

GENDER BIAS IN CROSS-ALLEGATION DOMESTIC VIOLENCE-PARENTAL ALIENATION CUSTODY CASES: CAN STATES LEGISLATE THE FIX?

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Abstract

“Parental Alienation Syndrome” (PAS), developed by Dr. Richard Gardner in 1985, posits that a frequent dynamic in child custody disputes involves vengeful mothers falsely convincing their children that they have been sexually abused by their fathers. Although PAS is widely discredited and courts have ruled it inadmissible, new formulations of the theory, such as Parental Alienation (PA), continue to play a dominant role in custody proceedings. Proponents of PA assign the label to a broad range of custody cases in which children favor one parent and reject the other. However, despite the seemingly more gender-neutral framing of PA, empirical research shows that courts use PA to discredit mothers’ allegations of domestic violence and abuse and justify custody switches away from the mother. This Note analyzes the gender bias in family courts’ handling of custody cases involving cross-allegations of domestic violence and PA, and then proposes four legislative provisions aimed at reducing the effects of such bias in custody proceedings.

INTRODUCTION

Six-year-old Gabriella Collins; twenty-eight-month-old Kyra Franchetti; two-year-old Jovani Liguro; three-year-old Autumn Coleman; and eight-year-old Thomas Valva.¹ These

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¹ Memorandum in Support of Legislation, NY Senate-Assembly Bill S08549, A10668 (N.Y. 2021), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10668&term=2019&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y&LFIN=Y&Chamber%26nbsp

are all names of children murdered by a parent in the past ten years due to a court's award of custody and/or unsupervised visitation over the vehement objections of a mother who alleged domestic violence and abuse by the father.² Unfortunately, these are not isolated tragedies. According to the Center for Judicial Excellence, 821 children were murdered by a parent involved in a separation or divorce between 2008 and 2021.³ The Center further identifies that for 111 of those children, across eighty-eight different cases, the family court was involved before the death of the child and ignored safety concerns.⁴ While these figures are staggering, they are perhaps less surprising given the estimate that over 58,000 U.S. children each year are court-ordered into the unsupervised care of a violent parent.⁵ The inevitable question then presents itself: Why are so many family courts ordering children into the unprotected care of an abusive parent in the wake of their parents' divorce?

One reason is a pervasive family court culture that tends to discredit allegations of family violence while ascribing inherent primacy to shared parenting.⁶ A dynamic that has come to dominate family court proceedings involves allegations of domestic violence or child abuse, generally made by the mother, met with cross-allegations of "parental alienation" (also known as "PA") from the father.⁷ The theory of parental alienation—a

Video%2FTranscript=Y [https://perma.cc/C89B-YRGW] (establishing procedure guidelines for custody agreements involving child abuse, family violence, and/or domestic violence).

² *Id.*

³ *US Divorce Child Murder Data (2008-Present)*, CTR. FOR JUD. EXCELLENCE, <https://centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/> [https://perma.cc/JQ8K-7JZA].

⁴ CHILDREN KILLED BY A PARENT IN THE U.S. WHEN DIVORCE, SEPARATION, CUSTODY, VISITATION, OR CHILD SUPPORT IS MENTIONED IN NEWS COVERAGE, CTR. FOR JUD. EXCELLENCE (2021), <https://drive.google.com/file/d/13DFpBXOIorT5P5QutC0OohO2hJ6K8zrS/view> [https://perma.cc/2VZU-JS3Y].

⁵ See Press Release, How Many Children Are Court-Ordered Into Unsupervised Contact With an Abusive Parent After Divorce?, THE LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE (Sept. 22, 2008), <http://www.leadershipcouncil.org/1/med/PR3.html> [https://perma.cc/SQU7-HPPR].

⁶ Joyanna Silberg & Stephanie Dallam, *Abusers Gaining Custody in Family Courts: A Case Series of Over Turned Decisions*, 16 J. CHILD CUSTODY 140, 145 (2019).

⁷ Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQUAL. 311, 317 (2017). See e.g., Kathryn Joyce, *She Said Her Husband Hit Her. She Lost Custody of Their Kids: How Reporting Domestic Violence Works Against Women in Family Court*, THE MARSHALL PROJECT (July 8, 2020), <https://www.themarshallproject.org/2020/07/08/she-said-her-husband-hit-her-she-lost-custody-of-their-kids>

variation of the “parental alienation syndrome” or “PAS” developed by psychiatrist Richard Gardner in 1985, discussed *infra* Section II.A—is frequently invoked by fathers accused of domestic violence who posit that the children’s mother is purposely alienating their children from him, and the ‘false’ claims of domestic violence are merely part of this campaign of denigration.⁸

A national U.S. study published in 2020 examining over 4,000 child custody cases has revealed the deeply gender-biased manner in which cross-claims of domestic violence and parental alienation play out in family court, discussed *infra* Section III.A.⁹ The study shows that courts are rejecting mothers’ abuse allegations at high rates and imposing potentially dangerous custody orders.¹⁰ Emboldened by this data, lawmakers at the state and national level have begun introducing legislation to reform child custody laws. These initial efforts aim to prioritize child safety and counteract the gender bias permeating the family court system.¹¹

The primary focus of this Note concerns gender bias in cases involving cross-allegations of parental alienation and domestic violence,¹² specifically, as opposed to child

[<https://perma.cc/GXJ7-99QK>] (describing the experience of Tara Coronado, a mother of four, who lost primary custody after accusing the children’s father of domestic violence and subsequent court ordered psychological evaluations, paid for by the father, labeled her with a range of diagnoses including “parental alienation”); Naomi Cahn, *Why Women Lose Custody*, FORBES (Jan. 26, 2020), <https://www.forbes.com/sites/naomicahn/2020/01/26/why-women-lose-custody/?sh=56bf4fc24641>

[<https://perma.cc/2VBL-DX8A>] (describing experience of a woman losing custody of her children to their father after she reported that the father repeatedly abused her and their children and the father claimed parental alienation).

⁸ Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 759 (2005); Debra Stark et al., *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1 (2019).

⁹ Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?*, 42 J. SOC. WELFARE AND FAM. L. 92 (2020) [hereinafter Meier, *U.S. Child Custody Outcomes*].

¹⁰ *Id.*

¹¹ See, e.g., H.R. Con. Res. 72, 115th Cong. (2017); S.78, 2021–2022 Reg. Sess. (Pa. 2021).

¹² “Domestic violence” definitions vary between jurisdictions, with some states adopting broad domestic violence provisions that encompass any violence in the home, including against children. See *Domestic Violence/Domestic Abuse Definitions and Relationships*, NAT’L. CONF. OF STATE LEG., <https://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and->

abuse. The reasons for focusing on domestic violence are twofold: First, there is a large amount of literature supporting the notion that the majority (or at least a significant percentage) of high-conflict custody cases involve domestic violence.¹³ Second, as will be elaborated further, PAS was originally developed as a response to mothers' allegations of child sexual abuse, and thus the extension of its use into the domestic violence context highlights the pervasiveness of gender bias within the court system. The aims of this Note are threefold: first, to analyze the factors that converged to produce a family court culture in which mothers' claims of domestic violence are easily denigrated while fathers' claims of parental alienation are elevated; second, to argue that in order to effectively counter gender bias in family court, states' custody laws must be reformed; and third, to assess what specific reforms are necessary for effecting change in practice and not just on paper.¹⁴

Part I examines the evolution of child custody standards and their intertwinement with societal views on sex and gender. Sections II.A and II.B detail the emergence of Gardner's theory of PAS and its continued influence in family courts in the form of PA, despite

relationships.aspx [https://perma.cc/P7NA-88S4]. For the purposes of this Note, the term "domestic violence" encompasses all relevant forms of physical and nonphysical abuse committed against a current or former spouse or partner, rather than child abuse. The reason for this distinction is that the empirical studies I reviewed, as well as a significant amount of the literature on the topic, invoke the term domestic violence as a category separate from child physical or sexual abuse. The term "intimate partner violence" encapsulates the meaning of domestic violence as it is intended in this Note. See *Intimate Partner Violence*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/index.html> [https://perma.cc/3UEY-4LSP].

¹³ See Joan S. Meier, *Research Indicating That the Majority of Cases That Go to Court as "High Conflict" Contested Custody Cases Have A History Of Domestic Violence*, THE LEADERSHIP COUNCIL (2005), <http://www.leadershipcouncil.org/1/pas/Meier.html> [https://perma.cc/BR8Y-ZWF4]. See also Joyce, *supra* note 7 ("One small 1992 study found that there was physical aggression between parents in 70 percent of high-conflict custody fights, and 'severe' violence (meaning battery or the threat or use of a weapon) in nearly half. Another study, published in 1997 by the National Center for State Courts and covering several cities, found documented evidence of domestic violence in 20 to 55 percent of contested custody cases. In one city where mediators screened for it, 'much higher' rates of abuse were revealed.").

¹⁴ This Note limits its focus to male-female relationships because this is the relationship structure examined in all of the empirical PA/PAS studies that I have found thus far. However, domestic violence remains pervasive in same-sex relationships. See Luca Rollè et al., *When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence*, FRONT PSYCH., (2018). See also Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 339 (1995). Furthermore, allegations of PAS have arisen in same-sex custody cases. See e.g., *Palazzolo v. Mire*, 10 So. 3d 748, 771–772 (La. Ct. App. 2009) (assessing PAS testimony in a case where the adoptive mother sued the birth mother for custody and visitation of a child who was adopted during their same-sex relationship). As such, it would be meaningful for further empirical and social science research to analyze the impact of PA in domestic violence custody cases involving same-sex relationships and non-traditional family structures.

rulings on PAS's inadmissibility. Section II.C then establishes why any version of the theory, regardless of the label, is highly problematic in the context of custody cases involving domestic violence. Section III.A reviews the empirical literature that proves the application of parental alienation in custody cases is gender-biased and frequently used to diminish claims of domestic violence, highlighting the groundbreaking significance of Professor Joan Meier's¹⁵ 2020 national study establishing that gender bias predominates such cases. Section III.B surveys and evaluates the effectiveness of the legislative efforts undertaken by states thus far to reform child custody laws. Finally, Part IV provides four concrete proposals for inclusion in future state legislation to effectively account for the dynamics of domestic violence and parental alienation in custody proceedings. The proposals directly respond to New York State's legislative scheme, but have applicability to other states.

I. Historical Treatment: Intersection of Sex/Gender and Custody in Family Courts

A. Paternal Presumption, Tender Years, and the Best Interests of the Child Standard

In the United States, the laws governing child custody decisions have largely reflected society's changing views on sex and gender, resulting in alternating custodial presumptions and preferences between mothers and fathers. Eighteenth and nineteenth century custody laws automatically bestowed child custody upon fathers following divorce, embodying the prevalent belief that such custody was part of the husband's property rights.¹⁶ By the mid-twentieth century most states followed the "tender years" doctrine, which was premised on the notion that mothers possessed greater nurturing capabilities that made them the proper custodians of young children unless proven unfit.¹⁷ However, the changing social fabric of

¹⁵ Joan Meier is a Professor of Clinical Law and Director of the National Family Violence Law Center at the George Washington University Law School, where she has served as a clinical law professor for thirty years. She is also the founder of the nonprofit DV LEAP, which provides pro bono appeals in domestic violence cases. See *Joan S. Meier*, GEO. WASH. U. L. (2021), <https://www.law.gwu.edu/joan-s-meier> [<https://perma.cc/3NG8-L4ZA>].

¹⁶ Erin Bajackson, *Best Interests of the Child - A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. L. 311, 312–13 (2013); Zoe Garvin, *The Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases*, 50 FAM. L.Q. 173, 175 (2016).

¹⁷ Louann C. McGlynn, *Parent and Child-Custody and Control of Child: Parental Alienation: Trash Talking the Non-Custodial Parent Is Not Okay* Hendrickson v. Hendrickson, 2000 Nd 1, 603 N.W.2d 896, 77 N.D. L. REV. 525, 531 (2001); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 505 (2001).

the 1960s and 1970s saw greater numbers of both women entering the workforce and men seeking larger roles in child caretaking, prompting legislatures to replace the tender years presumption with the “best interests of the child” standard.¹⁸

The “best interests of the child” analysis represents the standard currently used in all fifty states to determine custody and visitation matters.¹⁹ In 1970, the National Conference of Commissioners on Uniform State Laws fleshed out the standard by adopting the Uniform Marriage and Divorce Act (UMDA), a gender-neutral five-factor model for determining custody decisions upon divorce.²⁰ While many states adopted at least some of the five UMDA factors, they often incorporated additional factors—either statutorily or judicially—causing the criteria for the “best interests of the child” standard to remain varied between jurisdictions.²¹ The move away from the tender years doctrine represented a rare overlap in goals between fathers’ rights and feminist movements, both of which advocated for the removal of the maternal presumption from state legislation during the early 1970s.²² For this reason, the UMDA excludes any mention of the gender or sex of the custodian in determining the best interests of the child, and “[stands] for the proposition that gender had little legal relevance for the parent-child relationship.”²³

¹⁸ McGlynn, *supra* note 17, at 531–32; Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 58 FAM. CT. REV. 270, 274 (2020); Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 391 (2008).

¹⁹ Jaya L. Connors, *Advocating for Child Clients in Custody Cases Involving Parental Alienation Issues*, 28 WIDENER COMMONWEALTH L. REV. 5, 8 (2019). *See, e.g.*, N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2015).

²⁰ *See* Elrod & Dale, *supra* note 18, at 393–94; Bajackson, *supra* note 16, at 315. The five factors consist of: 1) the wishes of the child’s parents as to custody; 2) the child’s wishes as to whom shall be his/her custodian; 3) the interaction and interrelationship of the child with the parent or parents, siblings, and anyone else who may significantly affect the child’s best interests; 4) the child’s adjustment to his/her home, school, and community; and 5) the mental and physical health of the individuals involved.

²¹ Elrod & Dale, *supra* note 18, at 394; Bajackson, *supra* note 16, at 315.

²² Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 114–15 (2016). Dinner highlights the two groups’ differing reasoning, as “fathers’ rights activists argued that sex-based custody laws discriminated against men” whereas “feminist activists emphasized the ways in which they reflected and reinforced a gendered division of labor.”

²³ *Id.* at 115.

B. Joint Custody and Fathers' Rights Groups

In response to society's evolving views on parenting relationships and gender and sex equality, "[l]egislatures made a public policy shift finding that it was in a child's best interest to maintain relationships with both parents after divorce," which led to the concept of joint custody.²⁴ Joint custody may involve joint legal custody, whereby both parents share decision-making authority, or joint physical custody, whereby the child spends time residing with both parents, and often it involves both.²⁵ California spearheaded the joint custody charge in 1979 by enacting a provision establishing a presumption that joint custody is in the best interests of the child when asked for by both parents.²⁶ By 2006, forty-six states had adopted some form of joint custody legislation.²⁷

Advocates have continued to fight for joint custody laws across the country, typically for bills that include a presumption of joint physical custody that is rebuttable only by clear and convincing evidence that co-equal physical custody is not in the best interests of the child.²⁸ Such bills go one step further than California's statutory presumption, which is limited to instances of parental agreement. While facially this type of joint custody legislation appears gender neutral, since the 1970s its enactment has been one of the primary goals of fathers' rights groups ("FRGs")—a subgroup of the more generalized

²⁴ Elrod, *supra* note 17, at 507.

²⁵ Jocelyn Elise Crowley, *Fathers' Rights Groups, Domestic Violence and Political Countermobilization*, 88 SOC. FORCES 723, 728 (2009); Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 FAM. L.Q. 315, 323 (2006).

²⁶ CAL. CIV. CODE § 4600.5 (West 1979). See CAL. FAM. CODE § 3080 (1994). Section 3080 continues former Civil Code Section 4600.5(a) without substantive change. See also Nancy K. Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U.L. REV. 485, 488–89, 501 (1981); Nancy Ellen Yaffe, Note, *A Fathers' Rights Perspective on Custody Law in California: Would You Believe It If I Told You That the Law Is Fair to Fathers?*, 4 S. CAL. INTERDISC. L.J. 135, 139 (1994).

²⁷ Adams, *supra* note 25, at 323. See Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS REV. 273, 277 (1999) (noting there are three primary forms of joint custody legislation: 1) joint custody is explicitly an option for judges to take into account; 2) joint custody is authorized when asked for by either party, even if the other parent contests it; 3) joint custody is authorized only when condoned by both parents but the receptiveness of each parent to joint custody is a factor in determining which parent should be granted sole custody).

²⁸ Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 L. & CONTEMP. PROBS. 69, 77–78 (2014).

men's liberation movement originating in the mid-1960s.²⁹ In the wake of escalating divorce rates, FRGs promoted joint custody legislation in response to what they saw as biased child support³⁰ and custody awards.³¹ Certainly, there are legitimate arguments that joint custody fosters a continued relationship with both parents after a divorce from which many children benefit.³² However, research detailing the benefits of joint custody focuses on situations where parents agree to shared parenting and are able to cooperate.³³ Yet joint custody presumptions, or even statutory preferences, mostly impact litigated custody cases, which are by definition high conflict and most likely to involve domestic violence.³⁴ In the context of domestic violence, shared parenting can be harmful to both children and the abused parent. Abusive intimate partners often use joint custody and the continued contact it entails to further abuse their former partner.³⁵ As such, it is particularly concerning that

²⁹ FRGs initially sought this type of joint custody legislation in California, *see* Bajackson, *supra* note 16, at 322–23, as well as in New York, where it also did not pass, *see* Lemon, *supra* note 26, at 489–90; Yaffe, *supra* note 26, at 139; Scott & Emery, *supra* note 28, at 78 (noting prominent women's organizations have adopted a strong stance against a statutory presumption favoring joint custody); Stark et al., *supra* note 8, at 117 (noting that fathers' rights groups such as the National Parents Organization and Stop Abusive and Violent Environments have engaged in a nationwide push for statutory joint custody rebuttable presumptions, with no exception for when one of the parents has engaged in domestic violence).

³⁰ *See* Crowley, *supra* note 25, at 728–29; Dinner, *supra* note 22, at 112–13 (“Congressional amendments to the Social Security Act in 1975 created the Federal Child Support Enforcement Program, which supervised the collection of monies from fathers to reimburse states for welfare expenditures[.]”); Scott & Emery, *supra* note 28, at 77 (“The sustained effort to enact state laws favoring joint legal and physical custody has been at the heart of fathers’ legislative agenda from the beginning. . . . It also could reduce the burden of child support as fathers assumed a larger share of child-care responsibility[.]”).

³¹ Dinner, *supra* note 22, at 88; Adams, *supra* note 25, at 322–23.

³² Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 406 (2005); Maritza Karmely, *Presumption Law in Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption*, 30 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 329, 336, 353 (2016). Other arguments in favor of joint custody presumptions include that they increase the predictability of custody decisions, eliminate perceived gender biases, and increase the likelihood that fathers will pay child support. *Id.* at 328–29.

³³ Karmely, *supra* note 32, at 361.

³⁴ *Id.* at 330 (noting a joint physical custody presumption will have the greatest impact on the 10% of custody cases involving parents who are unable to resolve their issues outside of court, and tend to be high-conflict); Greenberg, *supra* note 32, at 411 (noting research shows that approximately 75% of the contested custody cases that require judicial intervention are cases in which there is a history of domestic violence).

³⁵ *See* Greenberg, *supra* note 32, at 411–12. *See also* D. Lee Khachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1748, 1763 (1999) (noting two

even though a majority of state statutes do not contain an explicit presumption for joint custody, most of them “elevate shared parenting in other ways, including through ‘friendly parent’ preferences given to whichever parent is more willing to share custody.”³⁶

C. “Friendly Parent”

As state legislatures and family courts endorsed shared parenting through joint custody, “friendly parent” provisions also emerged.³⁷ Generally, “friendly parents” are cooperative and promote the child’s continued contact with the other parent, whereas “unfriendly parents” resist continued contact, make allegations, and are otherwise deemed “alienating.”³⁸ Under this analysis, custody is more likely to be given to a “friendly parent.”³⁹ Joint custody and “friendly parent” provisions are tightly intertwined. For instance, in states like California—where the statutory scheme limits joint custody to cases of parental agreement but also has a “friendly parent” provision—a parent who expresses disagreement with joint custody risks a court award of sole custody to the “friendly” parent who is willing to share.⁴⁰

As will be discussed *infra* Section II.C, the “friendly parent” framework is problematic in domestic violence cases because it has been used to penalize mothers who are deemed “unfriendly” upon expressing legitimate concerns about a father’s involvement with their

prominent researchers on joint custody, Judith Wallerstein and Janet R. Johnston, concluded that “ongoing conflict between divorced parents has especially detrimental effects on the children and that children are particularly at risk when they have frequent and continuing access to both parents who are hostile and uncooperative with each other”).

³⁶ Joan S. Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward For Family Law* 32 (GWU Legal Studies Research Paper No. 2021-12, GWU Law School Public Law Research Paper No. 2021-12, 2021), <https://ssrn.com/abstract=3805955> [<https://perma.cc/LM2D-BST8>] [hereinafter Meier, *Denial of Family Violence in Court*]. See State Law Spreadsheet, https://drive.google.com/file/d/1eEMq_NtSBGrwR6Ofs5mlObsQuAUIfz3y/view?usp=sharing, (created by Joan Meier and on file with author) [hereinafter State Law Spreadsheet].

³⁷ Dalton, *supra* note 27, at 277.

³⁸ Margaret K. Dore, *The “Friendly Parent” Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41, 44 (2004).

³⁹ *Id.*

⁴⁰ See Dalton, *supra* note 27, at 277.

child.⁴¹ Nevertheless, “friendly parent” provisions have seen a rise comparable to that of joint custody statutes, with the American Bar Association reporting that as of 2008, thirty-two states include “friendly parent” presumptions in their best interest analysis.⁴² As of March 2020, forty-two states have included “friendly parent” provisions as a factor in the analysis of the best interests of the child.⁴³

II. Gardner and Evolution of PAS to PA (Among Other Terms): Tension with Domestic Violence

A. Parental Alienation Syndrome (PAS)

1. History

A problematic twist on the “friendly parent” preference emerged in the form of “parental alienation syndrome,” a theory technically formulated outside the men’s rights movement but nevertheless embraced by fathers’ rights groups.⁴⁴ In 1985, the child psychiatrist Richard Gardner advanced the term “parental alienation syndrome” (PAS) to describe a phenomenon he allegedly observed in custody disputes involving children rejecting their noncustodial parent (generally the father) solely due to the hostile custodial parent (generally the mother) brainwashing the children to falsely believe they had been sexually abused by the noncustodial parent.⁴⁵ According to Dr. Gardner, PAS only arises

⁴¹ Garvin, *supra* note 16, at 187.

⁴² Emmaline Campbell, Note, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA WOMEN’S L.J. 41, 46 (2017).

⁴³ Meier, *Denial of Family Violence in Court*, *supra* note 36, at 32 n.96; State Law Spreadsheet, *supra* note 36.

⁴⁴ Dorchon Leidholdt & Lynn Beller, *Domestic Violence and the Law: A New York State-Centric Overview and Update*, N.Y. STATE BAR ASS’N J., May 2017, at 18; Dore, *supra* note 38, at 51–52 (“Parental Alienation Syndrome contains three features of a friendly parent analysis. First, the alleged disorder is caused by one parent’s ‘indoctrination’ of the child against the other parent. As with a friendly parent analysis, one parent fails to support the child’s relationship with the other parent. Second, the outcomes can be the same. Where there is a problem with visitation, a solution is to transfer custody to the other parent. Third and perhaps most importantly, Parental Alienation Syndrome, like the friendly parent concept, presents a paradox. Richard Ducote states: ‘One irony of . . . “PAS” is that the increased existence of valid evidence of true sexual abuse leads Gardner and his devotees to more fervently diagnose “PAS.” Thus, “PAS” is the criminal defense attorney’s dream, since the greater the proof of the crime, the greater the proof of the defense.’”); Adams, *supra* note 25, at 323–24.

⁴⁵ Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 LAW & INEQ. 5, 5 (2011); Allison M. Nichols, Note, *Toward A Child-Centered Approach to Evaluating Claims of*

in the context of child custody disputes and its diagnosis rests upon eight “symptoms” that manifest in the child and preferred parent.⁴⁶ These symptoms include the child’s campaign of denigration against the parent, weak or frivolous rationalizations for the denigration of the parent, and reflexive support for the alienating parent.⁴⁷ Deeply concerning about PAS is that when “[r]eflecting on these eight steps with a gender perspective, . . . [c]ontrary to [what] PAS advocates argue, these eight steps may be characteristics of the behavior of a person who has been abused or experienced domestic violence.”⁴⁸

Upon diagnosing a child with PAS, Dr. Gardner classified the syndrome in the child, as well as the “alienating” parent, into the mild, moderate, or severe category.⁴⁹ He recommended that when the “alienating” parent is in the “severe” category, custody should be changed to the other parent.⁵⁰ The impetus for the newly emerged syndrome, according to Dr. Gardner, was the replacement of the tender years presumption with the “best interests of the child” analysis, combined with the state trend towards joint custody provisions.⁵¹ In response, Dr. Gardner asserted, mothers who were no longer “guaranteed” sole custody sought to maintain leverage in custody proceedings by indoctrinating their children with the false belief that their father had sexually abused them.⁵²

Alienation in High-Conflict Custody Disputes, 112 MICH. L. REV. 663, 664 (2014); Connors, *supra* note 19, at 11.

⁴⁶ Kelly Schwartz, *The Kids Are Not All Right: Using the Best Interest Standard to Prevent Parental Alienation and a Therapeutic Intervention Approach to Provide Relief*, 56 B.C. L. REV. 803, 806 (2015).

⁴⁷ *Id.* at 806; Nichols, *supra* note 45, at 664.

⁴⁸ Maria Sol Bravo, *PAS Application Despite of its Rejection Three Axes that Serve as the Basis for its Permanence* 4 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546223 [<https://perma.cc/38EN-3EQE>].

⁴⁹ Holly Smith, Note, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. MASS. L. REV. 64, 72 (2016). *See also* Dore, *supra* note 38, at 50–51.

⁵⁰ Dore, *supra* note 38, at 51. *See* Johnston, *supra* note 8, at 759 (“In severe cases of PAS, he recommends changing custody (*i.e.*, placing the child with the ‘hated’ parent) as well as other punitive measures that have resulted, for instance, in the child’s detention in juvenile hall, and/or the jailing and fining of the offending parent.”).

⁵¹ Smith, *supra* note 49, at 68; Adams, *supra* note 25, at 325–26.

⁵² Smith, *supra* note 49, at 68; Adams, *supra* note 25, at 325–26.

Therefore, although Dr. Gardner formulated PAS as facially gender neutral, he claimed mothers were the instigators of alienation in ninety percent of PAS cases.⁵³ Further revealing the gendered bases of PAS, Gardner wrote that a child sexual abuse allegation “is probably one of the most powerful vengeance maneuvers ever utilized by a woman whose husband has left her.”⁵⁴ Despite Dr. Gardner’s later alterations to the disorder to reflect a more gender neutral view of the alienator, many of the theory’s supporters continue to cast the mother as the alienator.⁵⁵ Although the introduction of PAS was not the first time a child’s rejection of a parent had been “tied to a pathological alignment between an angry parent and the child,”⁵⁶ and despite its questionable validity,⁵⁷ PAS has taken root in both family law and public discourse. As noted by law professor Carol Bruch, since Gardner’s invention of the term “PAS,” it has permeated the public sphere: “The media, parents, therapists, lawyers, mediators, and judges now often refer to PAS, many apparently assuming that it is a scientifically established and useful mental health diagnosis.”⁵⁸

⁵³ Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES J. 38, 41 (1997).

⁵⁴ Nichols, *supra* note 45, at 667. See Margo Lindauer, *Damned If You Do, Damned If You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 AM. U. J. GENDER SOC. POL'Y & L. 797, 808–09 (2012) (describing Gardner’s explanation of PAS as “a syndrome ‘whereby vengeful mothers’ use child abuse allegations to punish their ex-partners and in turn ensure that their exes do not receive custody”); Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: A Research Review*, NAT’L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 3 (2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_PASUpdate.pdf [<https://perma.cc/JLV6-2E3M>] (describing Gardner’s assertion that women lie about child sexual abuse in custody cases because “hell hath no fury like a woman scorned”).

⁵⁵ Smith, *supra* note 49, at 77.

⁵⁶ See Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 235 (2009) [hereinafter Meier, *A Historical Perspective*] (noting that divorce researchers Judith Wallerstein and Joan Kelly first identified an “‘unhealthy’ alignment” between an angry parent and an older child or adolescent, but this theory did not pervade family court culture at that time). See also Johnston, *supra* note 8, at 758–59; Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 12 (2010).

⁵⁷ Smith, *supra* note 49, at 69 (noting that Gardner’s development of PAS was based only on his personal observations from his psychiatric private practice). See also Lindauer, *supra* note 54, at 809.

⁵⁸ Adams, *supra* note 25, at 326.

2. Admissibility and the DSM-5

As this Note will demonstrate, PAS should not be admissible in court because it lacks both scientific validity and general acceptance in the scientific community. Nevertheless, the reality is that the syndrome and its variations, discussed *infra* Section II.B, still frequently enter and play a prominent role in family court proceedings.

While legal and mental health professionals acknowledge that some parents might attempt to alienate their children from the other parent, they generally do not recognize the specific construct of “parental alienation syndrome,” deeming it scientifically invalid.⁵⁹ In child custody cases, state law oversees the admissibility of expert testimony, with most states having adopted the Daubert test, the Frye test, or a mix of both.⁶⁰ While the Daubert regime examines a broader set of factors aimed at assessing the validity of the scientific testimony, the admissibility standard under the traditional Frye test asks whether the basis of the expert’s opinion is “generally accepted” in the relevant scientific community.⁶¹ PAS remains inadmissible regardless of which of these standards a state employs.⁶²

First, PAS is inadmissible under the Daubert standard because it fails to meet the requirements for validity on several grounds, including that: Gardner based his theory solely on personal observations of his own patients without any statistical analysis, the majority of his work was self-published or published in journals that lack peer-review, and

⁵⁹ See Daniel G. Saunders & Kathleen Coulborn Faller, *The Need to Carefully Screen for Family Violence When Parental Alienation Is Claimed*, 46 MICH. FAM. L.J. 7, 7 (2016).

⁶⁰ Nichols, *supra* note 45, at 666; Smith, *supra* note 49, at 78.

⁶¹ See *Frye v. United States*, 293 F.1013, 1014 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 580 (1993). See also *Frye Standard*, CORNELL LAW SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/frye_standard [<https://perma.cc/LHM9-J2YH>]; *Daubert Standard*, CORNELL LAW SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/Daubert> [<https://perma.cc/3GQY-D2XL>] (“Under the *Daubert* standard, the factors that may be considered in determining whether the methodology is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.”).

⁶² Rana Fuller, *How to Effectively Advocate for Battered Women When Systems Fail*, 33 WM. MITCHELL L. REV. 939, 958 (2007); Jennifer Hault, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 CHILD. LEGAL RTS. J. 1, 1–2 (2006) (noting that “science, law, and policy all support PAS’s present and future inadmissibility”).

finally, his findings have never been replicated.⁶³ Second, PAS also fails to meet the Frye standard.⁶⁴ In the 2000 case of *People v. Fortin*,⁶⁵ a New York county court assessed the admissibility of PAS testimony under *Frye* for the first time.⁶⁶ Although Dr. Gardner himself testified at the trial, the court found PAS to be inadmissible because the defendant had not demonstrated that the relevant professional community generally accepted PAS.⁶⁷ Given that PAS fails to satisfy either the Daubert or Frye standards, it is unsurprising that every court that has actually ruled on the admissibility of PAS found it inadmissible because it is scientifically invalid.⁶⁸

Furthermore, the medical community generally does not recognize PAS as a valid disorder. Tellingly, the American Medical Association, the American Psychological Association, and the American Psychiatric Association (APA) all do not accept PAS, and the Diagnostic and Statistical Manual of Mental Disorders (DSM) excluded PAS from its

⁶³ See Smith, *supra* note 49, at 80–81 (explaining why two recent studies conducted in an attempt to validate the existence of PAS fail to satisfy the Daubert factor requiring support of empirical research to test the theory). See also Scott & Emery, *supra* note 28, at 98; Smith & Coukos, *supra* note 53, at 41; Nichols, *supra* note 45, at 674–76.

⁶⁴ Fuller, *supra* note 62, at 960.

⁶⁵ *People v. Fortin* is also significant as one of only two decisions to set precedent on the issue of PAS's evidentiary admissibility, the other being the 1997 case of *People v. Loomis*. See Houlst, *supra* note 62, at 3–4. Both cases held PAS to be inadmissible, originated in New York State criminal court, and concerned the defense seeking to introduce PAS testimony in contexts where a man was accused of sexually abusing children. *People v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Co. Ct. 2000), *aff'd*, 735 N.Y.S.2d 819 (N.Y. App. Div. 2d Dept. 2001); *People v. Loomis*, 658 N.Y.S.2d 787, 787–88 (N.Y. Co. Ct. 1997).

⁶⁶ *People v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Co. Ct. 2000). See Smith, *supra* note 49, at 79.

⁶⁷ Schwartz, *supra* note 46, at 810. See also Smith, *supra* note 49, at 79–80 (noting that while testifying, “Dr. Gardner revealed that all but one of the forty three books he had written on parental alienation had been published through his own corporation.”).

⁶⁸ Brief for Domestic Violence Legal Empowerment and Appeals Project et al. as Amici Curiae Supporting Plaintiff-Appellant, at 6, Anonymous v. Anonymous & Anonymous (N.Y. 2019) [<https://perma.cc/QKT7-Q3RJ>] [hereinafter DV LEAP brief]. The Amicus Brief provides a list of published and unpublished decisions holding PAS to be inadmissible. See also, e.g., Snyder v. Cedar, No. NNHCv010454296, 2006 WL 539130, at *7–8 (Conn. Super. Ct. Feb. 16, 2006) (“The court finds that ‘parental alienation syndrome’ has no scientific validity at this time.”); NK v. MK, 851 N.Y.S.2d 71 (N.Y. Sup. Ct. 2007) (“This court does not believe that there is a generally accepted diagnostic determination or syndrome known as ‘parental alienation syndrome.’”). *Id.* at 64.

most recent publication.⁶⁹ The DSM, or the “bible of psychiatry”⁷⁰ as it is known to some, functions as the authoritative guide to psychiatric diagnoses for mental health professionals in the United States and around the world.⁷¹ In the DSM-5, the most recent version of the guide, the APA refused to include PAS as a disorder.⁷² This rejection was significant because at the time of the previous version’s publication in 1994, PAS was a nascent theory lacking sufficient research to support its inclusion.⁷³ Therefore, the exclusion of PAS from the subsequent version of the DSM released nearly twenty years later, despite a strong lobbying campaign for its inclusion, is a clear sign that PAS lacks general acceptance within the psychiatric community.⁷⁴

Affirming the inadmissibility of PAS, the National Council of Juvenile and Family Court Judges (NCJFCJ) explicitly stated in 2006 that PAS is “discredited” and any testimony pertaining to PAS should “be ruled inadmissible and/or stricken from the evaluations report[.]”⁷⁵ Nevertheless, in the absence of objections or motions to exclude the testimony, some courts that follow the Frye or Daubert tests for the admissibility of

⁶⁹ Smith, *supra* note 49, at 75-76; Hoult, *supra* note 62, at 5-6.

⁷⁰ Nichols, *supra* note 45, at 672.

⁷¹ See *DSM-5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> [<https://perma.cc/ZVM3-ZQ86>]. The APA explains the process that led to revision of the DSM, including the Task Force and Work Groups involved, and how decisions regarding changes were made. See also Smith, *supra* note 49, at 75.

⁷² Smith, *supra* note 49, at 76-77 (explaining that although Dr. Gardner passed away in 2003, a group of mental health professionals submitted two proposals to the DSM-5 Task Force of the APA for the inclusion of PAS in the DSM-5; however, in a December 1, 2012 news release, the APA explicitly listed PAS as a disorder excluded from the DSM-5).

⁷³ Smith, *supra* note 49, at 96; Nichols, *supra* note 45, at 672-73.

⁷⁴ Myrna S. Raeder, *Preserving Family Ties for Domestic Violence Survivors and Their Children by Invoking a Human Rights Approach to Avoid the Criminalization of Mothers Based on the Acts and Accusations of Their Batterers*, 17 J. GENDER RACE & JUST. 105, 121 (2014); Smith, *supra* note 49, at 96; Nichols, *supra* note 45, at 673; Barry Goldstein, *Why the Official Rejection of PAS Matters*, NAT’L ORG. FOR MEN AGAINST SEXISM (NOMAS) (Nov. 12, 2015), <https://nomas.org/official-rejection-pas-matters/> [<https://perma.cc/GUJ2-GL37>] (“Now that all this time has passed, and the proponents have had the opportunity to make whatever case they have, the rejection of PAS by the official professional organization that oversees mental health issues should be devastating to any attempt to continue relying on PAS.”).

⁷⁵ Fuller, *supra* note 62, at 957.

scientific evidence have admitted evidence of PAS.⁷⁶ Furthermore, even when expert evidence about the syndrome is not admitted, allegations of PAS can gain enormous traction and greatly influence a custody decision.⁷⁷ Therefore, PAS, and the concepts underlying it, remain a relevant concern in child custody proceedings in family courts

B. Parental Alienation (PA)

Although PAS has since been reformulated to sound more gender-neutral, courts and advocates continue to apply these reformulations in harmful ways during custody proceedings that involve domestic violence allegations.⁷⁸

Some researchers, courts, and custody evaluators, motivated in part to avoid the controversy and rulings of inadmissibility surrounding PAS, have adopted other terminology, including “Parental Alienation” (PA), the “alienated child,” “Parental Alienation Disorder” (PAD), or “parental gatekeeper” to describe the same phenomenon.⁷⁹ Although PA does not have a “universal clinical or scientific definition,” it generally describes the notion “that a child’s fear or rejection of one parent (typically the non-custodial parent), stems from the malevolent influence of the preferred (typically custodial)

⁷⁶ Schwartz, *supra* note 46, at 809–10; Nichols, *supra* note 45, at 679. For a list of cases in which courts have questioned the admissibility of PAS or allowed its application while avoiding the admissibility question, see Meier, *A Historical Perspective*, *supra* note 56, at 240.

⁷⁷ See e.g., Meier, *A Historical Perspective*, *supra* note 56, at 240 (describing *Licata v. Licata*, 2003, where the evaluator found PAS because the mother opposed joint custody, was once overheard saying she did not want to attend the child’s event if the father would be present, and alleged domestic violence). See also, *Wolf v. New Jersey*, No. CV 17-2072, 2018 WL 1942522 (D.N.J. Apr. 23, 2018) (giving custody to a father who alleged PAS).

⁷⁸ See Meier & Dickson, *supra* note 7, at 316.

⁷⁹ Meier, *A Historical Perspective*, *supra* note 56, at 245 (noting Joan B. Kelly and Janet R. Johnston, as well as Leslie M. Drozd and Nancy Olesen, as leading researchers spearheading this trend); Nichols, *supra* note 45, at 668 (noting some of the theory’s supporters have shifted to using the term “Parental Alienation Disorder” (PAD), which includes a diagnostic criteria virtually identical to those outlined in Gardner’s PAS framework); Peter G. Jaffe, Dan Ashbourne, & Alfred A. Mamo, *Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of Intervention*, 48 FAM. CT. REV. 136, 137 (2010) (“the concept of alienation has a rich history with varying redefinitions—from ‘pathological alignment’ (Wallerstein & Kelly, 1980) to PAS (Gardner, 1992) to the ‘alienated child’ (Kelly & Johnston, 2001)”); Meier, *Denial of Family Violence in Court*, *supra* note 36, at 58 (“New terminology, such as ‘visitation refusal/resistance’ is sometimes used to indicate greater neutrality as to cause; though other new terms, such as ‘gatekeeping,’ continue to hold the custodial parent responsible for undermining the other parent’s relationship with a child.”).

parent.”⁸⁰ PA proponents do not limit the theory’s focus to instances of false sexual abuse allegations, but rather apply it to a broader category of children who “*resist or refuse to have contact* with a parent.”⁸¹ Researchers leading the charge to, at least theoretically, differentiate PA from PAS have done so in a number of ways,⁸² including the following: acknowledging that there are usually a variety of reasons for why a child may reject a parent, not solely the influence of the favored parent as PAS posits;⁸³ eliminating Gardner’s harsh remedy of changing custody to the rejected parent and instead calling for “individualized assessments of both the children and the parents’ parenting”;⁸⁴ and describing PA as focusing on the acts of the alienating parent in contrast to PAS’s focus on the acts of the child that contribute to the denigration of the rejected parent.⁸⁵

Despite these attempts at establishing genuine conceptual differences between PA and PAS, many experts use the two terms synonymously.⁸⁶ The theoretical underpinnings of PAS still largely influence PA, and clear-cut differences between the two often remain tenuous.⁸⁷ The slight difference in names also has little effect, for as Professor Joan Meier

⁸⁰ DV LEAP Brief, *supra* note 68, at 2–3.

⁸¹ Johnston & Sullivan, *supra* note 18, at 275.

⁸² DV LEAP Brief, *supra* note 68, at 6.

⁸³ Meier, *U.S. Child Custody Outcomes*, *supra* note 9, at 93; Lindauer, *supra* note 54, at 809; Silberg & Dallam, *supra* note 6, at 144 (noting that Leslie M. Drozd, Nancy Olesen, and Michael Saini propose a multi-hypotheses approach “to consider all potential factors implicating a child’s relationship with a rejected parent to avoid the simplified attribution of blame advocated by Gardner.”). *See also* Demosthenes Lorandos, *Parental Alienation in U.S. Courts, 1985 to 2018*, 58 FAM. CT. REV. 322, 324 (2020).

⁸⁴ Meier, *A Historical Perspective*, *supra* note 56, at 246. *See also* Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 251, 254, 264 (2001).

⁸⁵ McGlynn, *supra* note 17, at 533; Fidler & Bala, *supra* note 56, at 12. Fidler and Bala note that researchers Amy Baker and Douglas Darnall likewise emphasize PA as focusing on the alienating parent’s behaviors in contrast to PAS and Gardner’s focus on the child’s reaction.

⁸⁶ Nichols, *supra* note 45, at 668.

⁸⁷ Lindauer, *supra* note 54, at 809. *See also* Meier, *U.S. Child Custody Outcomes*, *supra* note 9, at 93 (“Despite the more refined discussions of parent rejection in some literature, however, these nuances rarely, if ever, appear in practice. When children reject contact, the concept of alienation is still regularly used to focus blame on the preferred parent, as did Gardner and PAS. Other causes of a child’s rejection of a parent, including direct abuse, witnessing their mother’s abuse, or other forms of bad parenting . . . are routinely ignored.”).

explains, “the reality is that whatever some researchers may say about the differences between PAS and PA, in practice, PA is rarely understood to be different. Indeed, some proponents of alienation theory simply cite to both PAS and PA without distinction.”⁸⁸

The use of the term PA has also been one way for experts to overcome the inadmissibility of PAS, as some courts have permitted evidence of PA that strongly mirrors PAS so long as it is not framed clinically as a “syndrome.”⁸⁹ While some courts have deemed PAS inadmissible, it appears neither family courts nor appellate courts have ruled on the admissibility of PA “despite multiple attempts by capable lawyers.”⁹⁰ The difficulty in challenging courts’ allowance of PA to deny abuse claims is twofold: first, family courts generally accept looser evidentiary standards; and second, family courts tend to treat PA as a fact-based and gender-neutral theory.⁹¹ Regardless of whether it is truly distinct from PAS, it is clear PA holds great weight among family court personnel. Psychologist Richard A. Warshak notes that since the late 1990s, “the number of trial and appellate cases in which court-appointed evaluators testified on parental alienation or in which courts determined that parental alienation was material, probative, and relevant to the case has grown considerably.”⁹²

Describing the parent-child relationship using these diagnostic and evaluative labels, whether it be PAS, PA, or PAD, as a replacement for observable behaviors and evidence

⁸⁸ Meier, *A Historical Perspective*, *supra* note 56, at 247. *See also* Silberg & Dallam, *supra* note 6, at 144 (“For example, Bernet (2008) suggests that parental alienation is a ‘relational disorder’ rather than a syndrome; yet, it uses almost identical criteria as Gardner’s original conceptualization. Many newer formulations of parental alienation also rely on Gardner’s simplistic view of the preferred parent being primarily to blame. . .”).

⁸⁹ Stephen J. Yanni, Note, *Experts as Final Arbiters: State Law and Problematic Expert Testimony on Domestic Violence in Child Custody Cases*, 116 COLUM. L. REV. 533, 563 (2016); Nichols, *supra* note 45, at 680.

⁹⁰ Meier, *Denial of Family Violence in Court*, *supra* note 36, at 65; Meier & Dickson, *supra* note 7, at 319.

⁹¹ Meier & Dickson, *supra* note 7, at 319.

⁹² Richard A. Warshak, *When Evaluators Get It Wrong: False Positive IDs and Parental Alienation*, 26 PSYCHOL. PUB. POL’Y & L. 54, 54–55 (2020). *See also* Meier & Dickson, *supra* note 7, at 317. *See, e.g.*, DV LEAP brief, *supra* note 68, at 1 (noting Amici’s support of a petition for review of an earlier decision to award full legal and primary physical custody of the parties’ child to the father both because of concern for the parties’ son and because the case is emblematic of how the theory of parental alienation (“PA” or “alienation theory”) is used in family courts in New York and nationwide); *In re Marriage of J.H. & Y.A.*, No. A120227, 2009 WL 2106145, at *1 (Cal. Ct. App. July 17, 2009) (granting sole custody to father who alleged alienation against mother); *Martin v. Martin*, 952 N.W.2d 530, *appeal denied*, 949 N.W.2d 716 (2020) (granting sole custody to father in custody case where mother alleged domestic violence and father alleged parental alienation).

in child custody cases has created what some researchers call “an ideology that replaces science.”⁹³ This problem is especially acute in the context of custody cases involving a history of domestic violence, leading the NCJFCJ to advise in a bench book that in such cases, “a careful fact-based inquiry, unlike applying the PAS label, is likely to yield testimony that is more accurate and relevant.”⁹⁴ The NCJFCJ further notes that “it is often legitimate for the partner of an abusive parent to try to protect the children from exposure to abuse, or to try to secure his or her own safety from the abusive partner by limiting that partner’s contact with the children[,]” and as such the application of PAS/PA in domestic violence cases is wholly inappropriate.⁹⁵

C. Incompatibility Between Domestic Violence and PAS/PA, “Friendly Parent,” and Joint Custody

Regardless of any potential merits of joint custody, “friendly parent,” and “alienation” discourse more generally, it becomes clear that all of these concepts are inherently problematic in the context of custody disputes involving domestic violence or child abuse.⁹⁶ In the context of child custody disputes, fathers have often invoked PAS/PA as a defense to allegations of domestic violence and child sex abuse.⁹⁷ As courts in the 1980s started to ascribe more weight to family violence as a factor in custody cases, fathers’ rights

⁹³ Madelyn S. Milchman et al., *Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique*, 58 FAM. CT. REV. 340, 340 (2020).

⁹⁴ Smith, *supra* note 49, at 83.

⁹⁵ Campbell, *supra* note 42, at 45.

⁹⁶ Although the focus of this Note is spouse or partner domestic violence, and PA has moved away from Gardner’s original focus on accusations of child sexual abuse, it is important to note there is a strong correlation between allegations of adult domestic violence and child abuse. See Jennifer Jack, *Child Custody and Domestic Violence Allegations: New York’s Approach to Custody Proceedings Involving Intimate Partner Abuse*, 5 ALB. GOV’T L. REV. 885, 896 (2012) (“[T]he majority of studies done regarding the connection between domestic violence and child abuse indicate that when domestic violence is present, child abuse is also likely to be present.”); Linda Quigley, *The Intersection Between Domestic Violence and the Child Welfare System: The Role Courts Can Play in the Protection of Battered Mothers and Their Children*, 13 WM & MARY J. WOMEN & L. 867, 869 (2007) (“[I]n a national survey of over 6,000 families, the researchers found that 50% of the men who frequently assaulted their wives also frequently abused their children.”); Stark et al., *supra* note 8, at 35 (“[T]here is a strong co-occurrence of child abuse/neglect and domestic violence; it has been found that among approximately 30 percent to 60 percent of families where domestic violence or child maltreatment has been identified, there is a significant likelihood that both forms of abuse occur.”).

⁹⁷ Johnston, *supra* note 8, at 760.

activists responded by elevating parental alienation.⁹⁸ According to fathers' rights groups, mothers routinely falsely allege domestic violence or child abuse,⁹⁹ and it is false allegations and parental alienation that are the real danger.¹⁰⁰ However, studies indicate that in reality a relatively small percentage of mothers falsely allege domestic violence in custody cases where such allegations are made.¹⁰¹ Consequently, "application of the syndrome essentially reversed the allegations of abuse, implying that the abuse was, in effect, perpetrated by the custodial parent whose allegations alienated the child from the non-custodial parent."¹⁰² It is for this reason that Paul J. Fink, then-president of the Leadership Council on Child Abuse and Interpersonal Violence, asserted that "PAS is partly if not wholly responsible for the many family court decisions in which battered mothers lose custody to abusive men."¹⁰³

Nevertheless, fathers' rights groups' efforts to promote PAS/PA have been bolstered by their fusing of parental alienation with custody law's clear preference for sustained child contact with both parents following a divorce, often advanced through "friendly parent" provisions.¹⁰⁴ Yet the framework of "friendly parent," like PAS/PA, operates in direct contravention of the dynamics of domestic violence. Through the lens of "friendly parent,"

⁹⁸ Scott & Emery, *supra* note 28, at 88.

⁹⁹ Stark et al., *supra* note 8, at 55.

¹⁰⁰ Kelly Alison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM. & MARY J. WOMEN & L. 525, 532 (2015) ("FRGs train custody decision-makers to screen for PAS and mitigate its effects on children by modifying custody, and they attempt to reframe the issue of IPV by creating a presumption that mothers alleging IPV are lying and that their false allegations are evidence of PAS, an act of child abuse that should result in a change in custody in favor of the father."). *Id.* at 539.

¹⁰¹ Daniel G. Saunders et al., *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations*, 114 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/238891.pdf> [<https://perma.cc/3ZZW-FBJR>] (noting on average professionals as a whole estimated that thirty-five percent of fathers and eighteen percent of mothers make false allegations of domestic violence in custody cases involving domestic violence allegations). Saunders recommends that future research investigate and substantiate the actual rates of false allegations in domestic violence cases and expresses concern that custody evaluators and private attorneys estimate higher rates of false allegations than other professional sub-groups.

¹⁰² Adams, *supra* note 25, at 316.

¹⁰³ Raeder, *supra* note 74, at 121.

¹⁰⁴ Scott & Emery, *supra* note 28, at 88–89.

an abusive father who promotes shared parenting, thereby creating an avenue for continued contact and means of abusing his former partner, may be exalted as “friendly.”¹⁰⁵ Meanwhile, a mother who legitimately seeks to shield herself and her child from her abusive partner is deemed uncooperative and “unfriendly,” harming her custody prospects.¹⁰⁶ For these same reasons, according to psychologist Peter Jaffe, while shared parenting may be an ideal in cases where the parents voluntarily choose it, in cases involving domestic violence, a legal presumption of shared parenting will be harmful for the victimized adult and children.¹⁰⁷

As debates over the faults and merits of these various custody schemes wage on, rhetoric from alienation discourse continues to influence family court proceedings. Domestic violence organizations such as the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) report being “flooded with pleas for help from battered women litigating custody, reporting that court-appointed custody evaluators and judges do not credit their claims of abuse and instead seek to maximize fathers’ access to children.”¹⁰⁸ Furthermore, this dynamic unfolds regardless of whether the term alienation or PAS is used.¹⁰⁹ As mentioned previously, there “appears to be a trend toward reversal of custody from protective mothers to allegedly abusive fathers, which has been estimated to occur in up to 58,000 cases per year.”¹¹⁰ The urgency of the need to address the use of PAS/PA as a tool for obscuring genuine claims of domestic violence and abuse is highlighted by the theory’s penetration of family courts not only throughout the United States but across the world.¹¹¹

¹⁰⁵ Dalton, *supra* note 27, at 277.

¹⁰⁶ Dalton, *supra* note 27, at 277; Daniel G. Saunders, *State Laws Related to Family Judges’ and Custody Evaluators’ Recommendations in Cases of Intimate Partner Violence: Final Summary Overview*, NAT’L INST. OF JUST. 2–3 (Dec. 30, 2016) [hereinafter Saunders, NIJ Study 2016].

¹⁰⁷ Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 188 (2014) (drawing upon Jaffe’s work with domestic violence victims, perpetrators, and children for over forty years in both family and criminal courts).

¹⁰⁸ Meier & Dickson, *supra* note 7, at 313.

¹⁰⁹ Meier, *U.S. Child Custody Outcomes*, *supra* note 9, at 93.

¹¹⁰ Meier & Dickson, *supra* note 7, at 313.

¹¹¹ Jacqueline Campbell, *Children Resisting Contact with a Parent Due to Abuse, Alienation, or Other Causes: Can a Proactive Role for Lawyers Contribute to Better Outcomes?*, 58 FAM. CT. REV. 456, 459 (2020) (noting how over 300 family law academics, family violence experts, and child development and child abuse experts and organizations from thirty-five countries endorsed a Collaborative Memo of Concern submitted to the World

III. Empirical Proof of Gender Bias and Legislative Reform Efforts

Parts I and II of this Note established how the interrelated factors of joint custody, “friendly parent,” PAS, and PA work against mothers in custody cases involving domestic violence. Section III.A reviews the empirical literature establishing the gender-biased manner in which cross-allegations of domestic violence and parental alienation play out in family courts. Section III.B then reviews previous and current legislative efforts to better account for the harm of domestic violence in custody proceedings, and evaluates the strengths and weaknesses of the legislation.

A. Parental Alienation and Gender Bias (Empirical Studies)

Although domestic violence survivor advocates have long recognized the gender-biased manner in which courts treat competing claims of domestic violence and parental alienation, it is only recently that this bias was established empirically on a nationwide scale. In January 2020, Professor Joan Meier published the outcomes of an empirical study spanning ten years of U.S. cases involving abuse and alienation claims.¹¹² This study confirms the results of several previous, smaller scale studies that had revealed gender bias in family courts’ handling of custody cases involving allegations of parental alienation, each of which will be discussed in turn.

First, a 2011 study of eighteen custody cases involving parental alienation allegations in Minnesota courts led the author to conclude that these courts appeared to “exhibit anti-mother gender bias.”¹¹³ In each case, fathers used PAS to gain favorable custody judgments “while mothers ha[d] consistently been cast as alienating parents and deprived of custody of their children.”¹¹⁴

Second, Meier and her co-author Sean Dickson published an initial empirical pilot study in 2017 examining 238 custody cases involving allegations of domestic violence

Health Organization on July 10, 2019, expressing concern that the parental alienation designation “is frequently employed to divert attention from domestic violence and abuse and other evidence relevant to the best interests of the child”).

¹¹² Meier, *U.S. Child Custody Outcomes*, *supra* note 9, at 92.

¹¹³ See Berg, *supra* note 45, at 6.

¹¹⁴ *Id.*

and/or child abuse and alienation.¹¹⁵ The results showed both that fathers were more likely to bring alienation claims than mothers and that fathers had significantly higher win rates than mothers who did so.¹¹⁶ Furthermore, a father's likelihood of success was actually higher in a case where he was accused of abuse and cross-claimed against the mother for alienation than in a case without abuse claims.¹¹⁷ Further illustrating gender bias in the custody decisions, in cases where the court credited mothers' allegations of abuse but also found the mother to be alienating, "credited alienation trumped abuse."¹¹⁸

Third, building on the aforementioned empirical endeavors, a study published in 2019 examined twenty-seven custody cases across the United States.¹¹⁹ The study specifically focused on "turned around" cases in which a court initially refused to believe allegations of abuse against one parent and ordered the child into the custody of the abusive parent, and a second court then validated the abuse and reversed the custody decision.¹²⁰ According to the study, in the initial decision, the court granted fifty-nine percent of perpetrators sole custody, with the remaining getting joint custody or unsupervised visitation.¹²¹ Explaining this phenomenon, the authors highlight the initial judges' high levels of reliance on the reports of custody evaluators and guardians *ad litem*, the majority of whom discredited the abuse allegations by pathologizing the mothers advocating for the safety of their children as alienating parents.¹²²

¹¹⁵ Meier & Dickson, *supra* note 7, at 321.

¹¹⁶ *Id.* at 323–24.

¹¹⁷ *See id.* at 323–24, 328.

¹¹⁸ *See id.* at 328–29 (“[W]hen the court believed the abuse *and* the father’s claim of alienation, the alienation trumped.”).

¹¹⁹ Silberg & Dallam, *supra* note 6, at 140.

¹²⁰ In the study, all the protective parents were female and the abusers were male, with sixty percent of mothers reporting having experienced domestic violence and seventy-eight percent of children having disclosed more than one type of abuse. Children remained in the court ordered custody of an abusive parent for an average of 3.2 years. *See id.* at 148.

¹²¹ *See id.* at 140, 150.

¹²² In seventy-eight percent of cases, a primary reason the judge gave custody to the perpetrator was that the mother either was not viewed as credible or she was alleged to have some form of pathology that called her credibility into question. *Id.* at 150. Two-thirds of mothers were pathologized for advocating for the safety of their children, with both custody evaluators and GALs tending to view mothers as fabricating the child abuse or incidents of violence in order to gain a tactical advantage. Accusations of PAS or PA by the evaluator compounded pathological labels. Factors working against the protective mother and in favor of the abuser

Finally, in January 2020, Meier published the first set of outcomes from her national empirical study spanning ten years of U.S. cases (4,388 custody cases) involving abuse (both partner violence and child abuse) and alienation claims.¹²³ In assessing the impact of parental alienation allegations in child custody cases, the study concluded that courts were eight percent less likely to credit mothers' domestic partner violence allegations when fathers cross-claimed alienation, a gap that increases to twenty-four percent when the domestic violence allegations are mixed with allegations of child abuse.¹²⁴ According to Meier, "[t]he fact that the same dynamic does not appear when the genders are reversed, i.e., fathers do not see a statistically significant reduction in the crediting of their abuse claims when mothers cross-claim alienation, supports the complaint that alienation in abuse cases is indeed deeply gendered and, it appears, weaponized to deny mothers' abuse claims against fathers."¹²⁵

The study's results also reveal an alarming relationship between alienation claims and the rate of mothers' custody losses. While mothers lost custody in fourteen percent of cases in which the courts credited the allegations of domestic violence against the father and there was no cross-alienation claim, this figure increased to thirty-five percent for cases in which the mother alleged domestic violence and the father cross-claimed alienation.¹²⁶ Albeit based on a small sample size, the court switched custody to the father in twenty-nine percent of cases in which the court credited both the alienation and domestic violence claims.¹²⁷ Finally, when mothers alleged domestic violence and the court credited fathers' alienation claims, mothers lost custody sixty percent of the time.¹²⁸ As a result, courts create

included the evaluators' bias against mothers reporting abuse and their lack of education in domestic violence and child abuse, as well as statutory legal presumptions in favor of joint custody and "friendly parent" provisions. *Id.* at 151–52, 157.

¹²³ Meier, *U.S. Child Custody Outcomes*, *supra* note 9, at 94. It should be noted that while the focus of this Note is on domestic violence and Meier's study includes domestic violence as a variable, her study primarily focuses on the penalty associated with child abuse allegations, particularly child sexual abuse.

¹²⁴ *Id.* at 96–97 (noting courts credited mothers claims of domestic violence forty-five percent of the time without PA, but only thirty-seven percent of the time when fathers' claimed alienation, with similar results holding for other categories of abuse).

¹²⁵ *Id.* at 100–01.

¹²⁶ *Id.* at 96, 98.

¹²⁷ *Id.* at 99.

¹²⁸ *Id.*

the perverse incentive for mothers to not disclose information about a father's abusive behavior or else face a substantial risk of losing custody.¹²⁹

Meier's national study reveals a gender bias that diminishes the importance of domestic violence and elevates parental alienation claims by fathers. The significance of her findings is compounded by multiple international studies published in 2020 that highlight the same gendered dynamic in family courts around the world.¹³⁰ For example, research in England and Wales,¹³¹ as well as Canada,¹³² has revealed a similarly gender-biased treatment of cases involving claims of parental alienation and domestic violence. Indeed, a pattern has been documented across seven Commonwealth and European countries whereby family

¹²⁹ For example, this bind was felt by Hera McLeod, a mother whose fifteen-month-old son was killed by her abusive ex-boyfriend on a court-ordered visit. See Samantha Schmidt, 'A Gendered Trap': When Mothers Allege Child Abuse by Fathers, the Mothers Often Lose Custody, Study Shows, WASH. POST (July 29, 2019), https://www.washingtonpost.com/local/social-issues/a-gendered-trap-when-mothers-allege-child-abuse-by-fathers-the-mothers-often-lose-custody-study-shows/2019/07/28/8f811220-af1d-11e9-bc5c-e73b603e7f38_story.html [<https://perma.cc/L4NR-5JGD>] ("I was terrified for my son, but I had to be careful about what I said in court . . . if I acted in any way like I didn't want my son to have access [to his father],' McLeod said."). See also Joyce, *supra* note 7 (citing Margaret Basset, the previous deputy director of the University of Texas at Austin Institute on Domestic Violence & Sexual Assault, who describes the resulting fateful choice: "If I'm going to court and alleging that my partner is abusive, I'm probably going to lose custody of the children. Do I go to court and risk that, or do I play the game the way it's set up?").

¹³⁰ Meier, *Denial of Family Violence in Court*, *supra* note 36, at 68 ("Concern about parental alienation being used to deny mothers' and children's abuse allegations has reached international critical mass with the 2020 publication of a European journal's Special Issue covering 8 different countries . . .").

¹³¹ Adrienne Barnett, *A Genealogy of Hostility: Parental Alienation in England and Wales*, 42 J. SOC. WELFARE & FAM. L. 18, 18 (2020) (examining how parental alienation progressed in the context of private family law from 2000 to the end of March 2019 in England and Wales, "[t]he case law revealed a high incidence of domestic abuse perpetrated by parents (principally fathers) who were claiming that the resident parents (principally mothers) had alienated the children against them, which raises questions about the purpose of PA").

¹³² Elizabeth Sheehy & Susan B. Boyd, *Penalizing Women's Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases*, 42 J. SOC. WELFARE & FAM. L. 80, 82, 88 (2020) (examining reported Canadian cases involving claims of PA and family violence from 2014–2018 covering all Canadian territories and provinces except for Quebec. The authors found mothers were more than twice as likely to be accused of PA than fathers, and women declared alienators were more likely to suffer negative changes to their custody than alienator fathers. As for the ninety cases where both PA and intimate partner violence (IPV) were alleged, Sheehy and Boyd report that the allegation of IPV was discounted in thirty-one percent of cases, neutralized in twenty-three percent of cases, and deemed irrelevant to children's best interests in forty percent of cases. These results led Sheehy and Boyd to claim that "[j]udges are more likely to focus on alienating behaviours than IPV when determining custody and access").

courts rely on parental alienation allegations to refute abuse allegations from mothers and children and to justify removal of the mother's custody.¹³³

With national and international empirical data now supporting what advocates have witnessed for years, namely that allegations of parental alienation are obscuring domestic violence allegations in the courtroom, it is time for legislatures to fully tackle this issue.

B. Domestic Violence: Legislative Approaches

Sections III.B.1 and III.B.2 review the two primary avenues through which domestic violence legislation has traditionally been approached, namely presumption statutes and factor statutes. Section III.B.3. then looks at current efforts to reform child custody legislation, specifically examining a national bill and legislation in two states. The strengths and shortcomings of these bills will be addressed and used to inform the legislative proposals presented in Part IV.

1. Avenue One: Rebuttable Presumption Bills

For decades, domestic violence survivor advocates have pushed for states to enact custody laws that appropriately account for the harm perpetrated by domestic violence and protect abused spouses and children. Some progress was achieved in 1990 when Congress unanimously passed H.R. Congressional Resolution 172, a concurrent resolution denouncing abuse and imploring states to adopt statutes establishing a rebuttable presumption in domestic violence custody cases (domestic violence presumption).¹³⁴ Many states heeded the call of this federal resolution and adopted a rebuttable presumption against granting custody to parents found to have perpetrated domestic violence.¹³⁵ Other

¹³³ Meier, *Denial of Family Violence in Court*, *supra* note 36, at 11 n.24 (“[P]apers from Italy, Spain, UK, Canada, U.S., Australia, New Zealand and Wales detail consistent family court problems for abused women and harmful impact of parental alienation claims.”).

¹³⁴ Smith & Coukos, *supra* note 53, at 40; Yanni, *supra* note 89, at 534; Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 606 (2001) [hereinafter Lemon, *Statutes Creating Rebuttable Presumptions*]; H.R.J. Res. 172, 101st Cong. (1994) (sponsored by Rep. Constance Morella and passed unanimously on Oct. 25, 1990) (“It is the sense of Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.”).

¹³⁵ Bajackson, *supra* note 16, at 332.

states adopted a model that designates domestic violence as a factor for judges to consider in custody proceedings.¹³⁶

Currently, approximately half of the states have statutes that create a rebuttable presumption against courts awarding sole or joint legal or physical custody to a parent who has engaged in domestic or family violence, as defined in each state's specific statute.¹³⁷ Domestic violence presumptions "shape the best-interests inquiry by prioritizing [evidence of] domestic violence over other relevant factors."¹³⁸ The presumption effectuates a burden-shift so that once the court finds that a parent committed domestic violence, the burden then falls on that parent to show that it is nevertheless in the child's best interests that the parent be awarded custody rights.¹³⁹

States have not applied presumption statutes uniformly, with variations depending on: "1) how domestic violence is defined; 2) the severity and or frequency of the abuse necessary to trigger the presumption; 3) the evidentiary standard . . . required to trigger the presumption; and 4) the type of custody (sole or joint) to which the presumption applies."¹⁴⁰ For instance, some states will exercise the presumption upon finding a single occurrence of domestic violence, other states require proof of a history or pattern of abuse, while others invoke the presumption upon a showing of either a history of abuse or a single "serious" incident of abuse.¹⁴¹ Due to such variation among the states, such legislation does

¹³⁶ *Id.*

¹³⁷ See Stark et. al., *supra* note 8, at 78–80. See also Yanni, *supra* note 89, at 542 ("Recognizing the dangers domestic violence poses to children, twenty-four states and the District of Columbia have implemented some form of rebuttable presumption against awarding custody to a party found to have perpetrated domestic violence[.]"); State Law Spreadsheet, *supra* note 36.

¹³⁸ Yanni, *supra* note 89, at 543.

¹³⁹ *Id.*

¹⁴⁰ Bajackson, *supra* note 16, at 333.

¹⁴¹ Yanni, *supra* note 89, at 545, 559. For an example of a state in which there is a steep hurdle to trigger the domestic violence presumption, see Jack, *supra* note 96, at 909–10. In North Dakota, the domestic violence presumption only takes effect if "there is credible evidence that the batterer caused 'serious bodily injury,' used a dangerous weapon, or committed recent acts that rise to the level of a pattern of violence." As Jack notes, although the law does not mandate a conviction of domestic violence, the specificity of the factors poses serious difficulties in the applicability of the law for victims. Furthermore, the law focuses on the extent of harm done to the domestic violence victim, rather than the actions of the intimate partner abuser, which are what put a child at risk. *Id.* at 10. N.D. CENT. CODE ANN. § 14-09-06.2(j) (West 2020).

not guarantee that serious deliberation about the violence will occur in any given custody case.¹⁴²

2. Avenue Two: Factor Bills

According to an American Bar Association 50 State Review, nearly every state's custody laws now include domestic violence as a factor in their "best interests of the child" analysis.¹⁴³ The strength of a factor statute may vary according to whether the statute mandates, encourages, or simply permits the judge to consider domestic violence in the custody decision.¹⁴⁴ Eight states have statutes that give domestic violence special weight as a factor.¹⁴⁵ Overall, the significant judicial discretion the factor test affords courts evaluating domestic violence in the custody decision has led domestic violence survivor advocates to often view it as a less potent protection.¹⁴⁶ Nevertheless, even in states with domestic violence presumption statutes, advocates press for legislatures to adopt domestic violence as a statutory factor so that if the court finds the presumption inapplicable or rebutted, the "issue of domestic violence does not disappear from the custody decision."¹⁴⁷

3. Current Legislative Reform Efforts

Presumption and factor bills have constituted the primary approaches to addressing domestic violence in custody legislation for the past few decades. However, recent tragedies involving children murdered by an abusive parent during a court-ordered visit have served as an impetus for Congress as well as the Maryland and Pennsylvania legislatures to renew their focus on reforming child custody statutes. This section will review the strengths, weaknesses, and gaps in these pieces of legislation in order to inform the legislative proposals put forth in Part IV.

¹⁴² See Bajackson, *supra* note 16, at 333–34.

¹⁴³ Stark et al., *supra* note 8, at 78, 86–89. To see how Stark et al. details more fully the range in how rebuttable presumption provisions are treated in different states, see *id.* at 83–86. See also State Law Spreadsheet, *supra* note 36.

¹⁴⁴ Garvin, *supra* note 16, at 173–74; Lemon, *Statutes Creating Rebuttable Presumptions*, *supra* note 134, at 605.

¹⁴⁵ Saunders, NIJ Study 2016, *supra* note 106, at 3.

¹⁴⁶ Bajackson, *supra* note 16, at 334.

¹⁴⁷ Lemon, *Statutes Creating Rebuttable Presumptions*, *supra* note 134, at 619.

a. National Action: House Concurrent Resolution 72

On a national level, the House passed a concurrent resolution on September 25, 2018, aimed at providing more specific guidance to family courts addressing domestic violence and child abuse in custody cases.¹⁴⁸ Along with more than fifty domestic violence survivor advocacy organizations, one of the primary advocates for the resolution was Jacqueline Franchetti, whose twenty-eight-month-old daughter Kyra Franchetti was killed by her father in a murder-suicide during a court-sanctioned unsupervised visit in July 2016.¹⁴⁹ Although Franchetti had warned the New York court that her ex-husband was emotionally abusive, dangerous, suicidal, and had been stalking her, “it was almost as though [she] was being viewed as difficult, not him.”¹⁵⁰ The resolution, House Concurrent Resolution 72 (H. Con. Res. 72), urges states to ensure that child safety is the first priority in family courts; that courts resolve domestic violence and child abuse allegations before addressing other best interest factors; and that courts rely only on admissible evidence and testimony from qualified experts with expertise in the relevant types of abuse at issue.¹⁵¹ Although a concurrent resolution is not binding law, it is nevertheless influential as it “expresses the opinion of the House of Representatives and the Senate about an important topic.”¹⁵²

Despite lacking the stature of federal law, the development of the resolution was not without controversy. Specifically, contention over the legitimacy of PAS arose over a line in a draft of the resolution presented to the House in the summer of 2017 that referred to “*scientifically unsound theories such as parental alienation syndrome*.”¹⁵³ Several

¹⁴⁸ Shira Schoenberg, *Congress: State Courts Should Consider Domestic Violence in Custody Cases*, MASSLIVE (Jan. 29, 2019), https://www.masslive.com/politics/2018/09/congress_state_courts_should_c.html [<https://perma.cc/ST2M-KCUB>]; H.R. Con. Res. 72, 115th Cong. (2017).

¹⁴⁹ *About*, KYRA FRANCHETTI FOUNDATION, <https://kyrafranchetti.org/about/> [<https://perma.cc/M2CZ-HPAF>].

¹⁵⁰ This reaction by the New York court is in line with how a “friendly parent” factor interacts poorly with abuse claims. See Schoenberg, *supra* note 148; *Kyra’s Story*, KYRA FRANCHETTI FOUNDATION, <https://kyrafranchetti.org/kyras-story/> [<https://perma.cc/Q9QV-JN8Q>]; Dennis Slattery, *Long Island Mother Who Lost Daughter Lobbying for Court Reforms to Protect Kids from Abusive Parents*, N.Y. DAILY NEWS (Oct. 24, 2019, 4:00 AM), <https://www.nydailynews.com/news/politics/ny-long-island-mother-franchetti-court-reform-custody-divorce-20191024-tjn2vsnqxvg5tjmv4btocv7mrm-story.html> [<https://perma.cc/7S9P-KMHV>].

¹⁵¹ H.R. Con. Res. 72.

¹⁵² William Bernet, *Parental Alienation and Misinformation Proliferation*, 58 FAM. CT. REV. 293, 300 (2020).

¹⁵³ *Id.*

members of the organization Parental Alienation Study Group (PASG) decided to fight the inclusion of this language in H. Con. Res. 72, and the group met with the original sponsor of the resolution, Representative Patrick Meehan, to recommend that the reference to “parental alienation syndrome” be eliminated.¹⁵⁴ Ultimately, the House adopted H. Con. Res. 72 without specifying PAS.¹⁵⁵

Regardless, the resolution marked a milestone for advocates of abused mothers and children. Commenting on the passage of the bill, Professor Joan Meier, one of the resolution’s champions, stated: “It’s incredibly significant because it’s the first time the federal government has ever spoken explicitly, in an official capacity, about problems in family courts . . . Congress is extending itself to say we’re very concerned, children are dying.”¹⁵⁶ Meier added that although state control of family courts means that it will ultimately be up to individual state family courts to decide whether to adopt the recommendations in H. Con. Res. 72, “[t]he national picture is important to get states to take it seriously.”¹⁵⁷

b. State Action: Maryland Workgroup and Proposed Legislative Reform

Indeed, the U.S. House of Representatives’ unanimous adoption of H. Con. Res. 72 calls on states to improve family court practices to better protect children.¹⁵⁸ Maryland—which had recently seen four children murdered after unprotective family court orders—responded to this call by establishing a workgroup tasked with 1) assessing how state courts process allegations of domestic violence and child abuse, and 2) analyzing scientific

¹⁵⁴ *See id.* (“Initially, the resolution was referred to the House Judiciary Committee for consideration, so several members of PASG sent personalized letters and packets of information to all members of the committee.”).

¹⁵⁵ *Id.* (commenting on these efforts, William Bernet wrote, “However, it is clear that detractors of PA are highly organized and were hoping for the U.S. Congress to endorse their way of thinking. If Congress enacted the resolution as originally proposed, attorneys and expert witnesses (i.e., PA detractors) would cite the Congressional resolution to argue that testimony regarding PA should be rejected and ignored. Also, PA detractors would likely use the flawed Congressional resolution as a rallying cry for state legislatures to enact laws consistent with the notion that PA theory is ‘scientifically unsound.’”).

¹⁵⁶ Schoenberg, *supra* note 148.

¹⁵⁷ *Id.*

¹⁵⁸ DV LEAP brief, *supra* note 68, at 22.

research concerning child-experienced trauma.¹⁵⁹ The workgroup, composed of Maryland lawmakers and experts, met fourteen times between June 2019 and July 2020, ultimately providing twenty-four recommendations to the state legislature in December 2020.¹⁶⁰ Notably, the final report of recommendations explicitly states that Maryland formed the workgroup in response to H. Con. Res. 72.¹⁶¹ Also significant is the workgroup's discussion of and citation to Meier's research and nationwide study highlighting "how parental alienation became 'regularly' used to discount mothers' allegations of adult or child abuse."¹⁶² The Maryland workgroup's report is an example of how H. Con. Res. 72, coupled with Meier's empirical research, has the potential to spark actual change in state-level child custody policy.

While it remains to be seen whether any of the workgroup's twenty-four recommendations will ultimately make it into legislation, several of the group's most significant recommendations were presented during the 2021 Maryland legislative session. One such piece of legislation, S.B. 675, sought to adopt the workgroup's recommended mandate that all judges, children's lawyers, and custody evaluators participating in custody

¹⁵⁹ William J. Ford, *Maryland Lawmakers Briefed on Child Custody Report*, WASH. INFORMER (Dec. 9, 2020), <https://www.washingtoninformer.com/maryland-lawmakers-briefed-on-child-custody-report/> [<https://perma.cc/S9Z9-HM6W>] (commenting on the group's efforts, its chairman, Secretary of State John C. Wobensmith, noted, "You have placed Maryland on the forefront in dealing with this issue, which is a horrific problem across the nation . . . Attorneys, advocates and protected parents across the United States have been following the work group activity and are looking forward to our next steps."); *Governor Larry Hogan Establishes New Workgroup to Study Child Court Proceedings Involving Child Abuse or Domestic Violence Allegations*, THE OFFICE OF GOVERNOR LARRY HOGAN, <https://governor.maryland.gov/2019/06/26/governor-larry-hogan-establishes-new-workgroup-to-study-child-custody-court-proceedings-involving-child-abuse-or-domestic-violence-allegations/> [<https://perma.cc/5SA5-6FQW>] (noting that the workgroup included several Maryland legislators, parents impacted by current family court practices, as well as domestic violence, child abuse, and recognized custody experts and organizations); Communication from Joan Meier, Dir., Nat'l Fam. Violence L. Ctr., George Washington Univ. L. Sch., to Nina Jaffe-Geffner, J.D. 2022, Columbia L. Sch. (Nov. 10, 2021) (on file with author).

¹⁶⁰ Ford, *supra* note 159.

¹⁶¹ JENNIFER K. BOTTS, ET AL., WORKGROUP TO STUDY CHILD CUSTODY COURT PROCEEDINGS INVOLVING CHILD ABUSE OR DOMESTIC VIOLENCE ALLEGATIONS, FINAL REPORT (2020) [hereinafter Maryland WG Final Report], http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnChdAbuseDomViol/FinalReport_Workgroup_to_Study_Child_Custody_Court_Proceedings_Involving_Child_Abuse_or_Domestic_Violence.pdf [<https://perma.cc/RBN4-4FPV>]; *see also* WORKGROUP ON CHILD CUSTODY COURT PROCEEDINGS INVOLVING CHILD ABUSE OR DOMESTIC VIOLENCE ALLEGATIONS, <https://sos.maryland.gov/Pages/Governor-Custody-Workgroup.aspx> [<https://perma.cc/CCR8-EAU6>].

¹⁶² Ford, *supra* note 159; Maryland WG Final Report, *supra* note 161, at 9–15.

cases involving domestic violence or child abuse receive an initial training of at least sixty hours,¹⁶³ followed by ten additional hours every two years, on topics pertaining to the dynamics and effects of domestic violence and abuse.¹⁶⁴ S.B. 675 included the invalidity of PAS and the inappropriateness of the use of PA in child custody cases in its list of training topics.¹⁶⁵ This type of comprehensive training likely would educate relevant court personnel on the dynamics and harm of domestic violence as well as PAS/PA specifically, and therefore would likely reduce gender bias in custody cases involving domestic violence allegations and alienation theories.

Yet while S.B. 675 would have made domestic violence and child abuse training mandatory, it did not go so far as to prohibit custody evaluators from presenting final custody recommendations to the court.¹⁶⁶ The workgroup seemed to believe that mandatory training would sufficiently protect against faulty, and possibly dangerous, custody recommendations by evaluators as it posited that “fully-trained and specialized judges will be less likely to accept evaluations that are inadequate or performed by unqualified

¹⁶³ *Maryland Child Custody Committee Recommends Specialized Judges for Custody Cases Involving Child Abuse or Domestic Violence*, CHILD WELFARE MONITOR (Oct. 14, 2020) [hereinafter *CWM Specialized Judges*], <https://childwelfaremonitor.org/2020/10/14/maryland-child-custody-committee-recommends-specialized-judges-for-custody-cases-involving-child-abuse-or-domestic-violence/> [https://perma.cc/5ZLU-FWYJ] (“The workgroup recommended that the judiciary, in consultation with domestic violence and [child] advocacy organizations, develop an ongoing training program for judges who preside over custody cases that involve child abuse or domestic violence.”).

¹⁶⁴ Although on March 24, 2021, S.B. 675 failed to make it out of the Maryland Senate Judicial Proceedings Committee, analysis of the bill remains relevant as it represents one of the most recent and ambitious state attempts at legislative child custody reform. *See* Open States (Mar. 24, 2021) <https://openstates.org/md/bills/2021/SB675/> [https://perma.cc/C33W-3GFD]; S.B. 675, 432d Gen. Assemb., Reg. Sess. (Md. 2021) [hereinafter *Maryland S.B. 675*] <http://mgaleg.maryland.gov/2021RS/bills/sb/sb0675f.pdf> [https://perma.cc/8TDK-QEM6]; *Child Custody – Cases Involving Child Abuse or Domestic Violence – Training for Judges and Child’s Counsel*, MD. GEN. ASSEMB., <https://mgaleg.maryland.gov/mgaweb/Legislation/Details/SB0675> [https://perma.cc/HRK6-5PXU] [hereinafter *Maryland S.B. 675 tracking*]; Maryland WG Final Report, *supra* note 161, at xii.

¹⁶⁵ S.B. 675, 432d Gen. Assemb., Reg. Sess. (Md. 2021), at 3; *Maryland S.B. 675 tracking*, *supra* note 164.

¹⁶⁶ Samantha J. Subin, *Lawmakers, Experts Weigh Changes to Maryland’s Child Custody Court Process*, MD. DAILY REC. (Aug. 26, 2020), <https://sos.maryland.gov/Documents/Lawmakers-experts-weigh-changes-to-Maryland-child%20custody-court-process.pdf> [https://perma.cc/QH4S-64XV] (“‘If the custody evaluator is asked to make a final recommendation to the court, then that custody evaluator has to have the proper training to weigh in,’ said Dr. Jennifer Shaw, a founding partner of Gil Institute for Trauma Recovery and Education and a member of the work group.”).

people.”¹⁶⁷ However, as discussed *infra* Section IV.B.3, current psychological testing procedures do not actually enable custody evaluators to develop better-informed final custody recommendations. This shortcoming cannot be overcome with additional training and therefore will be addressed in the proposed legislation in Part IV.

Two additional legislative proposals presented during the 2021 Maryland session that incorporated the workgroup’s recommendations merit attention. First, S.B. 775 established a rebuttable presumption that it is not in a child’s best interests for a court to grant custody to a party who has committed abuse against certain individuals.¹⁶⁸ Second, S.B. 57 addressed the role of “friendly parent,” stating that “[i]f a case involves domestic violence or child abuse, the court shall exclude any factors . . . that relate to the willingness of a party to facilitate contact with the child or the other party.”¹⁶⁹ As discussed further *infra* Section IV.A.1, domestic violence presumption statutes like S.B. 775 have proven ineffective in states that also have “friendly parent” provisions. As such, the explicit exemption to “friendly parent” included in S.B. 57 is integral to effective child custody reform legislation.

c. State Action: Pennsylvania Senate Bill 78

Pennsylvania has also recently introduced legislation aimed at reforming child custody laws. Senate Bill 78, also known as Kayden’s Law, was unanimously voted out of the Senate Judiciary Committee in January 2021 and passed the state Senate in a 46-4 vote in June 2021.¹⁷⁰ The bill is named after seven-year-old Kayden Mancuso, whose biological

¹⁶⁷ CWM *Specialized Judges*, *supra* note 163.

¹⁶⁸ S. 775, 432d Gen. Assemb., Reg. Sess. (Md. 2021) (withdrawn by sponsor) <http://mgaleg.maryland.gov/2021RS/bills/sb/sb0775f.pdf> [<https://perma.cc/9Y9G-Y3D>] [hereinafter Maryland S.B. 775]; *Family Law – Child Custody and Visitation – Abuse*, MD. GEN. ASSEMB., <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/SB0775?ys=2021RS> [<https://perma.cc/A3SZ-VRS9>] [hereinafter Maryland S.B. 775 tracking].

¹⁶⁹ S. 57, 442d Gen. Assemb., Reg. Sess., 4 (Md. 2021), <https://legiscan.com/MD/text/SB57/id/2226246/Maryland-2021-SB57-Introduced.pdf> [<https://perma.cc/F2HU-WLQ8>] [hereinafter, Maryland S.B. 57]; *Family Law – Child Custody and Visitation*, MD. GEN. ASSEMB., <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/SB0057?ys=2021RS> [<https://perma.cc/9YJD-R2SK>] [hereinafter S.B. 57 tracking]; Maryland WG Final Report, *supra* note 161, at 23.

¹⁷⁰ See S.B. 78 Gen. Assemb., Reg. Sess. (Pa. 2021) <https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2021&sessInd=0&billBody=S&billTyp=B&billNbr=0078&pn=0930> [<https://perma.cc/QN6G-3XA7>]; Jo Ciavaglia, *Pennsylvania Senate Committee Approves Child Custody Bill Honoring Kayden Mancuso for Second Time*,

father bludgeoned her to death and then killed himself during a court-ordered unsupervised overnight visit, following a contentious yearlong custody battle.¹⁷¹ The father had a documented history of violent and erratic behavior.¹⁷²

S.B. 78's provisions are far-reaching. They include a rebuttable presumption that upon finding by a preponderance of the evidence that a parent has abused the child or any household member, the court shall limit that parent to supervised visitation; an expansion of the types of criminal convictions a court must consider when hearing a custody dispute; and encouragement of further judicial training programs focusing on domestic violence and child abuse.¹⁷³ S.B. 78 also states that a parent's reasonable concern for a child's health and welfare and subsequent efforts to protect the child shall not be considered attempts to turn the child against the other party—a likely reference to alienation theory.¹⁷⁴ S.B. 78's combination of provisions elevating the role of domestic violence and child abuse in the court's custody determination while minimizing the fault that can be attributed to protective parents when a child is resistant to contact with the other parent presents arguable benefits to PA/PAS custody cases. However, S.B. 78 has also been the subject of significant criticism.

The ACLU of Pennsylvania formally objects to S.B. 78, in particular condemning the statute's presumption that a parent with any history of abuse, no matter how old, only be

BUCKS CTY. COURIER TIMES (Jan. 26, 2021), <https://www.buckscountycouriertimes.com/story/news/2021/01/26/pennsylvania-senate-child-custody-family-court-kayden-mancuso-bucks-county/6679032002/> [https://perma.cc/58DX-A63M]; Chris Ullery, *PA Senate Passes Kayden's Law, Mandating Judges Put Child Safety First in Custody Judgments*, BUCKS CTY. COURIER TIMES (June 25, 2021), <https://www.buckscountycouriertimes.com/story/news/2021/06/24/kaydens-law-pennsylvania-state-senate-passes-child-custody-reform-bill/7780153002/> [https://perma.cc/2B6F-PPD7].

¹⁷¹ Ciavaglia, *supra* note 170; *Kayden's Law Clears Pennsylvania Senate Judiciary Committee*, WELLSBORO GAZETTE (Jan. 26, 2021), https://www.tiogapublishing.com/news/state/kayden-s-law-clears-pennsylvania-senate-judiciary-committee/article_8557972f-aff0-54d9-a550-d70c9be794e6.html [https://perma.cc/KN9K-774P]; Julie Shaw, Vinny Vella, & Meghan Bobrowsky, *Months Before Kayden Mancuso's Death, Mom Reported Girl 'Didn't Feel Safe' with Her Father*, THE PHILA. INQUIRER (Aug. 7, 2018), <https://www.inquirer.com/philly/news/crime/kayden-mancuso-jeff-mancuso-murder-suicide-manayunk-girl-murder-suicide-langhorne-20180807.html> [https://perma.cc/QM39-X9E4].

¹⁷² Ciavaglia, *supra* note 170.

¹⁷³ See S.B. 78 Gen. Assemb., Reg. Sess. (Pa. 2021), at 1, 5–6, 11–12, 15–16; Ciavaglia, *supra* note 170.

¹⁷⁴ See S.B. 78 Gen. Assemb., Reg. Sess. (Pa. 2021), at 9.

allowed supervised visitation.¹⁷⁵ This expansive presumption removes the requirement that a threat be ongoing, while simultaneously adding “simple assault” to the crimes list.¹⁷⁶ While the ACLU acknowledges that the presumption is rebuttable, it emphasizes “the practical reality that many working class litigants will not be able to afford the extensive and costly litigation that will be needed to rebut the presumption, and that unrepresented pro se litigants lack the knowledge or skill to rebut legal presumptions.”¹⁷⁷ Consequently, the ACLU argues that this combination of provisions will actually harm women, who are not uncommonly charged with simple assault in the context of self-defense in an abusive relationship.¹⁷⁸ Further, the ACLU asserts that the proposed bill will disproportionately harm the children of Black and Brown women.¹⁷⁹ In its Opposition Memorandum, the ACLU of Pennsylvania explains why S.B. 78 will have a racially and economically disproportionate adverse impact:

It is critical to understand that mothers are the people most likely to be accused of and found responsible for child abuse and SB 78’s expanded provisions will likely lead to custodial mothers losing the right to custody and contact with their children because they are deemed “abusers.” Given the reality of the intense surveillance and punishment that poor, disproportionately Black and brown mothers experience via mandated reporting and the child abuse registry, there is a significant likelihood that SB 78 will trigger traumatic suspensions of contact between mothers and their children, with nearly impossible barriers to reestablish contact, [in

¹⁷⁵ See *SB 78 Child Custody Proceedings (Kayden’s Law)*, *ACLU-PA Position: Opposes*, ACLU of PA., <https://www.aclupa.org/en/legislation/sb-78-child-custody-proceedings-kaydens-law> [https://perma.cc/SMN8-CJQT] [hereinafter ACLU SB 78]; Memorandum from Elizabeth Randol, Legislative Dir., ACLU of Pennsylvania, to the Pa. Sen. on Opposition to SB 78 P.N. 73 (BAKER) (Feb. 22, 2021), https://www.aclupa.org/sites/default/files/field_documents/aclu-pa_opposition_to_sb_78_pn_65_senate_2021-02-22.pdf [https://perma.cc/J2CG-WWCV] [hereinafter ACLU SB 78 Opposition Memo].

¹⁷⁶ ACLU SB 78, *supra* note 175, at 4, 11; ACLU SB 78 Opposition Memo, *supra* note 175, at 1.

¹⁷⁷ Memorandum from Frank P. Cervone, Exec. Dir., Support Ctr. for Child Advocs., Kathleen Creamer, Managing Att’y, Fam. Advoc. Unit Cmty. Legal Servs., Terry Fromson, Managing Att’y, Women’s L. Project, & Elizabeth Randol, Legis. Dir., ACLU of Pennsylvania, to the Pennsylvania Gen. Assembly (June 21, 2021), https://www.aclupa.org/sites/default/files/field_documents/opposition_to_sb_78_a00994_2021-06-21.pdf [https://perma.cc/WQ7Z-AHL3].

¹⁷⁸ ACLU SB 78 Opposition Memo, *supra* note 175, at 1.

¹⁷⁹ *Id.*

part] because the presumption of supervised visitation has no expiration date. . . .¹⁸⁰

As the ACLU of Pennsylvania's critique makes clear, advocates seeking to create legislation that will truly protect domestic violence survivors must also adopt a social and racial lens.

The reform efforts in Maryland and Pennsylvania exemplify some of the most recent attempts to modify state child custody laws to better protect children and adult victims of violence.¹⁸¹ It is clear they are part of an active discussion regarding the merits and drawbacks of various measures. This debate is ongoing, and additional states may soon endeavor to reform their own laws. Therefore, it is worthwhile for this Note to present four legislative proposals that it argues will combat gender bias in domestic violence-parental alienation custody cases.

IV. Policy Proposals

A. Proposals for Legislation: Examining New York State

Building on the momentum of Congress and the Maryland and Pennsylvania state legislatures, this Note will provide recommendations for states yet to engage in such efforts. The proposals in Section IV.B specifically target the New York landscape but may

¹⁸⁰ ACLU SB 78 Opposition Memo, *supra* note 175, at 1–2. For a full account of the ways in which the child welfare system discriminates against and punishes battered Black mothers, see Beth A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN. L. REV. 1131, 1160 (2005) (“The failure to consider the implications of race in ACS’s practice of punishing battered women and removing their children is akin to the general whitewashing of the domestic violence movement—both operate to eclipse the unique experiences of women of color and to promote interventions that often further the oppression of battered Black women.”). See also Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172 (2003).

¹⁸¹ This Note analyzes the legislation proposed in Maryland and Pennsylvania as illustrative of state efforts, at the time of writing, to significantly reform child custody legislation. However, the state movement for legislative change in the child custody realm continues to evolve. For instance, in June 2021, Colorado adopted HB21-1228, which mandates and funds domestic violence training for court personnel regularly involved in cases related to domestic matters. HB21-1228 requires such personnel to receive a total of twelve initial hours of training, as well as four hours of subsequent training every two years, on the topics of domestic violence (including coercive control), child abuse, and child sexual abuse and their traumatic effects on children, adults, and families. See *Domestic Violence Training Court Personnel*, H.R. 21-1228, 73d Gen. Assemb., 2021 Reg. Sess. (Co. 2021), <https://leg.colorado.gov/bills/hb21-1228> [<https://perma.cc/UTW6-GMPJ>].

be applicable to other states. There are several reasons why this Note focuses on New York for its legislative proposals.

First, following the success of H. Con. Res. 72, Jacqueline Franchetti has turned her focus to legislation in New York State.¹⁸² Several New York Assembly members have introduced pieces of legislation that would address Franchetti's concerns.¹⁸³ Franchetti's advocacy website for Kyra expresses the hope that changes to the laws in New York, where the family courts failed Kyra, can become model legislation for the forty-nine other states and even other countries.¹⁸⁴ It is evident that there is momentum in New York to create

¹⁸² Marco Schaden, *Franchetti Testifies for Family Court Reform*, MANHASSET PRESS (Nov. 15, 2019), <https://manhassetpress.com/franchetti-testifies-for-family-court-reform/> [<https://perma.cc/5EUX-8MHD>] (“I’m focusing in my efforts now in New York State and making changes in New York State,” she said. “Congressional resolutions are a message to the state, things are wrong, so see what you can do to make amends or fix them. Federal courts and federal legislation does not have jurisdiction over state courts. That’s why I’ve been approaching and talking to New York state legislators about making changes happen here.”).

¹⁸³ For instance, during the 2021–2022 legislative session, Assemblyman Jeffrey Dinowitz (D-Bronx) put forward a bill that would establish standardized credentials and training requirements, developed by the New York State Coalition Against Domestic Violence, for forensic evaluators. Assemb. A02375, 2021–2022 Assemb., Reg. Sess. (N.Y. 2021), https://assembly.state.ny.us/leg/?default_fld=&bn=A02375&term=2021&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=YA02375 [<https://perma.cc/29E7-DKCJ>]; Chris Bragg, *Assembly Bill Seeks Training of Key Family Court Officials*, TIMES UNION (Apr. 21, 2021), <https://www.timesunion.com/news/article/Assembly-bill-bolsters-training-of-key-Family-16118314.php> [<https://perma.cc/3PNP-EP4A>]. This proposed legislation is bolstered by the creation of a Blue-Ribbon Commission on Forensic Custody Evaluations, of which Franchetti is a member, announced by former New York Governor Andrew Cuomo in the summer of 2021. OFF. OF CHILD. & FAM. SERVS., *New York Announces Membership of Blue-Ribbon Commission on Forensic Custody Evaluations* (June 11, 2021), <https://ocfs.ny.gov/main/news/article.php?id=2247> [<https://perma.cc/7NX7-GDWR>]. In January 2022, the Blue-Ribbon Commission voted 11-9 in favor of eliminating the role of forensic evaluators in Family Court proceedings and issued a report presenting several recommendations for reform if forensic custody evaluators continue to be used in the New York State court system. Chris Bragg, *State Panel Recommends Reforms to Key Family Court Role*, TIMES UNION (Jan. 12, 2022), <https://www.timesunion.com/state/article/State-panel-recommends-reforms-to-key-Family-16770208.php> [<https://perma.cc/7DRV-9WVZ>]. Legislation backed by Assemblywoman Helene Weinstein (D-Brooklyn) and Sen. Alessandra Biaggi (D-Bronx) would grant litigating parents access to the evaluations. S.B. S753, 2021–2022 Leg. Sess. (N.Y. 2021); Dennis Slattery, *It’s Personal: Heartbroken Mom Who Knows Pain of Losing Child Fights for Family Court Overhauls*, N.Y. DAILY NEWS (Feb. 9, 2020), <https://www.nydailynews.com/news/politics/ny-franchetti-kyra-fight-for-family-court-overhauls-review-20200208-xfaxwgb5efgkxnv7vntcf5bsca-story.html> [<https://perma.cc/RGQ2-SYRT>].

¹⁸⁴ *Kyra’s Law*, KYRA FRANCHETTI FOUND., <https://kyrafranchetti.org/> [<https://perma.cc/2HMY-W4E7>] (2021). As of October 2021, Kyra’s Champions, the charity founded by Franchetti in honor of Kyra, details three legislative proposals pending in New York aimed at ensuring child safety in the family court systems including a comprehensive reform bill entitled “Kyra’s Law.” *See About Us*, KYRA’S CHAMPIONS, <https://www.kyrachampions.org/mission> [<https://perma.cc/BT9R-SAU3>]; *Kyra’s Law*, KYRA’S CHAMPIONS,

comprehensive custody reform legislation, and as such, it makes sense to discuss New York-oriented proposals.

Second, New York's historical treatment of domestic violence in custody cases makes it a representative case study. Although in some respects New York has been a leader of domestic violence survivor advocacy, many New York courts have been hesitant to fully acknowledge the potential for abusers to take advantage of custody and visitation proceedings to further their abuse.¹⁸⁵ For this reason, in 1996, the New York statute was amended to mandate that trial courts consider proof of domestic violence in custody cases.¹⁸⁶ The statute was amended once more in 2009, providing the additional requirement that courts memorialize in their custody decisions how evidence of domestic violence factored into those decisions.¹⁸⁷ The second amendment "suggests that even after the enactment of the 1996 law, the courts did not give proper weight to issues of domestic violence in these custody cases."¹⁸⁸ While domestic violence is a statutory factor¹⁸⁹ in New York's analysis for best interests of the child, it does not go so far as to create a presumption against awarding custody to parents who perpetuated domestic violence, as approximately half of the states have done.¹⁹⁰ In order for the court to consider domestic violence along with other relevant best interests factors, the domestic violence first must be proven by a preponderance of the evidence.¹⁹¹

<https://www.kyraschampions.org/kyras-law> [https://perma.cc/53FW-UMK4]; *Establishing Supervised Visits Guidelines* (A. 3314 / S. 1584), KYRA'S CHAMPIONS, <https://www.kyraschampions.org/supervised-visits> [https://perma.cc/7QQU-KJRV]; *Training for Forensic Child Custody Evaluators* (A2375-B/S6385A), KYRA'S CHAMPIONS, <https://www.kyraschampions.org/forensic-evaluators> [https://perma.cc/96UK-429Y].

¹⁸⁵ Leidholdt & Beller, *supra* note 44, at 18. Leidholdt and Beller indicate examples of leadership include the establishment of the New York State Governor's Task Force on Domestic Violence in 1983, spurring the creation of the New York State Office for the Prevention of Domestic Violence (OPDV) in 1992, the founding of The New York City Mayor's Office to Combat Domestic Violence in 2001, and the formation of the first specialized felony domestic court in Brooklyn in 1996, predecessor to the seventy-five domestic violence courts now existing across the state and presiding over more than 32,000 cases each year. *Id.* at 15.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Jack, *supra* note 94, at 890.

¹⁸⁹ Alayne Katz, *Junk Science v. Novel Scientific Evidence: Parental Alienation Syndrome, Getting It Wrong in Custody Cases*, 24 PACE L. REV. 239, 240 (2003).

¹⁹⁰ Jack, *supra* note 96, at 903; Stark et. al., *supra* note 8, at 78–80.

¹⁹¹ Jack, *supra* note 96, at 887–88.

Third, New York's treatment of the "friendly parent" factor and parental alienation highlight a need for legislation in the state that will protect against gender bias in custody cases. In New York, a parent's willingness to foster the relationship between the non-custodial parent and the subject child, also known as the "friendly parent" doctrine, is a component of the multi-factor best interest analysis.¹⁹² More notably, a parent's unwillingness to do so, whether it be called "unfriendly parent" or parental alienation, has such prominence in New York family courts that the "appellate courts in the second, third, and fourth judicial departments have found that a parent's interference with the other parent's relationship with the child is a per se finding that the alienating parent is unfit to act as the custodial parent."¹⁹³

Fourth, New York is ripe for change because it was the home state of Dr. Gardner and his "parental alienation syndrome."¹⁹⁴ Furthermore, the prevalence of PAS/PA in New York courts is at odds with admissibility rulings in the state: it was in New York that the aforementioned *People v. Fortin* court ruled that PAS failed to meet the Frye standard.¹⁹⁵

Fifth, and finally, the problematic acceptance of parental alienation in New York family courts is evidenced by a 2018 court decision, *J.F. v. D.F.*, which analyzes at great length the concept of "parental alienation" in New York courts and its historical entrenchment in the state.¹⁹⁶ The decision was so notable that it attracted a commentary

¹⁹² Katz, *supra* note 189, at 240; Connors, *supra* note 19, at 12–13.

¹⁹³ Connors, *supra* note 19, at 13; Katz, *supra* note 189, at 240 ("Since *Eschbach v. Eschbach*, case law has elevated the interference factor to a fitness factor, finding that interference with the non-custodial parent and child's relationship is so inconsistent with the best interests of a child, that it raises a strong probability that the custodial parent is unfit."). See Jordan E. Trager, *Parental Alienation-A Broader Perspective*, N.Y. L.J. (ONLINE) (Apr. 9, 2019), <https://www.law.com/newyorklawjournal/2019/04/09/parental-alienation-a-broader-perspective/> [<https://perma.cc/EH42-6ZTR>] ("It has long been held in the New York courts: 'Parental alienation of a child from the other parent is an act so inconsistent with the best interests of a child as to, per se, raise a strong probability that the offending party is unfit to act as custodial parent.' Doroski v. Ashton, 99 A.D.3d 902 (2d Dept. 2012); Bennett v. Schultz, 110 A.D.3d 792 (2d Dept. 2013); Avdic v. Avdic, 125 A.D.3d 1534 (4th Dept. 2015); Halioris v. Halioris, 126 A.D.3d 973 (2d Dept. 2015)."). See also Sanders v. Jaco, 48 N.Y.S.3d 729 (N.Y. App. Div. 2017); Gerber v. Gerber, 21 N.Y.S.3d 386 (N.Y. App. Div. 2015).

¹⁹⁴ Katz, *supra* note 189, at 239.

¹⁹⁵ *Id.* at 239–40.

¹⁹⁶ *J.F. v. D.F.*, 112 N.Y.S.3d 438 (N.Y. Sup. Ct. 2018). In his lengthy discussion of "The Law of Parental Alienation in New York" Judge Dollinger writes, "this court acknowledges that the New York courts have accepted the notion of parental alienation as a factor in determining whether a change in circumstances exists." After providing a detailed exploration of parental alienation and its sidling into New York family law, including

from the renowned family law expert Timothy Tippins in the New York Law Journal¹⁹⁷ as well as a subsequent article from Jordan E. Trager, another family law attorney, commenting on both the original court opinion and Tippins' piece.¹⁹⁸ What is clear is that judges and practitioners alike recognize that the theory of parental alienation is embedded in New York courts, and there is an active discussion as to how it should be applied. As such, it appears to be a particularly relevant moment to discuss what type of legislation should be adopted to ensure allegations of parental alienation in New York family courts do not obscure genuine claims of domestic violence. Therefore, the following legislative proposals target New York both because such legislation will lend itself to applicability in other states and because there is a current movement to reform New York's custody laws, making such recommendations immediately practicable.

B. Recommendations

1. Explicit Domestic Violence Exemption to "Friendly Parent"

One component of legislation that is necessary in New York, and indeed in any state that does not have it, is an explicit exemption to the "friendly parent" concept in cases involving domestic violence. The importance of a statutory exemption to the "friendly parent" standard is highlighted by the findings of Allison Morrill et al.'s study showing that in states with both "friendly parent"/joint custody provisions and domestic violence presumption statutes, the former provisions trumped the latter.¹⁹⁹ These findings were

references to behavioral science literature and case law, Judge Dollinger concludes that "a more demanding definition" of parental alienation is necessary. He presents a new four-factor test for determining parental alienation, modeled after the four elements in the tort for IIED, and substituting the word "parental alienation" for "emotional distress." *See id.* at 4–9.

¹⁹⁷ Timothy M. Tippins, *Parental Alienation: What a Concept!*, N.Y. L.J. (ONLINE) (Jan. 11, 2019), <https://www.law.com/newyorklawjournal/2019/01/11/parental-alienation-what-a-concept/> [<https://perma.cc/9ENB-9836>]. While praising what he calls Judge Dollinger's "27,000-word exegesis," Tippins himself argues the proposed definition for parental alienation, modeled after the tort of IIED, is "constrictive."

¹⁹⁸ Trager, *supra* note 193. Trager goes one step further, proposing that in addition to the standard of law for proving parental alienation suggested by Judge Dollinger, New York courts should consider a second standard: "Where a child refuses to have a relationship with a non-custodial parent, a court should thoroughly explore the specific reasons why not. The absence of any reasonable explanation shall raise a strong probability of parental alienation on the part of the custodial parent."

¹⁹⁹ Allison Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1092, 1101 (2005).

replicated in a study by Daniel Saunders involving eight laws and a sample of judges and evaluators: “‘friendly parent’ statutes seemed to carry more weight in determining custody outcomes for victims than the presumption that abusers should not have custody.”²⁰⁰ One policy implication Saunders draws from these findings is that states need to consider adding exemptions to the “friendly parent” standard for domestic violence survivors.²⁰¹

The recent legislative proposals from both Maryland and Pennsylvania include provisions for rebuttable domestic violence presumptions. As the Morrill et al. and Saunders studies show, domestic violence presumption statutes are largely ineffective in states with “friendly parent” provisions.²⁰² Therefore, an explicit exemption to “friendly parent” in cases involving domestic violence, as included in Maryland’s S.B. 57, must be included in future New York custody legislation. Furthermore, an explicit exemption to the “friendly parent” standard does not implicate the racial inequity concerns levied against Pennsylvania’s Bill 78. Unlike a presumption bill, a statutory exemption to the “friendly parent” standard does not mandate any particular outcome in the custody proceedings, such as supervised visitation or a fee imposition. Rather, the exemption simply removes one factor that has adversely impacted victims of domestic violence in custody proceedings, namely “friendly parent,” from the judge’s calculus.

The studies show that “batterers still win custody in states with the [friendly parent provision] unless a statute clarifies that it does not apply when there is [domestic violence].”²⁰³ Therefore, New York and any other state where “friendly parent” provisions exist, either judicially or statutorily, must explicitly ban the application of such provisions in cases of domestic violence.

However, in order to trigger the exemption to “friendly parent” provisions, there must first be a finding of domestic violence by the court. Given the nature of domestic violence and abuse cases, concrete proof of domestic violence is frequently difficult to come by. There is often a lack of clarity regarding whether the domestic violence occurred and the

²⁰⁰ Saunders, NIJ Study 2016, *supra* note 106, at 10, 12.

²⁰¹ *Id.* at 12.

²⁰² Some states have already recognized the importance of such a provision. *See, e.g.,* Berg, *supra* note 45, at 14. In Minnesota, the Minnesota Domestic Abuse Act (MDAA) explicitly establishes that the “friendly parent” provision is not a factor in cases where the court makes a finding of domestic violence.

²⁰³ Campbell, *supra* note 42, at 46.

extent of the abuse if it did. Comprehensive legislation must address these situations of ambiguity.

2. Failure of Proof

Failure of proof refers to situations where a court has not made a finding of domestic violence, but the domestic violence allegations have also not been disproven. It is essential for both courts and evaluators to distinguish unsubstantiated allegations from false allegations.²⁰⁴ In this vein, three legislative proposals are crucial: 1) as adopted from Meier, alienation theory (or any of its variations) should be prohibited as a reason to discount abuse allegations;²⁰⁵ 2) the statute should explicitly state that parents cannot be penalized solely on the basis of an unsubstantiated abuse claim; and 3) if the domestic violence claim is not initially proven, parents should not be barred from presenting evidence of the domestic violence later in the court proceedings.

These are all critical legislative reforms for addressing custody proceedings involving failure of proof that must be enacted in New York and elsewhere. While Gardner admitted that PAS should not apply to situations involving genuine abuse, Rita Berg noted that this exemption would be too narrow even if courts abided by it because “[h]is exemption does not cover mothers in domestic violence situations who have difficulty proving the abuse in court, yet wish to protect their children from the abusive parent.”²⁰⁶ Berg’s 2011 empirical study of the Minnesota legal system found that courts imposed custody decisions adverse to the mother in all seven cases where domestic violence allegations were unsubstantiated.²⁰⁷ While the court substantiated the PA claims against the mother in the majority of these cases, its joint custody award even in those cases without a finding of PA suggests possible causation between the unconfirmed abuse allegations and the adverse custody rulings.²⁰⁸ Berg therefore concludes that “[e]ven if the court is not using false

²⁰⁴ Stark et al., *supra* note 8, at 33 (“An unsubstantiated allegation occurs when an accusing party cannot provide documentation of domestic violence as required by courts, and there is evidence to believe that the child has not been abused or mistreated. False allegations, on the other hand, include alleging domestic violence in order to gain an unfair advantage in a custody case or to alienate the other parent from the child/children.”).

²⁰⁵ Meier, *Denial of Family Violence in Court*, *supra* note 36, at 67.

²⁰⁶ Berg, *supra* note 45, at 6.

²⁰⁷ *Id.* at 23–24.

²⁰⁸ *Id.* at 24.

abuse allegations as a symptom of PA, cases suggest that courts are at least using unproven abuse allegations as further reason to find against the mother.”²⁰⁹

However, the particular dynamics of domestic violence often make it especially difficult for abused individuals to substantiate their abuse claims.²¹⁰ Prior to separation, survivors of domestic violence are often hesitant to reveal the abuse even to relatives and friends.²¹¹ Likewise, survivors are unlikely to report the domestic violence to law enforcement or healthcare professionals, fearing potential negative ramifications from the report.²¹² Some individuals may be deterred from reporting violence by men in their community due to the abuse they believe these men suffer by police, while others may not report out of concern for their family’s reputation.²¹³ Additionally, some victims of gay or lesbian domestic violence may fear being “outed” if they report the abuse.”²¹⁴ Even in the context of ongoing custody cases, family violence often remains hidden because professionals lack the proper interviewing skills or fail to raise the topic – and if asked, many survivors remain fearful that disclosing the abuse will lead to retaliation from the abuser or adverse consequences in court.²¹⁵

For these reasons, “unless the perpetrator has inflicted severe injury requiring medical attention, or the victim, other family members, or neighbors have reported incidents to law-enforcement authorities,” the parent’s testimony will often be the main source of evidence advancing a domestic violence claim.²¹⁶ However, domestic violence victims encounter many hurdles when trying to convince the court to believe their testimony, such as the “credibility discount” that the legal system often applies to female victims of domestic violence²¹⁷ and the tendency of family courts to approach abuse allegations as criminal,

²⁰⁹ *Id.*

²¹⁰ Stark et al., *supra* note 8, at 33.

²¹¹ Scott & Emery, *supra* note 28, at 85.

²¹² Stark et al., *supra* note 8, at 33–34.

²¹³ Greenberg, *supra* note 32, at 416.

²¹⁴ *Id.*

²¹⁵ Saunders & Faller, *supra* note 59, at 8.

²¹⁶ Scott & Emery, *supra* note 28, at 85.

²¹⁷ See Amelia Mindthoff et al., *How Social Science Can Help Us Understand Why Family Courts May Discount Women’s Testimony in Intimate Partner Violence Cases*, 53 FAM. L.Q. 243, 243–44 (2019) (noting

therefore requiring extra proof.²¹⁸ This tendency “generates an automatic protectiveness toward the rights of the ‘accused,’ and an intuitive (or explicit) demand for greater proof than the regular civil procedure preponderance standard.”²¹⁹

One potential objection to the three legislative proposals addressing failure of proof situations is that allegations of domestic violence that cannot be proven should not receive any weight in the custody determination. However, the three proposals do not punish the accused parent but rather afford protection in the custody proceeding to parents whose abuse allegations remain unsubstantiated. Legislation that accounts for custody proceedings involving the failure of proof is essential given the great difficulty in substantiating domestic violence claims before the courts.

Given this reality, the American Professional Society on the Abuse of Children stated, “Professionals need to be mindful that failure to prove interpersonal violence does not prove that violence has not occurred nor that the child has been indoctrinated by the non-accused parent.”²²⁰ The gravity of this warning is particularly acute when one takes into account the incredible influence of custody evaluators on the outcome of court custody decisions.

3. Custody Evaluators

Legislation in New York and elsewhere must create standardized requirements for custody evaluators that both more narrowly define evaluators’ roles in custody proceedings and establish mandated training on domestic violence.

Three New York cases exemplify the problematic influence of evaluators. First, in *Zakariah*, following the evaluator’s “deprogramming” recommendation, the court switched custody from the mother to the father, who lived in a different state, and subsequently awarded the father full custody—an action arguably responsible for the

Deborah Epstein and Lisa Goodman expanded the dialogue on “credibility discount” first coined by Deborah Tuerkheimer, by claiming that it applies not only in the criminal legal system but also to “the experiences of female victims of [intimate partner violence] in legal and social service settings”). *Id.* at 244.

²¹⁸ Meier, *Denial of Family Violence in Court*, *supra* note 36, at 72-73 (“While this may be technically correct in a criminal case, in a custody case, the issue is not guilt or innocence, but future child well-being.”). *Id.* at 73.

²¹⁹ *Id.* at 73.

²²⁰ Saunders & Faller, *supra* note 59, at 8.

child's later hospitalization for an eating disorder.²²¹ In *Montoya v. Davis*, the trial court followed the drastic recommendation of the same forensic evaluator to grant primary physical custody to the father and suspend parenting time between the mother and child for a six month "deprogram" period, pursuant to the evaluator's assessment that the mother had severely alienated and brainwashed the child.²²² The *Montoya* court switched custody, despite the fact that the child had ADHD and autism, had resided with his mother since he was three years old, and had only seen his father, who lived in another state, a handful of times in the past few years.²²³ The influence of the same forensic evaluator in both of these cases is especially troubling considering the appellate division's reversal in *Montoya v. Davis* upon finding that the evaluator "abdicated her role as a neutral evaluator" and "her opinions and recommendations were afflicted by a pervasive and manifest bias against the mother."²²⁴ Furthermore, the aforementioned New York case of *J.F. v. D.F.* presents an example of what psychologist Richard Warshak calls false positive identifications—the judge explicitly found that the evaluator concluded wrongly that parental alienation existed.²²⁵ The existence of "false positive identification" cases in New York is thus evidenced by *J.F. v. D.F.*,²²⁶ and further supports the need for a law improving the role of custody evaluators.

Certainly, reform related to the role of custody evaluators in child custody proceedings extends beyond New York. With the introduction of the generally vague best-interests standard, courts have become more reliant on mental health and custody experts who

²²¹ Zakariah SS. v. Tara TT., 39 N.Y.S.3d 278, 279–80 (2016). *See also* Connors, *supra* note 19, at 19. Connors notes that a period of "deprogramming" is the exact remedy Gardner suggested. Connors further reveals that the child in this case was later hospitalized for an eating disorder and put on a feeding tube; the child's mother and her attorney suspect the disorder might have been caused by the "deprogramming." *Id.* at 19 n.76.

²²² *Montoya v. Davis*, 66 N.Y.S.3d 350, 353 (2017).

²²³ *Montoya v. Davis*, 66 N.Y.S.3d 350, 356 (2017). *See also* Connors, *supra* note 19, at 19–20.

²²⁴ *Montoya v. Davis*, 66 N.Y.S.3d 350, 353, (2017). *See also* Connors, *supra* note 19, at 20.

²²⁵ Warshak, *supra* note 92, at 54. Warshak's article and *J.F. v. D.F.* focus on false positive identifications of parental alienation outside the context of cases involving abuse allegations. However, Warshak's commentary and the case importantly show that in New York, and other states' family law cases, there are evaluators inaccurately assessing parental alienation as a present factor.

²²⁶ *Id.* ("A New York court noted that three experienced experts 'concluded that the mother had alienated the children.' But the court, rejecting the experts' conclusions, opined, 'There is not an iota of evidence that any one of three daughters are alienated from their father' (*J.F. v. D.F.*, 2018). Were the experts wrong? The judge?").

judges seem to believe “have the skill to obtain private family information and assess its credibility, and the knowledge to evaluate and compare factors for determining best interests.”²²⁷ As a result, in many custody cases, mental health professionals’ recommendations significantly shape custody outcomes “either as the basis of the court order or as the impetus for parents’ agreement.”²²⁸ Indeed, many courts unreservedly accept the evaluator’s recommendation, executing experts’ custody recommendations up to ninety percent of the time.²²⁹ However, such reliance is misplaced: mental health professionals are not credibility assessment experts, and they do not possess the scientific knowledge necessary for “linking clinical observations or test data to qualitative proxies for best interests or in comparing incommensurable factors to make custody recommendations to the court.”²³⁰

Due to the complexity of custody cases involving domestic violence, courts tend to place an even greater emphasis on experts’ opinions in these cases; however, the reality is that such experts often only have access to witness statements and evidence provided by the accusing parent and therefore lack any greater means for verifying the abuse.²³¹ Such reliance by courts is also problematic given the majority of evaluators’ ignorance of the dynamics of domestic violence, coupled with an overemphasis on Gardner’s theory, which remains deep-rooted among custody evaluators. A study of 201 psychologists in thirty-nine states found that “not only was domestic violence not a major factor in making recommendations, but that nearly seventy percent of custody evaluators endorsed denying sole or joint custody to a parent who ‘alienates the child from the other parent by negatively interpreting the other parent’s behavior.’”²³² These results show that custody evaluators view parental alienation as more significant than a history of domestic violence in forming

²²⁷ Scott & Emery, *supra* note 28, at 91; Yanni, *supra* note 89, at 549–50.

²²⁸ Scott & Emery, *supra* note 28, at 91.

²²⁹ Dana Royce Baerger et al., *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD. MATRIM. L. 35, 35 (2002); Yanni, *supra* note 89, at 550.

²³⁰ Scott & Emery, *supra* note 28, at 92.

²³¹ Yanni, *supra* note 89, at 553–54.

²³² Bajackson, *supra* note 16, at 330 (noting a study funded by the Department of Justice in 2010 to examine expert treatment of domestic violence and court reliance on this expert testimony found that the facts of the case have less influence on the final custody and visitation arrangements than the custody evaluator’s understanding of domestic violence); Scott & Emery, *supra* note 28, at 97–98 (“According to one survey, experienced evaluators listed alienation as the second most important factor in child-custody evaluations (following only a parent’s active alcoholism).”).

their recommendations for custody. Many custody evaluators ignore evidence of domestic violence or minimize the harmful impact it has on children, despite an abundance of research pointing to the contrary.²³³ Potentially explaining this outcome, only thirteen states clearly require that custody evaluators, guardians *ad litem*, or child representatives receive training on domestic violence and/or child abuse.²³⁴

Several significant recommendations have been made concerning how to reform the role of custody evaluators. These include prohibiting expert ultimate-issue opinions,²³⁵ requiring evaluators to summarize their data gathering procedures,²³⁶ requiring evaluators to investigate the different possible reasons for a child's preference for one parent,²³⁷ prioritizing an examination of the relationship with the non-custodial parent prior to separation,²³⁸ and prohibiting use of computerized interpretations of psychological testing in custody cases.²³⁹ Evaluators must also be required to attend trainings on domestic violence, and these trainings should, at least in part, be dedicated to the use of specialized detection and assessment tools, as well as the weeding out of various forms of gender bias. Such a requirement is necessary as research shows that even among custody evaluators who ask about domestic violence, many do not use specialized detection and assessment tools.²⁴⁰ Instead, many practitioners "rely on their own gut feelings or instincts to determine

²³³ See Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with "Outside Neutrals,"* 20 GPSOLO 16 (2003).

²³⁴ Stark et al., *supra* note 8, at 70, 76, 118–19.

²³⁵ Yanni, *supra* note 89, at 550–51. See also Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 193, 203, 214–17 (2005).

²³⁶ Elrod, *supra* note 17, at 542.

²³⁷ Warshak, *supra* note 92, at 54.

²³⁸ Katz, *supra* note 189, at 242–43. According to Katz, a New York practitioner whose work focuses on custody cases that often involve children's resistance to contact with one parent and allegations of PAS, "my anecdotal study and seventeen years of representing children shows that children's pre-separation relationships are the factor which is determinative of the child's post-divorce relationship with each parent."

²³⁹ See Timothy M. Tippins, *Psychological Testing: Controversy and Consensus*, N.Y. L.J. (ONLINE) (July 18, 2018), <https://www.law.com/newyorklawjournal/2018/07/18/psychological-testing-controversy-and-consensus/?slreturn=20211025075209> [https://perma.cc/R8S9-9VGX] (noting the exacerbated risks associated with psychological testing when evaluators rely upon conclusions generated by a computer program that is based on an algorithm).

²⁴⁰ Saunders & Faller, *supra* note 59, at 7.

whether domestic violence has occurred and impose their own personal assumptions about domestic violence.”²⁴¹ Furthermore, research indicates a significant correlation exists between sexist beliefs by judges and custody evaluators and the belief that abused women tend to falsely allege family violence as an alienating tactic.²⁴² As such, in tandem with trainings for evaluators, there must also be mandated training for judges to counter gender bias.

While this Note aligns itself with Maryland’s efforts to mandate domestic violence training for evaluators, attorneys, and judges, the Note goes one step further than Maryland S.B. 675 by arguing for the prohibition of ultimate-issue recommendations by evaluators. Timothy Tippins and psychologist Jeffrey Wittman mapped the reliability of different types of testimony offered by experts, and their findings, as described by author Stephen Yanni, purport that as “expert inferences deviate from scientifically grounded observations and conclusions and approach custody-specific recommendations—the ultimate issue—they become less reliable.”²⁴³ Therefore, although the “‘overwhelming majority of judges and attorneys believe that psychologists should directly address the ultimate issue before the court,’ the constraints of scientific knowledge and lack of uniform standards undermine the helpfulness and accuracy of outcome-specific opinions on the ultimate issue.”²⁴⁴ Consequently, evaluators should not provide final custody recommendations to the court, even if they have received domestic violence training. It is thus clear that for any legislation, in New York and across the country, there must be a provision reforming the role of custody evaluators in order to effectively address gender bias in custody cases.

²⁴¹ Gabrielle Davis, *A Systematic Approach to Domestic Abuse-Informed Child Custody Decision Making in Family Law Cases*, 53 FAM. CT. REV. 565, 567 (2015).

²⁴² Saunders & Faller, *supra* note 59, at 8 (“Of greatest concern, we found these beliefs to be linked to recommendations that child custody be awarded to perpetrators of domestic abuse.”); Mindthoff et al., *supra* note 217, at 248 (“[S]tudies exploring child custody cases with IPV allegations found that gendered beliefs of decision makers impact gendered differences in their recommendations.”).

²⁴³ Yanni, *supra* note 89, at 550–51, 568.

²⁴⁴ Yanni, *supra* note 89, at 550–51; Tippins, *supra* note 239 (acknowledging there is currently debate among professional psychologists as to whether any psychological testing should be used in custody evaluations; however, under the Frye test this debate in itself provides grounds for the exclusion of evaluations that incorporate test data).

4. Attorneys for Children (AFCs) Substituting Judgment

Finally, legislation in New York must explicitly state that in custody cases involving an Attorney for the Child (AFC),²⁴⁵ it is impermissible for the AFC to substitute judgment for the child based solely on the AFC's view that one of the parents has engaged in parental alienation. According to Rule 7.2 prescribing the function of the AFC in New York, as long as "the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests."²⁴⁶ Nevertheless, a review of the case law reveals that, at least in the upstate regions of New York, AFCs repeatedly are "failing to adhere to the strictures of child representation in alienation cases as set forth in 7.2."²⁴⁷

Jaya L. Connors, an Assistant Professor of Law and Director of the Family Violence Clinic at Albany Law School, highlights several upstate New York cases that exemplify the acuteness of this phenomenon.²⁴⁸ In one prototypical alienation case, *Viscuso*, the court discredited the mother's allegations of domestic violence and concluded there was parental alienation.²⁴⁹ The *Viscuso* court then used the finding of parental alienation to justify the

²⁴⁵ See ETHICS FOR ATTORNEYS FOR CHILDREN § 7.2 HON. GERALD J. WHALEN, PRESIDING JUST., N.Y. STATE SUP. CT. APP. DIV., FOURTH DEP'T, ATT'YS FOR CHILD. PROGRAM 2017), <https://www.nycourts.gov/courts/ad4/afc/afc-ethics.pdf> [<https://perma.cc/426Q-YRNE>] [hereinafter HON. WHALEN] ("[T]he role of the attorney for the child is to serve as a child's lawyer. The attorney for the child has the responsibility to represent and advocate the child's wishes and interests in the proceeding or action."). See also CHILD WELFARE INFORMATION GATEWAY, REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT PROCEEDINGS 2 (2018), <https://www.childwelfare.gov/pubPDFs/represent.pdf> [<https://perma.cc/J8A9-SBAW>]. As of December 2017, sixteen states (including New York) require the appointment of an attorney for the child.

²⁴⁶ 22 N.Y. COMP. CODES R. & REGS. tit. 22 § 7.2. See HON. WHALEN, *supra* note 245. See also Connors, *supra* note 19, at 9–10. As Connors notes, the two exceptions to this rule are: 1) "if the attorney feels that the child client is not of capacity; and this generally refers to very young children or children with diminished capacity," and 2) "if the attorney is convinced that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child." See also N.Y. FAM. CT. ACT § 241 (McKinney 2012).

²⁴⁷ Connors, *supra* note 19, at 15.

²⁴⁸ Jaya L. Connors, ALB. L. FAC. DIRECTORY (2020), <https://www.albanylaw.edu/faculty/directory/profiles?ind=Connors,%20Jaya> [<https://perma.cc/7P2C-XVP3>]; Connors, *supra* note 19, at 15–17.

²⁴⁹ *Viscuso v. Viscuso*, 12 N.Y.S.3d 684, 687. See Connors, *supra* note 19, at 15–16 (noting that the court concluded there was inherently parental alienation, as alleged by the father, based on its finding of maternal parental interference coupled with the child's desire to remain with the mother).

AFC's substitution of judgment, thereby "effectively erod[ing] the child's right to meaningful representation as directed by 7.2."²⁵⁰ Likewise, in *Zakariah*, the court discredited the mother's allegations of physical abuse by the father, and then, citing to *Viscuso*, permitted the AFC to substitute judgment for the child based on the forensic evaluator's determination that the mother was alienating the child from the father.²⁵¹ Finally, in *Rutland v. O'Brien*, the AFC substituted judgment for a sixteen-year-old and twelve-year-old through a successful motion to temporarily suspend the mother's parenting time despite the children's wish to continue their weekly visitations.²⁵² Although there was evidence that the mother criticized the father in front of the children and on social media, such behavior alone does not meet the threshold set by Rule 7.2 for the AFC to substitute judgment.²⁵³

These three cases illustrate that some AFCs perpetuate claims of parental alienation rather than provide true representation to the child. Therefore, legislation in New York and other states that provide for AFCs must include a provision stating that parental alienation is not grounds for an AFC to substitute judgment for the child. While this is technically already the case in New York based on Rule 7.2, there is a need for it to be stated explicitly in the legislation so that AFCs and judges alike do not consider parental alienation to be an implied justification for substituting judgment.

C. Legislative Proposals: Summary

The four outlined proposals directly respond to New York's legislative scheme and the ways in which parental alienation has entered New York family courts. First, the explicit "friendly parent" standard exemption in domestic violence cases would prohibit courts from punishing domestic violence survivors for not promoting their child's contact with the other parent. Second, provisions on custody cases involving failure of proof of domestic violence and/or child abuse would prohibit courts from employing alienation theory to discount abuse allegations or otherwise hold unsubstantiated abuse allegations against the accuser. Third, mandated training on domestic violence and stricter standards for the testimony of child custody evaluators would help prevent improper views on domestic violence and parental alienation from impacting final custody decisions. Finally, the fourth

²⁵⁰ Connors, *supra* note 19, at 16.

²⁵¹ *Zakariah*, 39 N.Y.S.3d at 279, 281. See Connors, *supra* note 19, at 16.

²⁵² *Rutland v. O'Brien*, 41 N.Y.S.3d 292, 292, 294 (2016). See Connors, *supra* note 19, at 16.

²⁵³ *Rutland v. O'Brien*, 41 N.Y.S.3d 292, 292, 296 (2016). See Connors, *supra* note 19, at 16.

proposal would explicitly prohibit the invocation of parental alienation as grounds for AFCs to substitute judgment for the child. Together, these four legislative proposals would make great strides in New York, and any other states where they are applicable, in diminishing the impact of gender bias in custody cases involving competing claims of domestic violence and parental alienation.

CONCLUSION

As Meier's 2020 study shows, despite some claims that parental alienation is a gender-neutral theory, its impact across the country has been to discredit mothers who allege domestic violence and child abuse and to penalize them in custody decisions.²⁵⁴ If a mother reveals abuse, the father is more likely to allege parental alienation, and thus the mother is more likely to lose custody. This places mothers in an impossible bind that puts at risk not only those mothers who are forced to have ongoing contact with their abusers, but also the children who must suffer the consequences of adverse custody decisions, especially when the mother loses custody to the abuser. In the worst of these outcomes, abusive parents have killed their children during court-ordered visits.

Meier's 2020 study coupled with H. Con. Res. 72 and the advocacy of parents such as Jacqueline Franchetti have encouraged states to enact new child custody legislation that protects abused mothers and children. However, it is crucial that legislators in these states receive input from practitioners so as to ensure that the impact of these new laws will be seen in practice and not just on paper. As exemplified by some of the domestic violence presumption laws, language that sounds promising initially may ultimately do little to change family courtroom dynamics. Since the four aforementioned proposals directly respond to the nuanced ways in which gender bias seeps into New York custody proceedings, this Note argues they will be successful in countering the gendered dynamics of cross-allegation domestic violence-parental alienation cases in practice. However, even if future legislation proves effective, the pervasiveness of the biased treatment of mothers in such custody cases points to a deeper societal issue:

One is left to wonder why North American professionals and courts have been so reluctant to acquire knowledge about domestic violence, yet so quick to embrace a mere theory dismissing such evidence. The incredible speed with which courts and professionals have accepted "alienated parent

²⁵⁴ Meier, *U.S. Child Custody Outcomes*, *supra* note 9.

syndrome” theory—with assertions that most of the perpetrators are women may in and of itself indicate a continuing gender bias.²⁵⁵

Therefore, while it is essential that states craft legislation aimed at providing institutional protections for mothers who allege abuse, the aforementioned dynamic points to a troubling system of beliefs existing in society, beyond the context of family court, which must be targeted directly.

²⁵⁵ Linda C. Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 FAM. CT. REV. 411, 425 (2004).