. *Droit de la famille — 161724*, *supra*, note 56 ; *Droit de la famille — 163308*, *supra*, note 72 ; *Droit de la famille — 161912*, *supra*, note 72
199. *Droit de la famille — 16622*, *supra*, note 56 ; *Droit de la famille — 161642*, *supra*, note 158 ; *Droit de la famille — 162587*, *supra*, note 56 ; *Droit de la famille — 1660*, *supra*, note 44 ; *Droit de la famille — 162769*, *supra*, note 72.
200. *Droit de la famille — 16757*, *supra*, note 45.
201. *Droit de la famille — 162587*, *supra*, note 56 ; *Droit de la famille — 161642*, *supra*, note 158.

of PA suffices to justify a change in custody[202], two of these cases not relying on any expert testimony on either the risk of PA or the need for a change in custody.

"Common sense" cases involve a finding of PA despite the recognized lack of scientific proof. For example, one judge writes : "Malgré le fait que seule une expertise psychologique puisse véritablement démontrer la présence d'aliénation parentale, les témoignages entendus pendant le procès donne[nt] la nette impression de la présence d'une telle aliénation véhiculée dans le milieu maternel de façon consciente ou inconsciente et affectant le vécu de X[203]".

The remaining cases[204] involve conclusions that resemble a PA finding : the possibility of PA cannot be discarded[205], there are signs of alienating behavior[206], there is no PA "as defined in the literature" but an intervention is required[207], or the father attempts to cause PA[208]. In one case, the risk that the mother will maintain alienation-like behaviors suffices to reject her petition for custody, with the risk that the children will be sexually assaulted by her partner intervening as a secondary reason for the decision[209].

In short, quasi-PA cases, while supported by less evidence of alienation, also allow the parent who alleges PA (generally the father) to win the case. A mere risk of PA can support a radical intervention such as a change in custody. While preventive quasi-PA cases echo some experts' call for early intervention before situations of PA crystallize, most cases rely on "common sense" assertions and ambiguous findings that suggest that this category of cases is no more in tune with the literature than cases with a PA finding.

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202. *Droit de la famille — 161724*, *supra*, note 56 ; *Droit de la famille — 16920*, *supra*, note 159 ; *Droit de la famille — 161518*, *supra*, note 45.
203. *Droit de la famille — 162769*, *supra*, note 72, par. 34. Translation : "Despite the fact that only a psychological expertise can truly demonstrate the presence of parental alienation, the testimonies heard during the trial give the distinct impression of the presence of such alienation conveyed in the maternal environment consciously or unconsciously and affecting X's life." See also *Droit de la famille — 163070*, *supra*, note 162.
204. *Droit de la famille — 16622*, *supra*, note 56 ; *Droit de la famille — 1660*, *supra*, note 44 ; *Droit de la famille — 16735*, *supra*, note 44 ; *Droit de la famille — 162295*, *supra*, note 170 ; *Droit de la famille — 161591*, *supra*, note 162 ; *Droit de la famille — 161912*, *supra*, note 72 ; *Droit de la famille — 16621*, *supra*, note 164.
205. *Droit de la famille — 16622*, *supra*, note 56.
206. *Droit de la famille — 161591*, *supra*, note 162.
207. *Droit de la famille — 161912*, *supra*, note 72, par. 28 (our translation).
208. *Droit de la famille — 16621*, *supra*, note 164.
209. *Droit de la famille — 162295*, *supra*, note 170.

3.4 No-PA Cases

The 27 explicit or implicit findings of no PA[210] do not always correspond to cases with less evidence of alienation. Rather, judges in these cases adopt narrower definitions of PA that often require the consideration of the parents' and the child's behaviors. The increased attention to the child's behavior fits definitions in the literature and calls into question the accuracy of many PA and quasi-PA cases.

3.4.1 Parent-focused and Child-focused Perspectives

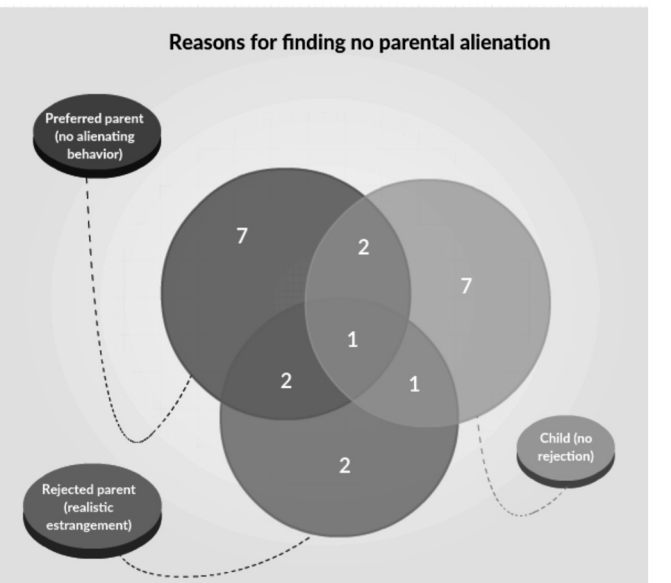
Judges' reasons for finding that there is no PA can relate to the child (the child has a good relationship with the allegedly alienated parent), the preferred parent (he or she does not act in alienating ways), or the rejected parent (the estrangement is justified). An example on the child's side is a case in which the paternal aunt is alleged as alienating, but the Court finds that her badmouthing of the mother will not alienate the child, considering the strong mother-child relationship[211]. In two other cases, the Court comments that the children have a good relationship with their father and that there is, therefore, no alienation[212]. On the preferred parent's side, judges comment that there is no evidence that the preferred parent obstructs access or attempts to alienate the child[213], or that the custodial parent is open to the other's involvement in the child's life[214]. A former alienator who has stopped denigrating the other parent[215] or started recognizing their importance[216] can resume or normalize contacts with the child through unsupervised access to the child[217] or access every other weekend[218].

In some cases, the parent alleging alienation is found to be responsible for the problematic situation. These cases can be read as "realistic estrangement" cases, although this label is not used. The rejected parent is found to have provoked the deterioration of the relationship by making

210. There are 25 no-PA cases, with two cases where neither parent is found to be alienating.
211. *Droit de la famille — 163385*, *supra*, note 45.
212. *Droit de la famille — 162591*, 2016 QCCS 5070; *Droit de la famille — 161170*, *supra*, note 69.
213. *Droit de la famille — 161575*, *supra*, note 69; *Droit de la famille — 161188*, *supra*, note 68.
214. *Droit de la famille — 16923*, *supra*, note 67.
215. *Droit de la famille — 16896*, *supra*, note 69.
216. *Droit de la famille — 161303*, *supra*, note 69.
217. *Droit de la famille — 16896*, *supra*, note 69.
218. *Droit de la famille — 161303*, *supra*, note 69.

insufficient efforts to see the children[219], being physically absent because of immigration problems[220], or being too prompt to litigate[221]. Recall that in PA and quasi-PA cases, the fact that the father was absent[222], litigated aggressively[223], abused alcohol[224], or was violent toward the mother[225] did not impede findings of PA.

Finally, a finding of no PA can be supported by a combination of these reasons[226]. The following Venn diagram summarizes the reasons for finding that there is no parental alienation, with the number of cases falling under each situation inscribed within the corresponding circle(s), excluding cases that provide no reason for the finding[227].



219. *Droit de la famille — 16593*, *supra*, note 69.
220. *Droit de la famille — 162437*, *supra*, note 67.
221. *Droit de la famille — 162424*, *supra*, note 50.
222. *Droit de la famille — 16192*, *supra*, note 48.
223. *Id.*
224. *Droit de la famille — 161642*, *supra*, note 158 ; *Droit de la famille — 16622*, *supra*, note 56.
225. *Droit de la famille — 161167*, *supra*, note 44.
226. *Droit de la famille — 16735*, *supra*, note 44 ; *Droit de la famille — 16221*, *supra*, note 48 ; *Droit de la famille — 16473*, *supra*, note 69.
227. *Droit de la famille — 16756*, *supra*, note 69 ; *Droit de la famille — 161486*, *supra*, note 67 ; *Droit de la famille — 161136*, *supra*, note 67.

Discussion

This distribution of cases by reason for finding that there is no PA informs the study of the implicit definitions of PA in the jurisprudence. Fourteen cases find an absence of PA because the child is not alienated *or* because the parent is not alienating, implying that a proof of PA requires both conditions to be fulfilled[228]. By contrast, only three cases support the proposition that either alienating behavior or an alienated child suffices for a finding of PA. In *Droit de la famille — 162591*, the judge states that PA is defined first and foremost in relation to the child's relationship with the allegedly alienated parent :

> Le Père croit que l'enfant a peur de lui démontrer son affection lorsqu'elle est en présence de la Mère. Selon le Père, l'enfant a aussi certains propos qui l'inquiètent. X rapporte que « papa est une monstre » [*sic*], « papa a volé X à maman ». *Ce ne sont pas des indices d'aliénation parentale. Le concept d'aliénation parentale est déterminé en fonction de la relation entre parents et enfant.* La preuve non contestée démontre clairement que la relation entre le Père et X est chaleureuse et attachante[229].

This reveals one more inconsistency in PA jurisprudence : most no-PA cases contradict the PA and quasi-PA cases where the finding is based solely on the alienator's behavior. Different definitions of PA and different understandings of how it must be proved lead judges to make opposite findings in similar cases. More clarity and standardization are needed to ensure fairness for litigants and coherence for the jurisprudence.

Conclusion

In high-conflict custody disputes, judges are often faced with complex family dynamics and reprehensible parental behaviors. In this context, they may be tempted to use the powerful tool that is parental alienation, even when it does not fit the situation at hand. This inappropriate use of alienation leads to a legal definition of PA that is at odds with its definitions in the literature and that generates inconsistencies. Indeed, this study has

228. See *Droit de la famille — 162271*, *supra*, note 48 (there is no alienation despite the father's denigration because the child has a good relationship with the mother) ; *Droit de la famille — 162437*, *supra*, note 67 (there is no alienation even though the child appears to have a borrowed discourse because there is no evidence of denigration).

229. *Droit de la famille — 162591*, *supra*, note 212, par. 14 (emphasis added). Translation :
> The father believes that the child is afraid to show him her affection when the mother is present. According to the father, the child also says things that worry him. X says that "dad is a monster", "dad has stolen X from mom". These are not signs of parental alienation. The concept of parental alienation is determined according to the relationship between the parents and the child. The uncontested evidence clearly shows that the relationship between the father and X is warm and endearing.

found that judges often adopt a parent-focused definition of PA that fails to meet even the most basic criteria for alienation given in either Gardner's model or Kelly and Johnston's reformulation. Judges define a low threshold for parental alienation that, if applied consistently, could justify a finding of alienation in most conflictual custody cases. Women appear to be particularly vulnerable to PA's over-inclusiveness, as they are the ones who are most often found to be alienating based on passive behaviors or pleadings in court, or in "quasi-PA" cases where children do not reject the "alienated" parent. To add to the confusion, the failure to define PA prevents judges from achieving internal coherence between the definition of PA and its proof in any given case, not to mention the lack of consistency regarding what constitutes alienation from one case to another. The oscillation of PA between a scientific diagnosis requiring expert testimony and a legal test falling within the judge's knowledge further raises the question of whether PA jurisprudence is more rooted in science or in pop psychology or pseudoscience. Although PA may be useful to explain the unjustified rejection of a parent and to sanction unacceptable behaviors by mothers and fathers, there is significant room for improvement to make PA jurisprudence coherent, intelligible, and fair, starting with :

— More awareness of concurrent models of PA ;

— A clear articulation of the relationship between expert evidence and a legal finding of PA ;

— A coherent definition of PA that requires the child to present specific signs of being alienated and distinguishes PA from realistic estrangement ;

— A higher threshold for alienating behaviors, to exclude actions, feelings, and minor flaws common to every conflictual separating family ;

— Close monitoring of ambiguous findings and findings of alienation based on passive behaviors, and the awareness that these findings seem to disproportionately affect mothers.

All in all, such a controversial concept, which is ambiguous, poorly delimited, incoherently defined and detached from scientific debate, is of little assistance in custody decisions when it can mean whatever the judge wants it to mean.

This study has presented a snapshot of parental alienation jurisprudence in Quebec in 2016. Further research is necessary to explore how the case law has evolved over time, how it compares to jurisprudence in other Canadian provinces, and how PA cases compare to similar factual situations where the label is not used. A systematic comparison of similar cases with different potential alienators would be useful to confirm the signs of

gender bias found in this study. Moreover, the addition of interviews to the study of legal materials could allow a deeper understanding beyond legally relevant factors. While research on PA flourishes in the fields of psychiatry and mental health, there is still much to learn regarding the articulation of this concept in Canadian and Quebec law.