

THE “FRIENDLY PARENT” CONCEPT: A FLAWED FACTOR FOR CHILD CUSTODY

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I. INTRODUCTION

The so-called “friendly parent” concept presents what seems to be a reasonable idea for the resolution of child custody disputes.¹ Children are thought to do better when allowed or encouraged to maintain a close relationship with both parents.² Therefore, custody should be awarded to the parent most likely to foster the child’s relationship with the other parent, i.e., the “friendly parent.”³

The friendly parent concept is sometimes referred to as the friendly parent doctrine.⁴ It is codified in child custody statutes requiring a court to consider as a factor for custody, which parent is more likely to allow

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1. See Wendy N. Davis, *Family Values in Flux: Some Lawyers are Growing Hostile to the ‘Friendly Parent’ Idea in Custody Fights*, 87 A.B.A. J. 26 (Oct. 2001).

2. *Id.*; see also Edward B. Borris, *Parents’ Ability and Willingness to Cooperate: “The Friendly Parent Doctrine” as a Most Important Factor in Recent Child Custody Cases*, 10 DIVORCE LITIG. 65, Part III (1998).

3. See Borris, *supra* note 2; *Lawrence v. Lawrence*, 20 P.3d 972, 974 (Wash. Ct. App. 2001) (“Under the ‘friendly parent’ concept, primary residential placement is awarded to the parent most likely to foster the child’s relationship with the other parent”).

4. Borris, *supra* note 2.

“frequent and continuing contact” with the child and the other parent, or which parent is more likely to promote the child’s contact or relationship with the other parent.⁵

For example, Florida’s child custody statute requires courts to consider two friendly parent provisions: which parent is “more likely to allow the child frequent and continuing contact with the nonresidential parent;” and “[t]he willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.”⁶

As another example, Virginia’s child custody statute also requires courts to consider two friendly parent provisions: “[t]he propensity of each parent to actively support the child’s contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;” and “[t]he relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child.”⁷

On close examination, the friendly parent concept presents a paradox. This is because in a child custody dispute, the parents are in litigation against each other. The purpose of this litigation is to take custody away from the other parent, which by definition does not foster the other parent’s relationship with the child. The friendly parent concept, however, requires parents to make the opposite showing, that they will “most likely foster . . . the other parent’s relationship with the child.”⁸

With this inherent contradiction, the results of a friendly parent analysis are unpredictable and at times, bizarre. The friendly parent concept also encourages litigation and conflict between parents; it renders parents unable to protect themselves and their children from abuse, violence, and neglect at the hands of the other parent. Because of these problems, this article argues that the friendly parent concept should be eliminated from child custody practice, and that existing friendly parent statutory provisions should be repealed or judicially overturned.

5. *Lawrence*, 20 P.3d at 974 (“[T]he ‘friendly parent’ concept . . . is often reflected in statutes that establish that it is a matter of public policy that children have ‘frequent and continuing contact’ with both parents.”).

6. FLA. STAT. § 61.13(3)(a) and (j) (1995).

7. VA. CODE ANN. § 20-124.3(6)-(7) (2004).

8. *Lawrence*, 20 P.3d at 974 (“Under the ‘friendly parent’ concept, primary residential placement is awarded to the parent most likely to foster the child’s relationship with the other parent.”).

II. THE CURRENT STATE OF THE LAW

The friendly parent concept and friendly parent statutory provisions are widespread and routinely applied throughout the United States.⁹ There is, however, a small but growing movement to reject the friendly parent concept or limit its application as a factor for custody.¹⁰ In *Lawrence v. Lawrence*, for example, the court rejected the friendly parent concept and concluded that its use in a custody determination “would be improper and an abuse of discretion.”¹¹ More recently, the State of Alaska amended its child custody statute to prevent consideration of its friendly parent factor if a parent is able to prove that the other parent committed sexual assault or domestic violence.¹² Oregon and Vermont have similar “domestic violence exceptions.”¹³

Courts also limit application of the friendly parent concept by putting more weight on competing factors. For example, in *In re Marriage of Compton*, the court found that the child’s need for education outweighed her need for “frequent and continuing contact” with her noncustodial parent.¹⁴ In *Lester v. Lennane*, the court affirmed custody awarded to the mother based on “stability” although the father was “more likely to allow frequent and continuing contact.”¹⁵

9. See sources cited *supra* note 3; see also Joan Zorza, “Friendly Parent” Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921, 923 (1992) (“Even when a state has neither friendly parent language in its custody statutes nor any appellate court decisions favoring a friendly parent analysis, many judges still act as if their state’s laws have such a provision.”).

10. See Davis, *supra* note 1 (“Some lawyers are growing hostile to the ‘friendly parent’ idea in custody fights.” “At least one court recently has joined the unfriendly opposition.”) (capitalization changed).

11. *Lawrence*, 20 P.3d at 974.

12.

[E]xcept that the court may not consider this willingness and ability [of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child] if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child.

ALASKA STAT. § 25.20.090(6)(E) (2004). (More information about this enactment is available at <http://www.legis.state.ak.us/PDF/23/Bills/HB0385Z.PDF>)

13. OR. REV. STAT. § 107.137(1)(f) (“[T]he court may not consider such willingness and ability [to facilitate and encourage a close and continuing relationship between the other parent and the child] if one parent shows that the other parent has sexually assaulted or engaged in a pattern of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.”); VT. STAT. ANN. tit. 15 § 665(b)(5) (excluding from the friendly parent provision: “where contact will result in harm to the child or a parent”).

14. 33 P.3d 369, 372 (Or. Ct. App. 2001).

15. 101 Cal. Rptr. 2d 86, 126 (Ct. App. 2000). The court stated: “What the [trial] court did

III. APPLICATION OF THE FRIENDLY PARENT CONCEPT

In practice, courts making the friendly parent determination examine parental conduct. Under the most common analysis, “friendly parents” are those who do not make allegations about the other parent, who do not withhold access to the child and who are cooperative.¹⁶ “Unfriendly parents” are those who make allegations, who are “alienating” and who withhold access.¹⁷ The “friendly parent” is the parent more likely to get custody, or at least, more time with the child.¹⁸

A typical example of a court’s use of the friendly parent concept is found in the majority opinion in *In re Marriage of Wang*.¹⁹ In *Wang*, the majority affirmed that the father would be more likely to provide frequent and continuing contact, i.e., be the “friendly parent,” because the mother had placed restrictions on his visitation.²⁰ The restrictions included her insistence that he not be working during visitation and that he actually spend time with the child.²¹

However, almost any fact pattern can be spun or twisted to support a friendly parent analysis. For example in *Wang*, the dissent argued for further findings to determine if the father was the unfriendly parent because his church allowed little authority to women.²² The dissent stated that, “[w]hether under the guise of religion or not, any indoctrination of a minor child which undermines a child’s respect for his/her mother because she is a woman, subverts the child’s interaction and interrelationship with that parent”²³

find is that each parent scored better on some of the applicable tests: although [the father] was more likely to allow frequent and continuing contact [be the ‘friendly parent’] . . . , only [the mother] had experience as a primary parent. In most relevant respects, the court found the parents equally ‘capable.’ Accordingly, the court used ‘stability’ as the tie-breaker, a decision well within the court’s discretion.” (footnote omitted).

16. Margaret K. Dore & J. Mark Weiss, *Washington Rejects “Friendly Parent” Presumption in Child Custody Cases*, B. NEWS, 32 (Wash. St. Bar Ass’n., Aug. 2001).

17. *Id.* Compare Borris, *supra* note 2, Part IV (identifying four common fact patterns: denying the other parent’s right to see the child; speaking ill of the other parent in the child’s presence; filing false charges of abuse; and disappearing with the child). In the author’s experience, it does not matter whether the statements are true or false; any allegation can be sufficient to support a friendly parent analysis.

18. See Dore & Weiss, *supra* note 16.

19. 896 P.2d 450 (Mont. 1995).

20. See *Wang*, 896 P.2d at 452.

21. *Id.*

22. See *id.* at 454-55.

23. *Id.* at 454.

IV. REWARD AND PUNISHMENT

Judicial application of the friendly parent concept can be viewed as a reward and punishment paradigm.²⁴ Courts punish parents engaging in “unfriendly behavior” by denying them custody or time with their children.²⁵ Thus, children’s needs are subordinated to penalties against the parent. This is one of the reasons for the *Lawrence* court’s rejection of the friendly parent concept.²⁶ The friendly parent analysis as “punishment” is also reported in the literature.²⁷

V. INCREASED LITIGATION AND CONFLICT

The easiest way to prove that a parent is friendly is to prove the other parent unfriendly.²⁸ Parents are therefore encouraged to create situations that induce the other parent to refuse visitation, to be uncooperative, or to appear “alienating.”²⁹ *Ford v. Ford* provides a good example of this phenomenon.³⁰ In *Ford*, the father manipulated events to “prove” that the mother was withholding visitation:

The husband . . . took the couple’s Ford Mustang from [the wife] . . . late one night after they separated, and knew the Ford Explorer he left in its place was “probably” going to be repossessed. Indeed, the car was repossessed the day before a scheduled . . . visit, leaving the wife unable to transport [the child] to the husband for visitation, as she was required to do. The wife telephoned the husband, who agreed to drive to the wife’s home in Miami. He appeared at the wife’s home with several people and a video camera,

24. Margaret K. Dore, *The Friendly Parent Concept: Anything But Friendly*, FAMILY LAW SECTION NEWSLETTER, 5 (Wash. St. Bar Ass’n., Fall 2001), available at http://www.margaretdore.com/fp_anything.htm.

25. *Id.*

26. See *Lawrence*, 20 P.3d at 974 (“[R]ejection of [the friendly parent] rule is consistent with our state’s policy that ‘custody and visitation privileges are not to be used to penalize or reward parents for their conduct.’”); see also *Wang*, 896 P.2d at 452 (where the mother was in effect punished for restricting the father’s visitation with denial of custody); Borris, *supra* note 2, Part IV. A. (“Clearly, *Wang* stands for the proposition that custody may be denied to one parent simply because that parent interfered with the visitation rights of the other parent.”).

27. MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT 169 (1999) (“The transfer of custody to the ‘friendly parent’ more often is done to punish the other parent than to meet the needs of the child.”). See also Borris, *supra* note 2, Part V (“A parent who . . . injures the relationship between the child and the other parent will often face the *penalty* of loss of custody”) (emphasis added).

28. See Dore, *supra* note 24, at 6.

29. See *id.*; Dore & Weiss, *supra* note 16, at 33.

30. 700 So.2d 191 (Fla. Dist. Ct. App. 1997).

explaining he wanted to “prove the [wife] was withholding visits.”³¹

Parents also compete through “expert shopping.” Although court-appointed parenting evaluators and guardians *ad litem* are ostensibly neutral, many have known views and litigation histories.³² If an evaluator or guardian *ad litem* is known to treat the outcome of a friendly parent analysis as dispositive, the parent planning to present a friendly parent analysis may advocate for that person’s appointment.³³ Parents also employ their own experts such as psychologists who give opinions on alienation.³⁴

For parents with lower budgets, aggressively worded letters alleging that the other parent is being uncooperative can be effective.³⁵ Regardless of whether the matters presented in such letters are trivial, the other parent’s failure to respond can be seen as an admission to the allegation that he or she is uncooperative and “unfriendly.”³⁶

Another ploy is for one parent to allow the other parent to have visitation with the child, but later claim that the visitation was unauthorized.³⁷ A parent may also claim that his visitation was actually denied.³⁸ These ploys and others can lead to the other parent being deemed “unfriendly.”³⁹ With the friendly parent concept, game-based custody determinations are not uncommon.

VI. “CATCH 22” AND A “CHILLING EFFECT”

With the paradox of the friendly parent concept—that a parent is

31. 700 So.2d at 194; *see also* Julian v. Bryan, 710 So. 2d 1037, 1038 (Fla. Dist. Ct. App. 1998) (“Several of the complaints regarding the denial of visitation concerned times when the child was sick and actually hospitalized.”); Dore & Weiss, *supra* note 16, at 33 (father requested every-other-day visitation when child was extremely ill so that mother would object and thereby provide the father with proof that she had denied him access to the child).

32. Margaret K. Dore, *Parenting Evaluators and GALs: Practical Realities*, B. BULL. (King Co. Bar Ass’n., Dec. 1999), available at [http://www.margaretdore.com/Parenting evaluators.htm](http://www.margaretdore.com/Parenting%20evaluators.htm).

33. *See id.*

34. *See* MARGARET A. HAGEN, WHORES OF THE COURT: THE FRAUD OF PSYCHIATRIC TESTIMONY AND THE RAPE OF AMERICAN JUSTICE, 199 (Regan Books, 1997) (“[T]here are usually two experts hired, one per parent . . .”); *see also* Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 537 (2001) (“An electronic search for all reported U.S. cases between 1985 and February 2001 employing the term ‘parental alienation syndrome’ revealed numerous mental health professionals . . . who have testified that [parental alienation syndrome] was present . . .”).

35. *See* Dore, *supra* note 24, at 6.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

trying to obtain custody from the other parent but also prove the opposite—parents can find themselves in a no-win “Catch 22.”⁴⁰ The following examples serve to illustrate this situation.

A. AN “UNFRIENDLY FATHER”

In *In re Marriage of Roe*, the court affirmed that the father would be less likely to support frequent and continuing contact with the child’s mother.⁴¹ Substantial evidence supporting the trial court’s decision included that the father asked for custody and provided supporting reasons in his favor, but he had only written a single reason in the mother’s favor.⁴²

The father wanted custody. He had therefore asked for custody and provided supporting reasons. By doing so, he undercut his chances. He was in a no-win “Catch 22.”

B. DOMESTIC VIOLENCE

“Domestic violence victims, . . . for the safety of the children and themselves, take active steps to minimize contact and relationships with the abuser.”⁴³ By doing so, these protective parents are more likely to be labeled “unfriendly” so that custody will be awarded to the abusive parent.⁴⁴ Family law attorney, Richard Ducote, describes this practical effect of the friendly parent concept:

The generalization is frightening, but like all broad statements there are many exceptions: After twenty years in family law courtrooms throughout the country, I confidently say that no woman, despite very abundant evidence that her child has been sexually molested by her ex-husband or that she has been repeatedly pummeled by the violent father of her child, can safely walk into any family court in the country and not face a grave risk of losing custody to the abuser for the sole reason that she dared to present the evidence to the judge and ask that the child be protected.⁴⁵

40. See *supra*, Part I (discussing the paradox and self-contradiction of the friendly parent concept).

41. 23 Cal. Rptr. 2d 295, 297, 300 (Ct. App. 1993).

42. 23 Cal. Rptr. 2d 295, 297, 300 .

43. Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 141 (2002) (quoting *A Judge’s Guide: Making Child-Centered Decisions in Custody Cases*, 116-17, ABA Center on Children and the Law, 2001).

44. See *id.*; Dore, *supra* note 24, at 6.

45. EXPOSÉ: THE FAILURE OF FAMILY COURTS TO PROTECT CHILDREN FROM ABUSE IN CHILD CUSTODY DISPUTES, ch.1, Richard Ducote, *What I Have Learned at the Courthouse* 11, ¶ 1

By restricting access to protect the child, the protective parent provides evidence that custody should be awarded to the abusive parent. So, another “Catch 22.” In practice, this situation causes parents who wish to protect their children to not disclose that their children are at risk. Professor Mary Ann Mason states “mothers who fear abuse are better off keeping it to themselves”⁴⁶ A similar sentiment is echoed by Joan Zorza, editor of the *Domestic Violence Report*.⁴⁷ She states that “[f]riendly parent provisions effectively chill the right of any parent to raise even the most meritorious claim.”⁴⁸

C. A CHRISTIAN FAMILY

The third and last example is from an article in *World Magazine* by Joel Belz.⁴⁹ Mr. Belz describes a custody trial in which the doctrine of “parental alienation,” i.e., “friendly parent,” put a stepfather in an impossible situation and provided a chilling effect on religious freedom.⁵⁰ Mr. Belz states:

Profound consequences spring from the doctrine of parental alienation.

The first is that [the stepfather] is put in an impossible situation. If he does bad things to the children he is informally fathering, he is of course a bad father. But if he does good things to those children, guess what—that is also bad, for now, simply by the contrast he is drawing, he is alienating the children from their biological father!

A second serious consequence is that Christian parents, and the churches where they are members, find themselves fearfully restricted in their teaching of biblical truth. May we tell our children that adultery is wrong—or that marriage is intended by God to be permanent? May we call it “sin” when those standards are broken? “Well,” the courts seem to be saying, “you can say what you want. But there are consequences if we catch you reflecting

(Elize T. St. Charles & Lynn Crook, eds., 1999); see also MASON, *supra* note 27, at 169 (“courts tend to favor the ‘friendly parent,’ that is, the parent who is not making the accusation or withholding access, and often will transfer custody on that basis”) (emphasis removed).

46. MASON, *supra* note 27, at 164.

47. Zorza, *supra* note 9, at 923.

48. *Id.*

49. Joel Belz, *Live With the Consequences: Custody Issues, Like Divorce, are Too Complicated for our Courts*, WORLD MAG., September 21, 2002, available at <http://www.worldmag.com/subscriber/displayarticle.cfm?id=6327>.

50. *Id.*

negatively on anyone—and those consequences might include your losing custody privileges you now enjoy.” (In this case, as a matter of fact, the mother did lose the primary custody she once enjoyed.)

So much for meaningful religious freedom. In the case I watched, the tape of a sermon preached at the family’s church was played for the judge, to help determine whether the tone of that sermon might have tilted the children’s thinking against their father. If that practice doesn’t produce what civil-liberties folk have often called a “chilling effect,” it’s hard to imagine what might be any more icy.⁵¹

These three examples also illustrate a root problem with the friendly parent concept. Parents are discouraged from protecting their children according to their own viewpoints and belief systems. In addition, they often *cannot* protect their children.⁵²

VII. MERE “CONFLICT”

The friendly parent concept also puts children and their protective parents at risk because it encourages courts to view evidence of violence, abuse and neglect as mere “conflict.” For example, in *Ford*, the record from the six day trial was “replete with testimony . . . regarding domestic violence and spousal abuse.”⁵³ The father also admitted to violence and abuse against the mother.⁵⁴ The trial court, however, devoted just one sentence to summarize this evidence, as follows: “The court has considered everything that each side accused the other side of as well as all the good things that each side presented about themselves.”⁵⁵

The trial court awarded custody to the father citing visitation difficulties.⁵⁶ The Florida Court of Appeals reversed, stating in part:

[T]he trial court’s expressed concern regarding difficulties encountered in visitation reflects a problem commonly occurring in cases where evidence demonstrates a pattern of domestic violence. The trouble occurs when a court attempts to harmonize the non-abusive parent’s conduct with “friendly parent” provisions [The trial court]

51. Belz, *supra* note 49.

52. See also discussion *infra*, Parts VII, IX.

53. *Ford*, 700 So.2d at 196.

54. *Id.* at 196-97.

55. *Id.* at 196 (capitalization changed).

56. *Id.* at 194.

failed to recognize the probability that the mother's actions were justified.⁵⁷

This tendency of courts to treat evidence presented by parents as mere "conflict," has been reported by commentators. For example, Professor Claire Dalton states:

[J]udges confusing abuse with conflict may . . . conclude that the parents who oppose shared parenting are acting vindictively and subordinating the interests of the children to their own rather than expressing their legitimate anxieties about their own and their children's ongoing safety. Ironically, within the friendly parent framework, a mother's proper concern about her abusive partner's fitness to parent will negatively affect her chance to win custody, not his.⁵⁸

VIII. PARENTAL ALIENATION SYNDROME

Parental Alienation Syndrome (PAS) is a theory developed by Richard A. Gardner, M.D.⁵⁹ Like the friendly parent concept, it is used by some courts in determining child custody.⁶⁰ Dr. Gardner defines PAS as follows:

The parental alienation syndrome (PAS) is a disorder that arises primarily in the context of child custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent⁶¹

According to Dr. Gardner, there are three levels of PAS in children,

57. *Ford*, 700 So.2d at 196 (footnote omitted).

58. Claire Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM & CONCIL. CTS. REV. 273, 277 (1999); see also Ducote, *supra* note 43, at 137-38 ("Any attempt to claim, despite the abundant proof of the reality of the situation, that a father is dangerous is simply dumped into the category of 'conflict'—the ultimate anathema in the eyes of the family court judge.")

59. Richard A. Gardner, *The Judiciary's Role in the Etiology, Symptom Development, and Treatment of the Parental Alienation Syndrome (PAS)*, 21(1) AM. J. FORENSIC PSY. 39 (2003), para. 3, available at <http://www.rgardner.com/refs/ar11w.html>.

60. See Bruch, *supra* note 34; Ducote, *supra* note 43, at 140-41; Eric Zorn, *Pop Psychology has Brutal Role in Family Court*, CHI. TRIB., April 18, 2002, available at <http://www.ericzorn/columns/2002/april/>.

61. Gardner, *supra* note 59, at 40.

namely: mild, moderate and severe.⁶² In the mild level, the alienation of the other “target” parent is relatively superficial.⁶³ The children basically cooperate with visitation, but are intermittently critical and disgruntled.⁶⁴ In the moderate level, the alienation is more formidable, the children are more disruptive and disrespectful.⁶⁵ In the severe level, visitation may be impossible, so hostile are the children to the other parent.⁶⁶

Dr. Gardner also classifies the “indoctrinating” parents, or “alienators,” into categories.⁶⁷ When the parent is in the “severe” category, Dr. Gardner recommends a change in custody to the other parent.⁶⁸ He states that “the court’s decision for custodial transfer should be based primarily on the alienator’s symptom level”⁶⁹

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.⁷⁰ As with a friendly parent analysis, one parent fails to support the child’s relationship with the other parent.⁷¹ Second, the outcomes can be the same. Where there is a problem with visitation, a solution is to transfer custody to the other parent.⁷² 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.”⁷³

62. Gardner, *supra* note 59, at 41-42; *see also Parental Alienation Syndrome Diagnosis and Treatment Tables*, 1999-2002, Creative Therapeutics, Inc., <http://www.rgardner.com/refs/pastable.pdf>.

63. Gardner, *supra* note 59, at 41-43.

64. *Id.* at 43.

65. *Id.*

66. Gardner, *supra* note 59, at 43.

67. *Id.* at 43-44, 52; *see also Parental Alienation Syndrome Diagnosis and Treatment Tables*, *supra* note 62.

68. Gardner, *supra* note 59, at 44, 52.

69. *Id.* at 52.

70. *Id.* at 40.

71. *See discussion supra*, Part III; Borris, *supra* note 2, Parts IV, V (four common fact patterns that lead courts to award custody to the friendlier parent include: denying the other parent’s right to see the child; speaking ill of the other parent in the child’s presence; filing false charges of abuse; and disappearing with the child). “A parent who . . . injures the relationship between the child and the other parent will often face the penalty of loss of custody.”

72. Borris, *supra* note 2, Parts IV, V; Gardner, *supra* note 59, at 44; *see also Parental Alienation Syndrome Diagnosis and Treatment Tables*, *supra* note 62.

73. *See Ducote, supra* note 43, at 141.

Parental Alienation Syndrome is a controversial theory that has been challenged on numerous grounds including that it is not recognized by the scientific community.⁷⁴ It is regardless, a variation of the friendly parent concept: if a parent badmouths or criticizes the other parent, there is the possibility that custody will be transferred.⁷⁵

IX. THE FRIENDLY PARENT CONCEPT IS HARMFUL TO CHILDREN IN ALL CONTEXTS

Occasionally, the results of a friendly parent analysis are tragic. An article published in the *Pittsburgh Post Gazette* highlighted a case in which the children refused to visit the father “citing fear and anger.”⁷⁶ The father responded by filing for a change in custody claiming the children suffered from Parental Alienation Syndrome.⁷⁷ The court did not award the father custody, but did order that the children visit the father.⁷⁸ One of the children, a sixteen year old boy, reacted to the order by committing suicide.⁷⁹

Even where the facts are benign, the friendly parent concept works against the needs of children. Consider the following example.⁸⁰ The child has learning disabilities. Both parents believe that he needs a single home with a stable routine to improve school performance. The mother files for sole custody. After consulting with a lawyer, the father counters with a 50-50 parenting plan, to thereby appear the more “friendly” parent of the two. The 50-50 plan requires the child to alternate his residence between the parents’ two homes on an every other week basis. The father’s position has nothing to do with what he thinks is best for the child, i.e., a single home with a stable routine.

74. See, e.g., Bruch, *supra* note 34, at 530-43; R. James Williams, *Should Judges Close the Gate on PAS and PA?*, 39 FAM. CT. REV. 267, 273-79 (2001); Lewis Ziropiannis, *Evidentiary Issues With Parental Alienation Syndrome*, 39 FAM. CT. REV. 334 (2001) (*previously known as* FAMILY & CONCILIATION CTS. REV.); Gardner, *supra* note 59, at 59 (acknowledging that “PAS” is not listed in the DSM-IV).

75. See Borris, *supra* note 2, Parts IV and V; Gardner, *supra* note 59, at 40, 44.

76. Mackenzie Carpenter & Ginny Kopas, *Casualties of a Custody War: The Courtroom as a Battleground* (pt. 2), PITTSBURGH POST GAZETTE, June 1, 1998, available at <http://www.post-gazette.com/custody/parttwo.asp>.

77. *Id.*

78. *Id.*

79. Carpenter & Kopas, *supra* note 76 (In a school essay written two weeks before his death, the boy wrote about how a girl had rejected him. He also wrote about “the other torture in my life—his parents’ divorce.” He stated that his father was “still harassing us through court case after court case,” and concluded with “[t]hus ends this chapter in my life of endless torment”).

80. Example presented by Janet Helson at the 8th Annual Family Law Institute, King County Bar Ass’n, Washington State Convention and Trade Center (Dec. 6, 2001).

X. THE ECONOMICS OF FRIENDLY PARENT LITIGATION

The friendly parent concept increases the likelihood of protracted litigation and conflict.⁸¹ This in turn creates an opportunity to compel financial concessions from the economically disadvantaged parent, typically the mother. Former Minnesota Court of Appeals Judge Gary Crippen states:

Increased opportunities for litigation . . . increase the risk that the non-caretaker parent will use the threat of litigation to compel costly concessions by primary parents who lack the economic means or personal strength to defend their claims This parent often cannot afford litigation expenses and must be concerned with meeting future economic needs. Thus, a primary parent who lacks the means to bargain might make unwarranted concessions on financial issues to avoid costly litigation.⁸²

When the non-caretaker parent is an unfit parent, this bargaining advantage can be especially great. Consider the following commentary in the context of a joint custody statute:

[W]hen only one parent seeks joint custody, the court, pursuant to the “friendly parent” provision, is likely to favor that parent in a sole custody award. This reality further increases the risks of opposing joint custody⁸³

[I]n an irony suitable for Solomon, the parent *least* fit for custody may benefit most from this type of statute. A parent opposed to joint custody might be more willing to risk loss of sole custody if she feels that the other parent is capable of providing satisfactory care of the child. The parent opposed to joint custody cannot, however, and probably will not, take that risk where the other parent would not provide minimally sufficient care as sole custodian. Thus, the less fit the parent requesting joint custody, the more bargaining leverage that person gains.⁸⁴

81. See discussion *supra*, Part V.

82. Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four year Experiment with the Primary Caretaker Preference*, 75 MINN. LAW REV. 427, 449-50 (1990) (footnotes omitted).

83. Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 517 (1988).

84. Singer & Reynolds, *supra* note 83, n.104 (emphasis in original).

Thus, the friendly parent concept contributes to the reported impoverishment of children and their primary caretaker parents subsequent to divorce. Professors Jana Singer and William Reynolds state: “[S]tudies increasingly confirm: divorcing husbands routinely and successfully use the threat of a custody fight to reduce or eliminate alimony and child support obligations. The success of such “custody blackmail” has been identified as a major cause of the impoverishment of divorced women and their children.”⁸⁵

For the non-caretaker parent using custody as a bargaining tool, there is little downside risk. If the strategy fails, he will likely be able to change his mind as the other parent will likely want to care for the child.⁸⁶

The friendly parent concept can also lead to financial ruin because of the cost of the friendly parent litigation itself. The author has seen combined fees in excess of \$200,000.00.⁸⁷ It is not unusual for one or both parents to file bankruptcy.⁸⁸

By contrast, the friendly parent “industry” profits.⁸⁹ This would include the attorneys who represent the parents, and the evaluators, guardians *ad litem* and other persons who provide opinions on alienation.⁹⁰

XI. POTENTIAL CONSTITUTIONAL CHALLENGES

The Fourteenth Amendment of the United States Constitution “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly

85. Singer & Reynolds, *supra* note 83, at 503.

86. *Id.* at 517. The authors make a similar observation in the context of joint custody:

A parent who is not really interested in having joint custody may use the threat of demanding it as a tool to induce the other parent to make concessions on issues of property division and child support. The downside risks to such a strategy are minimal: even if the strategy fails and the husband is “stuck” with joint (legal) custody, he will not have to assume a major childrearing role (footnotes omitted).

87. Dore, *supra* note 24, at 6.

88. Ducote, *supra* note 43, at 149 (“[D]ivorcing parents commonly land in bankruptcy court”).

89. See HAGEN *supra* note 34, at 199 (“We arrive at a total national cost of using psychological experts in custody disputes of around \$93.75 million annually.”); Ducote, *supra* note 43, at 149 (“Fees for guardians *ad litem* in contested custody cases can amount to many thousands of dollars Fees exceeding \$20,000 are not rare.”); Timothy Beason & Gwendolyn Jo M. Carlberg, *The Legal Basis for Appointing Independent Psychological Evaluators in Custody Cases*, 21 FAMILY LAW NEWS, 2, 3 (Va. State Bar Fam. L. Sect. Summer 2001) (with the appointment of an evaluator, “you can figure on about \$10,000.00-15,000.00 more in litigation expenses”).

90. See sources cited *supra* note 89.

tailored to serve a compelling state interest.”⁹¹ This requirement for substantive due process applies to a parent’s liberty interest in the care, control and custody of his or her child.⁹²

With these principles, the friendly parent concept and friendly parent provisions would appear vulnerable to constitutional challenge. First, it is difficult to see what compelling state interest is served by the concept and related statutory provisions. In application, they work *against* the interests of children and their protective parents. Second, application of the concept is not a “narrowly tailored” infringement. Rather, it can be a great intrusion as parents find themselves in no-win situations in which they cannot protect themselves or their children.

Parents also have a fundamental constitutional right to court access that is “adequate, effective and meaningful.”⁹³ With the friendly parent concept and friendly parent provisions, this fundamental right is also impaired. This is because in contested cases, judicial fact-finding is based on an adversarial system in which the litigants present opposing evidence and points of view. It is not a cooperative undertaking. By contrast, the friendly parent concept encourages courts to focus on cooperation as paramount. With this focus, the normal adversarial functioning of the courts is undermined:

[T]he question of whether or not brutal domestic violence or heinous child abuse occurred—a fact subject to proof as any other fact in a civil or custody case—is forgotten, ignored or completely subjugated to the overriding concern preoccupying the judge . . . : does Mommy say nice things about Daddy and does she encourage the relationship between the two?⁹⁴

Thus, the friendly parent concept disables the normal functioning of the courts. Court access for parents and their children is often not adequate, effective or meaningful. The fundamental right of court access is thereby denied.

91. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)) (emphasis in original).

92. *See id.* at 720-21; *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Marriage of Parker*, 957 P.2d 256, 258-59 (Wash. Ct. App. 1998).

93. *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (“More recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful.”).

94. *Ducote*, *supra* note 43, at 138-39.

XII. CONCLUSION

The friendly parent concept, including its cousin, Parental Alienation Syndrome, presents what at first seems to be a reasonable standard for the determination of child custody disputes. We all want friendlier parents who do not engage in alienation. On close examination, however, the friendly parent concept presents a dangerous paradox. It works against the interests of children. The normal functioning of the courts is undermined.

Courts and legislatures should now follow the example of the *Lawrence* court to reject the friendly parent concept as a factor for the resolution of child custody disputes. Existing friendly parent case law and statutes should be judicially overturned or repealed.