INTERFERENCE WITH PARENTAL RIGHTS OF NONCUSTODIAL PARENT AS GROUNDS FOR MODIFICATION OF CHILD CUSTODY

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I. Introduction

Interference by one parent in the relationship of a child and the other parent is almost never in the child's best interests. In fact, in extreme cases, actions by one parent to alienate the affections of the child from the other parent, to interfere win the other parent's visitation rights, or to remove the child to a distant state or country can often lead to liability in tort. See generally E. Borris, "Torts Arising Out of Interference with Custody and Visitation," 7 Divorce Litigation 192 (1995). Tort liability is not always an option, however, as many courts refuse to award damages based upon interference with visitation rights. E.g., Cosner v. Ridinger, 882 P.2d 1243 (Wyo.1994).

A noncustodial parent is not always left without a remedy, however, simply because courts in that parent's jurisdiction refuse to recognize tort actions arising out of interference with his or her parental rights. This article discusses a different type of liability which may result from interference with the noncustodial parent's rights: loss of custody. The article will first discuss whether a party may generally obtain a change of custody based upon such interference. The article will then examine specific acts by a custodial parent which may cause a court to change custody, including denial of visitation rights, alienation of the child's affections away from the noncustodial parent, and removal of the child to a distant jurisdiction. The section on alienation of the child's affections includes a discussion of Parental Alienation Syndrome (PAS) and recent cases that have dealt with PAS. The article concludes with a suggestion of possible provisions that practitioners may insert in custody decrees in order to prevent future problems between custodial and noncustodial parents.

II. Interference Amounting to a Substantial Change in Circumstances

Most courts and experts agree that except in unusual cases it is most important for a child to have a strong relationship with both parents. Thus, courts will typically conclude that an award of custody to the parent who is most likely to foster a relationship between the child and the other parent is in the child's best interests. For this reason, if a custodial parent has demonstrated in the past a pattern of interference with the relationship between the child and the noncustodial parent, unless other facts dictate a different holding, courts will frequently conclude that a substantial change in circumstances justifying a change of custody has occurred.

Not surprisingly, there is a long-standing tradition of awarding a change of custody where the custodial parent has interfered with the parental rights of the other parent. The Court of Appeals of Maryland clearly established this point in Berlin v. Berlin, 239 Md. 52, 210 A.2d 380 (1965). In Berlin, the parties entered into a written separation agreement. Pursuant to the agreement, incorporated into the court's order, custody of the children was awarded to the mother, and the father received reasonable visitation rights. In addition, the parties also agreed that the mother would notify the father if the mother moved out of the Washington metropolitan area. Subsequently, the mother began denying the father his right to visitation. For this reason, the father requested a change in custody. The trial court granted the father's

request, and the mother appealed.

On appeal, the Court of Appeals of Maryland held that the trial court properly changed custody to the father. As support for its decision, the court noted only that "the record indicates that the mother had deprived the father of his rights of visitation for a substantial period of time and that he is a fit and proper person to have custody of the children." 210 A.2d at 384. Thus, in Maryland, where a parent has attempted to create emotional distance between the other parent and the child, that parent has committed an act so egregious that the other parent could be awarded custody based solely on this one fact.

Another court which reached this conclusion was Walden v. Walden, 112 A.D.2d 1035, 492 N.Y.S.2d 827 (1987). In Walden, the parties' marriage produced two children, who were minors at the time of the divorce proceeding. The parties entered into a stipulation that awarded sole custody of the daughter to the mother and sole custody of the son to the father. Subsequently, the father filed a motion for a change of custody of the daughter to himself. The mother filed a cross-motion for a change of custody of the son to herself. The trial court awarded custody of both children to the mother, and the father appealed.

On appeal, the Appellate Division, Second Department, affirmed the trial court's decision to award custody to the mother. In reaching this conclusion, the court noted that the father had influenced the son to derogatorily call the mother by her name rather than "mother," and the child "mimicked the abusive names which he had heard the [father] direct at her." 492 N.Y.S.2d at 829. Therefore, the court believed that in order to "remedy the deteriorating relationship" it was in the son's best interests that the mother be awarded custody of the son. Id. Hence, where one parent has alienated the child from the other parent, in order to repair the relationship it is in the child's best interests for the innocent parent to receive custody.

Likewise, in Gentry v. Simmons, 754 S.W.2d 579 (Mo.Ct.App.1988), the parties divorced in 1982. Pursuant to the decree, custody of the parties' minor daughter was awarded to the mother. Subsequently, the father alleged that the mother and her new husband had attempted to degrade the father in front of the child. For this reason, the father alleged that he should be awarded custody. The trial court disagreed and awarded custody and attorney's fees to the mother. The father appealed.

On appeal, the Court of Appeals of Missouri noted that the mother had repeatedly attempted to frustrate the father's right to visitation. Also, in the presence of the child, the mother held conversations that were critical of the father. Furthermore, frequently, when the father was speaking with the child on the telephone, the mother would monitor the call and force the child to hang up on her father. In addition, the mother degraded the father in the presence of the child. In fact, because the mother had so actively sought to injure the child's view of the father, her strategy backfired, and the child actually began to resent the mother. Based upon these facts, the court of appeals held that the trial court incorrectly awarded custody to the mother:

> The evidence, including the mother and stepfather's own testimony, indicated that they held the father in low regard, degraded him in [the child's] presence, depicted him as an evil person with whom [the child] should have no contact and engaged in persistent efforts to destroy [the child's] natural affection for her father. The mother expressed it as her preference that [the child] have nothing to do with her father, a directive which [the child] continually resisted. This state of facts showing an attempt by one parent to alienate a child from the other parent is a changed condition and can form the basis for a modification of custody, Eatherton v. Eatherton, 725 S.W.2d 125, 128 (Mo. [Ct.] App.1987). When a parent who has custody makes disrespectful and abusive statements against the

> other parent and attempts to wean the children away, the decree can properly be modified and the custody changed. Garrett v. Garrett, 464 S.W.2d 740, 743 (Mo. [Ct.] App.1971.)

Id. at 582 (emphasis added). Thus, if one parent speaks in a derogatory manner about the other parent and engages in other efforts to destroy the child's relationship with the other parent, the other parent should be awarded custody.

In Nauman v. Nauman, 445 N.W.2d 38 (S.D.1989), the parties were divorced in 1980. Custody of the parties' two minor children was awarded to the mother. The father was awarded reasonable visitation. Subsequently, the father attempted to exercise his visitation rights, but the mother frustrated these attempts. The father tried to call the mother, but she refused to take his telephone calls. The mother told the father that the children did not want to visit him. In 1987, the father filed an action for a change of custody. The trial court concluded that it was in the children's best interests to be placed with the father. The mother appealed.

On appeal, the Supreme Court of South Dakota held that the trial court correctly vested custody in the father. In entering this decision, the court recognized that the mother had repeatedly frustrated the father's attempts to visit with the children. Also, the mother had engaged in efforts to alienate the children from the father:

> Here, the record indicates that there was in fact a substantial and material change in circumstances since the decree of divorce was entered. Most importantly, mother has been unwilling to abide by the trial court's orders regarding visitation, thereby aggravating an already hostile relationship between the parties. She has also attempted to alienate the children from their father, as shown by the children's parroting of language used by mother in her arguments with father. Furthermore, mother has communicated her hostile feelings through the children rather than by direct communication with father, and she has allowed the children to read the legal documents in this case and has solicited their responses.

Id. at 39. Thus, as the court noted in this passage, where one parent attempts to (1) frustrate the other parent's right to visitation, and (2) alienate the child from the other parent, the other parent should be awarded custody.

Also, in Marriage of Birge, 34 Or.App. 581, 579 P.2d 297 (1978), the mother was awarded custody of the parties' child. Shortly thereafter, the mother voluntarily gave custody to the father. Subsequently, the mother filed an action for a change of custody back to herself. The trial court awarded custody to the mother, and the father appealed.

On appeal to the Oregon Court of Appeals, the trial court's decision to award custody to the mother was affirmed. The court noted that the mother "experienced difficulty in exercising her visitation rights." 579 P.2d at 298. Also, the mother was "subjected to verbal abuse and harassment in front of the child whenever she would begin and end her visitations." Id. Thus, because the father had interfered with the mother's right to visit with the child and because the father had belittled the mother in the presence of the child, it was proper to award custody to the mother.

For other cases where courts changed custody based upon interference with the noncustodial parent's parental rights, see England v. England, 650 So.2d 888 (Ala.Civ.App.1994) (where mother refused to allow father access to child, trial court correctly modified custody award to place custody with father); In re Marriage of Quirk-Edwards, 509 N.W.2d 476 (Iowa 1993) (efforts of mother to deprive father of court-ordered visitation constituted substantial change of circumstances); In re Marriage of Rosenfeld, 524 N.W.2d 212 (Iowa Ct.App.1994) (change of custody to mother was warranted where father's new wife had forbidden child to talk to the

mother; father failed to respect mother's contact with child); In re Marriage of Clifford, 515 N.W.2d 559 (Iowa Ct.App.1994) (custody of children was properly changed from mother to father, based on evidence of mother's interference with father's visitation rights); Shortt v. Lasswell, 765 S.W.2d 387 (Mo.Ct.App.1989) (award of change of custody to mother was warranted where paternal grandparents had attempted to alienate the child from the mother); Cornell v. Cornell, 809 S.W.2d 869 (Mo.Ct.App.1991) (award of change of custody to father was justified where mother had attempted to alienate the daughter from the father); Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957 (1995) (custodial parent's interference with relationship between child and noncustodial parent justified change of custody); Sullivan v. Sullivan, 216 A.D.2d 627, 627 N.Y.S.2d 829 (1995) (modification of custody was justified where mother consistently violated court-ordered visitation and telephone contact); Betancourt v. Boughton, 204 A.D.2d 804, 611 N.Y.S.2d 941 (1994) (court awarded change of custody from mother to father where mother interfered with father's visitation rights); Jeschke v. Wockenfuss, 534 N.W.2d 602 (S.D.1995) (modification of custody from father to mother was consistent with best interests of the children where father had consistently interfered with mother's relationship with children); and Sigg v. Sigg, 905 P.2d 908 (Utah Ct.App.1995) (mother's interference with father's visitation rights was a material change in circumstances).

III. Jurisdictions That Conclude That Parental Interference is not Grounds for Modification

Although it is clearly the minority position, courts in some jurisdictions have held that interference with the noncustodial parent's parental rights is not grounds for a change of custody. Surprisingly, most of these courts conclude that such interference is not so severe that it affects the child's best interests. See generally Annot., "Interference by Custodian of Child with Noncustodial Parent's Visitation Rights as Ground for Change of Custody," 28 A.L.R.4th 9 (1984).

Due to an unusual statute in Wisconsin, it is virtually impossible for a noncustodial parent to be awarded a change of custody based upon interference with his or her parental rights by the custodial parent, where the noncustodial parent has filed the action within two years of the prior custody order. Pursuant to Wis.Stat.Ann. § 767.325(1) (West 1988), where a parent files a motion for a change of custody within two years of the prior order, that parent may not receive an award of a change of custody unless he or she presents "substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interests of the child." In interpreting this statute, courts in Wisconsin have held that interference with the noncustodial parent's parental rights within two years of a custody order will not justify a change of custody. For example, in Stephanie R.N. v. Wendy L.D., 174 Wis.2d 745, 498 N.W.2d 235 (1993), the parties had one minor child. In August 1988, the court in Wisconsin awarded custody to the mother and alternate weekend and holiday visitation to the father. On several occasions, the mother denied the father his visitation rights. In February 1989, the trial court awarded temporary custody to the father, but the mother refused to transfer custody to the father. As a result, a sheriff forcibly entered the mother's house to retrieve the child. In December 1989, the trial court held additional hearings and transferred permanent custody to the father. This decision was based, in part, upon the mother's unreasonable interference with the father's visitation rights. The mother appealed.

On appeal, the Supreme Court of Wisconsin held that because of the language of § 767.325(1)(a) the trial court improperly transferred custody to the father. The court specifically wrote that, although interference with visitation rights may be emotionally harmful to the child, interference with visitation rights will not justify a change of custody within the two-year period after the previous custody decision:

> Moreover, at what point does the harm or threat of harm caused by denial of visitation make modification "necessary?" As explained above, the sec. 767.325(1)(a), Stats., standard requires "necessity," which suggests some immediate need for modification. "Necessity" also requires more than that the modification is in the child's best interests. The fact that denial of visitation may cause emotional harm to a child does not indicate when modification becomes "necessary."

498 N.W.2d at 243 (emphasis in original). As the court wrote, under § 767.325(1)(a), denials of visitation, even if willful and repeated, do not create a "necessity" for a transfer of custody within the two-year period.

Although this decision may appear harsh, a further analysis of the case indicates that the decision may have been a correct reading of § 767.325(1)(a). As the court of appeals noted in its earlier decision in the case, § 767.325(1)(a) specifically omits a best-interests standard in favor of a "necessity" standard. In re Paternity of S.R.N., 167 Wis.2d 315, 481 N.W.2d 672 (Ct.App.1992). Furthermore, as the court of appeals stated, the legislative history of § 767.325(1)(a) indicates that the legislature intended to create a "'time out' or 'truce' period of two years during which the child and the parents can adjust to the new family situation." 481 N.W.2d at 679. Thus, as the court of appeals and supreme court believed, interference with visitation during the two-year window, although possibly harmful to the child, is not harmful enough to justify breaking the "truce" period mandated by the legislature. Regardless of whether this decision is sound, one cannot help but wonder if the courts and the legislature in Wisconsin have given custodial parents the "green light" to interfere with the rights of noncustodial parents for the first two years after the divorce. In order to prevent such a catastrophe, S.R.N. should be limited to its facts. In S.R.N., although the mother denied the father's court-ordered visitation, the mother did not completely cut off the child's access to the father. Rather, the mother permitted the father to see the child so long as the father did not remove the child from her house. Future courts should conclude that if a custodial parent completely cuts off access to the child by the noncustodial parent, a change of custody is appropriate, even if the request is made within the two-year "truce" period.

Without any legislative assistance, some courts have established a flat rule that interference with a noncustodial parent's parental rights does not per se amount to a substantial change in circumstances which justifies a modification. Courts in Florida appear to have firmly adopted this rule. For example, in Bryant v. Meredith, 610 So.2d 586 (Fla.2d DCA 1992), a child was born out of wedlock. The court awarded primary residential custody to the mother and liberal visitation to the father. The court also required the parties to inform each other of his or her new address if either of them relocated. Subsequently, the father remarried and the mother moved to a different city. Then, the father filed an action for a modification of custody, alleging (1) frustration of his visitation rights, and (2) failure of the mother to inform him of her new address.

In denying the modification, the Second District Court of Appeal of Florida wrote:

> We are concerned that there was some evidence that the mother was frustrating visitation and telephonic contact between the father and the child. The father testified and the mother admitted that she failed to advise him where she was moving. Consequently, he was unable to contact the child during the month of August 1990. However, there is also evidence that the father aggravated the visitation issue by his extremely inflexible attitude. Despite the existence of problems with visitation, the record shows that visitation took place while the child was a resident of Georgia. The custodial parent's frustration of visitation rights, alone, does not justify a change in residential custody.

Id. at 588. Hence, as noted by the court in Florida, a denial of parental rights of the noncustodial parent does not amount to a substantial change in circumstances which would justify a change in custody. Accord Sherman v. Sherman, 558 So.2d 149 (Fla.3d DCA 1990); Schweinberg v. Click, 627 So.2d 548 (Fla. 5th DCA 1993); Pierce v. Pierce, 620 N.E.2d 726 (Ind.Ct.App.1993).

IV. Specific Acts of Interference Which May Cause a Court to Change Custody

After a practitioner determines whether the relevant jurisdiction may award a change of custody based upon acts of interference with the noncustodial parent's rights, it must be determined which particular acts will justify such a change. The relevant authority indicates that three distinct fact patterns may justify a change. First, courts often award a change of custody if the custodial parent repeatedly interferes with the noncustodial parent's court-ordered visitation rights. Second, courts are inclined to award a change of custody if the custodial parent alienates the child's affections away from the noncustodial parent. Third, if the custodial parent removes the child to a distant jurisdiction without informing the noncustodial parent of the move, courts frequently order a change of custody. Each of these scenarios will be addressed in turn.

Frustration of Visitation Rights

The most common form of interference with parental rights which is remedied by courts occurs when custodial parents consistently refuse to turn children over to the noncustodial parents for court-ordered visitation. The fact that courts frequently order changes of custody in this circumstance is perfectly understandable, since court-ordered visitation is often the noncustodial parent's only connection to his or her children. If this visitation is frustrated, the child's best interests are clearly injured because the child will be completely deprived of a relationship with the noncustodial parent.

Thus, the court in Ready v. Ready, 906 P.2d 382 (Wyo.1995), transferred custody because of the frustration of visitation rights by the custodial parent. In Ready, the divorce decree awarded primary physical custody of the parties' four children to the mother, subject to the father's visitation rights. For several years thereafter, the parties were in constant contact with the court because of disputes over the father's visitation rights. Approximately three years after the divorce, the court found the mother in contempt of court and warned her that an additional contempt order might cause her to lose custody. At a subsequent show cause hearing, "evidence was produced that Mother had repeatedly frustrated Father's visitation rights." Id. at 384. Based upon this fact, the trial court ruled that "the children were suffering because they were not able to spend time with their father and therefore it was in the children's best interests for Father to have custody of the children." Id.

The mother appealed, arguing that the facts did not indicate that a substantial change in circumstances had occurred. The Supreme Court of Wyoming wrote, however, that because the mother showed no inclination to honor the father's visitation rights, the trial court clearly did not err by changing custody:

> Although Mother argues that no substantial change in circumstances has occurred, certainly she must concede her repeated failure to abide by the district court's orders is a matter which neither the parties nor the court could have foreseen when drafting the original decree. In its order from the bench, the district court stated, "I will simply acknowledge on the Bench that there is no way I can get [the mother] to obey the orders of this Court in extending visitation privileges to [the father], and I am going to transfer custody as of today to [the father]." The district court has broad discretion to determine whether Mother's

> behavior affected the children's welfare. The court also stated, "I told you before, every time you do this the victims get it, the victims are the kids."

Id. at 385. Hence, as the court stated, repeated denials of visitation cause injuries to the children. Thus, it would be improper to leave the children in the custody of the person who caused those injuries.

Similarly, a court in New York indicated that the repeated frustration of visitation rights is so injurious to the children that such frustration may, in effect, create a presumption that the offending parent is unfit to continue to have custody. In Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957 (1995), the parties' marriage produced four minor children and the mother was initially awarded custody at the parties' divorce. Subsequently, the father filed a motion for a change of custody. This motion was based, in part, upon "the mother's ongoing interference with visitation." 628 N.Y.S.2d at 959. In awarding a change of custody, the appellate division wrote:

> Indeed, a custodial parent's interference with the relationship between a child and a noncustodial parent has been said to be "an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent[.]"

Id. at 958 (quoting Maloney v. Maloney, 208 A.D.2d 603, 617 N.Y.S.2d 190, 191 (1994)). Thus, the Appellate Division, Second Department, of New York has taken a strong stand against interference with visitation rights by the custodial parents. Such interference is so egregious, according to the court, that there is a "strong probability" that the offending party is not fit to act as the child's custodian.

For other recent cases where the court awarded a change in custody based upon repeated violations of court-ordered visitation, see In re Marriage of Quirk-Edwards, 509 N.W.2d 476 (Iowa 1993); Smith v. Smith, 508 N.W.2d 222 (Minn.Ct.App.1993); Sullivan v. Sullivan, 216 A.D.2d 627, 627 N.Y.S.2d 829 (1995); Betancourt v. Boughton, 204 A.D.2d 804, 611 N.Y.S.2d 941 (1994); and Jeschke v. Wockenfuss, 534 N.W.2d 602 (S.D.1995).

Nonetheless, some courts have simply held that denials of visitation rights do not justify changes of custody. The court in Lesavich v. Anderson, 192 W.Va. 553, 453 S.E.2d 387 (1994), reached this conclusion. In Lesavich, the divorce decree awarded custody of the parties' daughter to the mother. The decree also awarded visitation to the father, which would increase as the child got older. Subsequently, the father filed a petition for a change in custody. This petition alleged that the mother "had failed to afford [the father] reasonable visitation rights." 453 S.E.2d at 388. After reviewing the evidence, the family law master concluded that "the [mother] was never going to permit visitation by [the father] with the child" and recommended a change of custody to the husband. Id. The trial court agreed and awarded the recommended change of custody. Believing that a denial of visitation, even if persistent, would not justify a change of custody absent a showing that such a change would materially benefit the child, this decision was reversed by the Supreme Court of Appeals of West Virginia. See also Bryant v. Meredith, 610 So.2d 586 (Fla.2d DCA 1992) (custodial parent's frustration of visitation rights does not, alone, justify a change of custody); Rogge v. Rogge, 509 N.W.2d 163 (Minn.Ct.App.1993) (unwarranted denial of visitation is not controlling on issue of whether to grant a modification of custody); Humphrey v. Humphrey, 888 S.W.2d 342 (Mo.Ct.App.1994) (no change of custody was warranted where mother failed to honor father's visitation rights on only one occasion); Sullivan v. Sullivan, 249 Neb. 573, 544 N.W.2d 354 (1996) (frustration of visitation did not justify change in custody from mother to father; father only missed two weekend visitations and grandmother interfered with one holiday visitation).

Alienation of Child's Affections from Noncustodial Parent

Courts frequently conclude that where the custodial parent attempts to show the other parent in a negative light, a substantial change in circumstances has occurred which justifies a change of custody. As noted in the case of Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957 (1995), experts generally agree that when a custodial parent speaks negatively about the noncustodial parent in the presence of the child, a custodial parent causes great damage to the emotional and mental health of the child. In Young, the parties' marriage produced four minor children. From 1988 until 1992, the mother had custody of the parties' children. In 1992, the father moved for a change of custody, alleging that the mother's behavior was "calculated to destroy the children's relationship with [him]." 628 N.Y.S.2d at 959. The father noted that during the four-year period of the mother's custody the mother had repeatedly made false allegations of abuse in order to destroy the relationship between the children and their father. A report by an expert witness confirmed the husband's beliefs:

> "It has become eminently clear that if the four children of the Young marriage are left in the care of [the mother], they will have no relationship with their biological father, but they will grow up in an environment where they are taught that he is a devilishly perverse parent who offers them an ever-present threat of abuse. There is clear information to support [the mother's] everyday teaching of this to her children without the slightest appreciation of how that distorts their view of themselves, her past or their father.... She is single-minded in trying to teach the children how dangerous their father is and through that single-minded preoccupation does not allow them to form any type of neutral relationship with their father.["]

Id. at 962-63. In spite of the expert's report that indicated that the mother was intentionally destroying the relationship with the father, because the children stated a desire to remain with the mother, the trial court refused to award a change of custody. After recognizing "the mother's consistent preaching to the children that their father was an evil and dangerous man," the Appellate Division, Second Department, overruled the decision of, Second Department, the trial court and awarded a change of custody to the father. Id. at 963; see also Stamps v. Rawlins, 297 Ark. 370, 761 S.W.2d 933 (1988) (custodial parent screamed at father in the presence of the child; change of custody was warranted); Theisen v. Theisen, 405 N.W.2d 470 (Minn.Ct.App.1987) (modification of custody was justified where custodial parent repeatedly made false accusations to children regarding the noncustodial parent); Jeschke v. Wockenfuss, 534 N.W.2d 602 (S.D.1995) (custodial parent repeatedly called the noncustodial parent vulgar names in front of the children).

In spite of the above authority, some courts believe that a transfer of custody is no cure for the alienation of the child's affections from the noncustodial parent. For this reason, even where the custodial parent has clearly damaged the child's relationship with the noncustodial parent, these courts will refuse to award a change of custody. For example, in Wiederholt v. Fischer, 169 Wis.2d 524, 485 N.W.2d 442 (Ct.App.1992), the mother gave birth to three children prior to the parties' divorce. The divorce decree awarded primary placement of the children to the mother, and reasonable visitation rights to the father. Subsequent to the divorce, each party filed numerous allegations that the other party had violated the divorce decree with respect to the awards of custody and visitation. In 1990, the father moved for a change of custody. The basis of the motion was that the children suffered from "Parental Alienation Syndrome." 485 N.W.2d at 443. In fact, the father's expert witness indicated that two of the parties' children had "one of the worst cases I've ever seen in doing this kind of work." Id. at 444. The expert also noted that the mother was the cause of the syndrome. Nonetheless, the trial court refused to order a change in custody, and the father appealed.

On appeal, the decision by the trial court to refuse to change custody was affirmed. The court believed that a transfer of custody was not necessarily a cure for the children's ills, and the children had no desire to live with their father. Thus, even though the children were clearly being alienated from their father, a change of custody was not warranted. See also In re Marriage of Hansen, 48 Or.App. 193, 616 P.2d 567 (1980) (court refused to award change in custody even though custodial parent caused confrontations with noncustodial parent whenever noncustodial parent came to the custodial parent's house to visit the children).

Parental Alienation Syndrome

As demonstrated by the Wiederholt case, a recent trend has developed whereby noncustodial parents have attempted to gain custody by alleging that the child at issue is suffering from Parental Alienation Syndrome (PAS). The theory of PAS was developed by Dr. Richard Gardner. See generally R.A. Gardner, M.D., The Parental Alienation Syndrome (1992). "Dr. Gardner describes PAS as a disturbance in which children are not merely systematically and consciously 'brainwashed' but are also subconsciously and unconsciously 'programmed' by one parent against the other." Wood, "The Parental Alienation Syndrome: A Dangerous Aura of Reliability," 27 Loy.L.A.L.Rev. 1367, 1370 (June 1994) (quoting R.A. Gardner, supra, at 60). Thus, PAS occurs when one parent consciously programs the child to disfavor the other parent.

As noted in Wiederholt v. Fischer, 169 Wis.2d 524, 485 N.W.2d 442 (Ct.App.1992), the possible existence of this syndrome does not always compel a court to award a change of custody. Some courts have concluded, however, that where a child has been programmed to disfavor the noncustodial parent a change in custody is warranted. In Karen B. v. Clyde M., 151 Misc.2d 794, 574 N.Y.S.2d 267 (Fam.Ct.1991), aff'd, Karen "PP" v. Clyde "QQ", 197 A.D.2d 753, 602 N.Y.S.2d 709 (1993), the parties' daughter was born out of wedlock. The parties entered into a joint custody arrangement in 1990. Subsequently, the mother filed a motion in which she requested that she be awarded full custody. In the motion, the mother alleged physical and sexual abuse of the child by the father. A caseworker conducted an investigation. The caseworker testified that the child informed her that she had been abused. An expert at the Department of Social Services conducted a further investigation. The mother repeated the allegations to the expert. The expert attempted to ask the mother questions, but the mother could not answer the expert's questions unless the mother started over from the beginning and repeated the entire story. Furthermore, the child stated that she had been just "[m]aking believe" when she informed others of the alleged incidents of abuse. 574 N.Y.S.2d at 269. At trial, the expert concluded that the mother desired to remove the father from her and the child's lives, and "there was no information which would indicate that [the child] had been sexually abused by her father." Id. Also, a pediatrician examined the child and concluded that the child had not been abused.

Subsequently, the mother contacted the Department of Social Services again and made additional allegations of sexual abuse. In an interview, the child stated that she had been sexually abused by her father. After interviewing the child, another expert witness concluded that the child had been abused by the father. The expert indicated, however, that false allegations of abuse were "most common" during periods of hostility between parents. Id. at 270. Several other witnesses observed that the child displayed no fear of the father.

In a decision that was affirmed by the Appellate Division, Third Department, of New York, the trial court removed the child from the custody of the mother and placed custody of the child with the father. In entering this decision, the court cited a report by Dr. Gardner concerning PAS. Id. at 271. Based upon Dr. Gardner's report, the trial court concluded that the mother had "programmed" the child to accuse the father of sexual abuse so that she could obtain custody. Id. at 272. As the court wrote:

> In the case before the Court, [the mother] has sought to destroy the reputation of her former friend and lover by accusing him of one of the most heinous crimes known to man. The aura of the allegation, irrespective of its falsehood, may stand over him and affect him for the rest of his life. Likewise, by involving her own daughter in her nefarious scheme, she may have inflicted irreparable psychological damage on her. Like Medea, she is ready to sacrifice her child to accomplish her selfish goal.

Id. In other words, because the child had been programmed to accuse the father of abuse, a change of custody which awarded full custody to the father was appropriate.

As indicated in Wood, supra, 27 Loy.L.A.L.Rev. at 1370, PAS is a relatively new concept which has not been thoroughly studied except by Dr. Gardner. Thus, particularly when a child accuses a parent of sexual abuse, practitioners should be cautious about alleging the existence of PAS. At the same time, as noted in Karen B. v. Clyde M., supra, a custodial parent who wants to end the child's relationship with the noncustodial parent has every incentive to repeatedly allege sexual abuse. Until PAS is further studied by experts such as Dr. Gardner, parties should concentrate on the facts in the case, and whether the child is actually being harmed by abuse or by the custodial parent's attempts to alienate the child from the father's affections. In other words, attorneys should attack or defend alleged abusers without discussing PAS until further studies are conducted. Otherwise, experts who allege that PAS has occurred in a particular case will face a stiff cross- examination on the very existence of the syndrome, and the court's focus will be shifted from the child's best interests to the existence of PAS. As in Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957 (1995), an attorney can make a strong argument for a change in custody based upon alienation of the child's affections from the noncustodial parent without bringing in evidence of the controversial PAS.

Change of Residence

Many practitioners insert requirements in their divorce decrees that custodial parents inform the noncustodial parents of any relocation plans. Such notification will give the noncustodial parent an opportunity to argue that the relocation is not in the child's best interests. See generally N. Roddy, "Stabilizing Families in a Mobile Society: Recent Case Law on Relocation of the Custodial Parent," 8 *Divorce Litigation* 141 (1996). Quite frequently, however, a custodial parent will ignore the notification requirement and relocate to a distant jurisdiction without informing the other parent of the move. Since a clandestine move to a distant location often injures the child's relationship with the noncustodial parent, courts often determine that the move constitutes a substantial change in circumstances justifying a change in custody.

A good example was provided by the case of In re Marriage of Clifford, 515 N.W.2d 559 (Iowa Ct.App.1994). In Clifford, the parties' divorce decree awarded custody of their two minor children to the mother. The decree also awarded reasonable visitation to the father. Approximately five months later, the mother moved from Des Moines, Iowa, to Cedar Rapids, Iowa. The mother did not provide the father with her new home address or telephone number until three or four months after the move. Subsequently, because the father's visitation became frustrated by the mother's actions, the father filed a motion for a change of custody. After considering the mother's failure to inform the father of her new location or telephone number, the court awarded a change of custody to the father. Id. at 561.

Likewise, in Sigg v. Sigg, 905 P.2d 908 (Utah Ct.App.1995), the parties' marriage produced two daughters. The divorce decree awarded custody to the mother and liberal visitation to the father. The decree also stated that in the event that the mother moved away from Utah the

father would be allowed 60 days' visitation each year. The decree further provided that the parties would openly communicate with each other concerning the children's best interests and take actions to enhance the relationship with the children and both parents. Approximately two years later, the mother sold her home and relocated to New Zealand. The mother did not inform the father of the move, and the father did not learn of the move until after the children and the mother left the United States. As a result, the children's access to their father was severely limited. Subsequently, the mother moved to Colorado, but only gave the father a business telephone number until she was required to give a personal number. Frustrated, the father filed a motion for a change in custody and visitation. Even after the father filed the motion, the mother continued to obstruct the father's access to the children. The trial court concluded that although the children had strongly bonded with the mother, it was in their best interests for the court to transfer custody to the father.

On appeal, the decision by the trial court to transfer custody was affirmed. The Court of Appeals of Utah specifically cited the fact that the mother had removed the children to a foreign country without notifying the father:

> [O]ur review of the record indicates [the mother] has violated the terms of the divorce decree. For example, although [the mother] is correct in pointing out that the divorce decree explicitly contemplates her possible move to New Zealand or elsewhere outside of Utah, it certainly does not anticipate, let alone condone, removing the children without notifying the father. Such notification, although not explicitly required in the decree, is clearly within the scope of the decree's requirement that the couple "freely and openly communicate regarding actions to be taken in the best interests of the children."

Id. at 913-14. Hence, as stated by the court, a removal of a child to a distant jurisdiction by a custodial parent justifies a change of custody. Accord Chandler v. Chandler, 261 Ga. 598, 409 S.E.2d 203 (1991) (change of custody to father was warranted where mother violated divorce decree by taking child out of the state without notifying father); In re Marriage of Clifford, supra (custodial mother's move out of Iowa without notification to the father justified change of custody to father); Moon v. Moon, 795 S.W.2d 511 (Mo.Ct.App.1990) (change of custody was proper where mother removed children to Mexico without father's authorization).

In contrast, some courts have refused to change custody simply because a parent removed the child without notification to the other parent. For example, in In re Marriage of McDole, 67 Wash.App. 884, 841 P.2d 770 (1992), the parties' marriage produced one child. Shortly after the child's birth, the parties were divorced and the decree awarded primary residential custody to the mother. The decree also awarded liberal visitation to the father. Furthermore, although the decree did not enjoin the parties from removing the child from Walla Walla County, Washington, the court orally stated that the parties could not remove the child from Walla Walla County. Because the decree did not state this restriction, however, without notifying the father, the mother moved to Utah with the child. Upon a motion by the father, the court ordered the mother to provide a telephone number to the father. At first, the mother refused to provide a residential telephone number, but she later complied with the order. Then the court considered a motion by the father to change custody. A social worker testified that the move to Utah caused psychological damage to the child. The trial court concluded that a substantial change in circumstances had occurred and ordered a change of custody, and the mother appealed.

The Court of Appeals of Washington reversed the decision of the trial court to order a change of custody. The court of appeals noted that the only alleged grounds for a change in custody was the mother's move to Utah and her lack of cooperation with visitation. Because the court of appeals believed that the mother's move was not "in any way" detrimental to the child, the

move to Utah without permission did not permit the court to order achange of custody. See also Fatemi v. Fatemi, 371 Pa.Super. 101, 537 A.2d 840 (1988) (father's removal of child to foreign country and other isolated violations of custody decree did not warrant a change of custody to the mother).

V. Conclusion

As the authority cited in this memorandum indicates, while obstruction of the noncustodial parent's relationship with the child will often lead to a change in custody, such a change is not guaranteed. Courts appear to recognize that the detriment to a child caused by occasional failures to turn a child over for visitation does not automatically require a change of custody. See Humphrey v. Humphrey, 888 S.W.2d 342 (Mo.Ct.App.1994) (no change of custody was warranted where mother failed to honor father's visitation rights on only one occasion). If, however, a custodial parent has developed a pattern of refusing to allow visitation or otherwise interfering with the noncustodial parent's relationship with the child, the court should award a change in custody. E.g., Sullivan v. Sullivan, 216 A.D.2d 627, 627 N.Y.S.2d 829 (1995) (modification of custody was justified where mother consistently violated court-ordered visitation and telephone contact).

In order to prevent a child's relationship with the noncustodial parent from deteriorating, certain provisions should be standard in every custody decree. First, every decree should require each person with a right to custody or visitation to foster the relationship between the child and other persons who have a right to custody or visitation. Second, every decree should state that persons who have custodial or visitation rights should not speak ill of another person who has custodial or visitation rights. Third, practitioners should consider placing restrictions on a custodial parent's right to relocate without informing the court or the noncustodial parent. Otherwise, similarly to the father in In re Marriage of McDole, supra, the noncustodial parent may surprisingly discover that the custodial parent has left the jurisdiction without a forwarding address.

These three provisions will not guarantee that no problems with custody or visitation will occur. Rather, a custodial parent who desires to destroy the relationship of the child with the noncustodial parent will succeed unless stopped. If, however, the above provisions are inserted into the decree, a violation of a specific provision could lead to a contempt citation. While not a panacea, the above three provisions may give the noncustodial parent the extra edge which he or she may need in a postdissolution custody proceeding. Furthermore, since the provisions encourage a strong relationship between both parents and the child, such provisions are generally in the child's best interests.