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Serious Parental Alienation – The Approach of the Courts and Practitioners in 2016

Francesca Wiley QC of 1 Garden Court Family Law Chambers considers how the landscape is changing in the courts' and practitioners' attitudes to intractable contact cases.



[Francesca Wiley QC of 1 Garden Court Family Law Chambers](#)

Despite what appears to be a somewhat conservative approach by courts and practitioners to what are usually called "intractable "or "implacable hostility" cases the landscape appears to be changing. Courts, in particular the High Court, have started to recognise that the dynamic and presence of parental alienation are real in some families and require rapid intervention if children and parents are to have a healthy emotional future free from long term psychological harm.

Some judgments from the High Court are now explicitly using the phrase "parental alienation" to describe particular cases despite it being explicitly acknowledged that parental alienation syndrome is not recognised in the DMS (Diagnostic and Statistical Manual of mental disorders) or by the World Health Organisation.

There has been resistance in the lower courts to even considering that the presence or dynamic of alienation may be real. Nevertheless other countries, including Canada and the USA, identify it and have been proactive in their approaches, now using "parenting coordinators" and "bridging programmes" ordered and supervised by the court by which skilled and informed professionals help to restore relationships with parents and children identified as alienated. In Mexico and Brazil alienating a child from a parent is a criminal act.

In the UK parental alienation was often seen as a phrase relating only to campaigners for fathers' rights and as a consequence professionals and courts were slow to accept such an analysis could or might be right. The default position was to consider an assertion of parental alienation as a red herring raised by a (most likely, aggrieved) parent as part of a long standing problem or dynamic with their ex-partner and with limited insight into their own role in the family. In some cases this will, of course, be so.

Careful scrutiny of the facts is essential at an early stage as well as a garnering of as much objective evidence as possible about the circumstances in which a parent now has no contact.

How to approach the case as a practitioner

Often, but not always, these cases can involve very serious allegations against a parent ranging (in my own experience) from domestic violence to sexual abuse and rape to cannibalism and murder. Almost inevitably and for understandable reasons professionals, including Guardians, social workers and child protection police officers and by extension the court, have assumed a default position of initially believing allegations made by children (often supported or manipulated in the manufacture of extreme allegations by their primary carer either consciously or unconsciously).

This position can be adopted and reinforced by professionals despite there being no other objective evidence beyond the allegation and despite any nagging doubts about the likely validity of the allegations and the conduct or mental health of the parent with whom the children reside.

Any residual concern is usually put to one side and there can be inadequate exploration of the psychological functioning of the children or adults of the family at an early stage (and /or unless application is made for the same in the family court). The focus remains on the accused, not the accusers. This approach can be replicated by the police and the CPS, which can reinforce the problem.

1) Be wary of "wishes and feelings"

As a practitioner do not necessarily accept that wishes and feelings of children, in such cases often expressed loudly and forcefully, are determinative. The impact upon a child of being recruited and alienated consciously or unconsciously by a vengeful or unwell former partner (or both) should not be underestimated.

More recent case law is re-emphasising that the correct approach should relate to "ascertainable" and not expressed wishes and feelings of the child

[*H \(Children\) \[2014\] EWCA Civ 733*](#) and *Re K (Abduction: case management) [2011] 1 FLR 1268* are both cases where the court was clear that it was inappropriate to take expressed wishes and feelings at face value and the court needed to look far more closely at the context of the same.

Very often an alienating parent places a high store on the expressed wishes and feelings of the child and insists that despite their (often very young) age they must be listened to. It is not uncommon to see children hugely empowered by the litigation and very convincing about why they will flout court orders or refuse contact if anyone tries to make them attend. At this point Cafcass and well-meaning social workers and local authorities are often flummoxed. Sometimes too the court.

A robust approach from the court is required when cases have got to this stage and professionals versed in alienation and recruitment of children should be considered as an option. They are a scarce resource and it seems many practitioners and courts are unaware they even exist. Trained in this type of extreme reaction from children when the facts do not warrant the same, they can be invaluable in remedying the situation.

Mrs Justice Parker's words in *H (Children) [2014] EWCA Civ 733* in a case where she was forced to transfer residence to re-establish a relationship between children and parent seem salient:

"74. I regard parental manipulation of children, of which I distressingly see an enormous amount, as exceptionally harmful. It distorts the relationship of the child not only with the parent but also with the outside world. Children who are suborned into flouting court orders are given extremely damaging messages about the extent to which authority can be disregarded and given the impression that compliance with adult expectations is optional. Bearing in mind the documented history of this mother's inability to control these children, their relationship with one another and wholly inappropriate empowerment, it strikes me as highly damaging in this case. I am disappointed that the professionals in this case are unable truly to understand this message. The recent decision of the Court of Appeal, [*Re M \(Children\) \[2013\] EWCA Civ 1147*](#) requires to be read by all practitioners in this field. Lady Justice Macur gave firm and clear guidance about the importance of contact. Parents who obstruct a relationship with the other parent are inflicting untold damage on their children and it is, in my view, about time that professionals truly understood this."

The High Court has concluded that in serious cases wishes and feelings need to be seen in the correct context and as secondary to overall welfare. See also the case of [*S \(Children\) \[2010\] EWCA Civ 447*](#) where Thorpe

LJ made plain

"it is a condition of contact that the children have to decide for each contact whether to take it up or not...in reality this burdens them with a responsibility they should not be asked to bear at the respective ages of 12 and 13".

A separate point to note is that even if a concerned judge expresses the view that the children can be informed that "the judge has decided they should have contact and no blame should attach to either parent", this will only work as long as the message conveyed is reinforced at home. In a case of serious alienation this is not very likely.

Experience indicates that if appropriately and professionally supported, the alienated child can quickly reconnect with the exiled parent and must not be left in charge of the process or invited in any way to determine the outcome. This is anathema to Guardians and social workers trained in listening expressly to the stated desires of the subject children. This absence of training has resulted in such cases often ending up in the High Court after years of litigation in the lower courts with the alienated parent by now being accused by professionals of being relentless or failing to listen to the views of the children. Often the rejected parent has complained about social workers or the guardian or the lower court and the view he/ she is in fact the real problem pertains.

As children head to adolescence resolving this impasse becomes harder but again the authorities underscore that there is a responsibility on the court to try and restore contact if at all possible. There is minimum research and evidence in relation to the long term effects of being a child seriously alienated from a parent; however it is axiomatic to note it is likely to distort one's world view and subsequent approach to relationships, the truth, situations of conflict and self-esteem.

2)To fact find or not to fact find?

Since the era of Jimmy Savile a very real difficulty faced by parents accused of serious allegations is that they are often left on police bail without charge, in some instances for years, and with bail conditions prohibiting them from contacting their children at all. Often the children/ other parent are then reinforcing their allegations through therapy or pre-trial counseling via the CPS, NSPCC, domestic violence projects or the local authority. The emotional harm visited upon children through such therapy if these allegations are false cannot be overstated.

Clients (and some practitioners including both family and criminal practitioners) do not immediately think they can seek redress through the family courts and mistakenly believe the police investigation must run its course prior to any application being issued.

Practitioners should be alive to the need to make urgent applications to the court to counter any delay in the police process and to allow for proper fact finding on the allegations undertaken by a family judge especially when there is no clear time line from the police. This has the benefit of focusing the position of the police/CPS and allowing for disclosure (both ways) in order for the police and family court to have the full context in which allegations were made, including the level of acrimony and discord that may have existed between the parents post- / pre-separation as well as any previous concerns about the psychological functioning of the parties. The attitude and approach of the resident parent to contact with the non-resident parent can be pivotal.

T (Children) [2014] EWHC 2164 (Fam) is a case where Holman J emphasises the need for detailed investigation (fact finding) at an early stage. A mother had terminated all contact between the father and the children upon him beginning a new relationship and allegations were then made that he had sexually abused or otherwise harmed the children. The allegations were held to be wholly fabricated by the children and the mother.

3)Hear evidence as soon as possible (whatever the hearing is called)

Re E (A child) [2011] EWHC 3251 (Fam) includes guidance for case management in parental alienation cases, and in particular notes that in such cases evidence should be heard at an early stage and emphasises

the need for judicial continuity. Interestingly the conclusions of the court that there should be urgent welfare hearings and not fact finding hearings do not sit easily with the case of *T (Children)* [2014] EWHC 2164 (Fam) above or the author's own experience in the more serious cases. The welfare hearing will inevitably not conclude if allegations are found to be false in view of the court's obligation to try and restore contact. It is also essential that the court controls this second stage of the case and doesn't merely end the case with a contact order that is unlikely to be complied with.

The sooner the court hears oral evidence the better in cases such as these. Despite the very real pressures on the court and the current judicial thinking to allow for only composite or "rolled up" hearings in the average case, these serious and complex cases do require allegations (if made) to be resolved first and/or for the court to determine and make findings as to the appropriateness of a parent having contact as soon as possible.

In the absence of such an approach, no proper assessment of the real situation can take place and serious delay in the resumption of the relationship between the parent and child is inevitable. Meanwhile the child is being further alienated through absence from the non-resident parent and, in some cases, ongoing overt acts by the resident parent.

A clear judgment absolving a parent also allows for the police/CPS to determine whether, in fact, it is in the public interest to continue with any prosecution and allows for the family court to control the repair of the ruptured relationship with the alienated parent.

Despite the good intentions of "joint case management" hearings involving the criminal and family divisions working in tandem in care cases, the practice is that in private law cases such as these they do not seem to take place.

4) A parent is exonerated – what then?

Despite full or partial exoneration or a determination by the court that the complaints of the children or other parent are insufficient to justify such a rejecting stance on contact by the child, the court is often faced with the difficulty of assessing how to re-establish the contact.

The court and the practitioner should not fall into the trap of thinking that such a finding is the end of the case and no more can be done.

Indirect contact is not the answer to these cases and is an inadequate solution to a very difficult problem. See the judgment of McFarlane J in [W \(children\) \[2012\] EWCA Civ 999](#).

The Court of Appeal has been clear that such an approach should be deprecated. There is a clear duty on the court to try to restore direct contact and (in the opinion of the author) fast. In the generation of skype, email, WhatsApp and FaceTime, indirect contact by way of letter is still routinely suggested by social workers and guardians as a "softly, softly" approach to restarting contact. This is rarely helpful and allows for further delay.

The case of [Re K \[2016\] EWCA Civ 99](#) is interesting on this topic. The Court of Appeal made plain their disquiet with an order that the father was to have indirect contact for an unspecified period of time, to begin by way of an apology letter only (after a finding was made about him being "controlling" in a fact finding hearing), and was to have no direct contact. In [Q and Q \[2015\] EWCA Civ 991](#) the President, sitting in the Court of Appeal, reiterated (in para 19) the following points made by him in [Re C \(A Child\) \[2011\] EWCA Civ 521](#):

"-Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.

-Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and where there is no alternative. Contact is to be terminated only if detrimental to the child's welfare.

-There is a positive obligation on the state, and therefore on the recorder, to take measures to maintain

and to reconstitute the relationship between parent and child, in short, to maintain and restore contact.

-The court should take both a medium term and long- term view and not accord excessive weight to what appear likely to be short term or transient problems.

-The key question, which requires 'stricter scrutiny', is whether the recorder has taken all the necessary steps to facilitate contact as can be reasonably demanded in the circumstances of a particular case.

-All that said, at the end of the day the welfare of the child is paramount "the child's interests must have precedence over any other consideration". [Abridged and emphasis added.]

A clear view seems to be emerging that judicial control of situations of these types is essential. In an appropriate case a suspended residence order can be considered a weapon in the court's armoury to ensure contact is finally supported by an intransigent parent. *Re L-W (Children)* [2010] EWCA Civ 1253 and [M \(children\) \[2012\] EWHC 1948](#) both attest to this approach and are worth referring to in an appropriate case.

The sword of Damocles, when suspended appropriately, seems to be an approach gaining momentum in the lower courts. Often, where the court has concluded that a parent has been seriously alienated, practitioners and psychological experts ordered to reunite children and parents insist that such an order must be in place in order for their work to be effective and final.

If this does not work, what then? The courts have historically been slow to consider a transfer of residence especially when taking account of the practical issues as to moving the children in the face of their opposition. However, this also seems to be changing. The risk of ongoing harm to a child has meant that in several recent cases children have gone into foster care or to a "neutral third party" to allow for them to transition to the care of the alienated parent. This has been almost always at the behest not of the local authority – whose staff struggle to cope with the complex psychological dynamics in play in some of these cases and often assert the children are safe and well cared for with the alienating parent (in some cases despite the clear judgment of the court to the contrary) – but of a judge after ordering a section 37 Children Act 1989 assessment and imposing either interim supervision or interim care orders under section 38 Children Act 1989.

Cafcass? Independent social worker? Psychologist?

The court is often tempted to rely on Cafcass via a 16.4 Guardian or an independent social worker to assist and can wholeheartedly resist applications for expert assessment. The author is regularly informed that Cafcass or an ISW are able to evaluate parental alienation or recruitment of children. However, experience has highlighted that Guardians and social workers are unlikely to be able to offer remedies which see past the children's expressed wishes and feelings and are not trained in the psychology of this type of case and, of course, cannot provide any psychological assessment of the parent who may be at fault.

A comprehensive assessment by an appropriately qualified professional (psychological or psychiatric) is essential as soon as possible (straight after fact finding if there were allegations) or at the first hearing if no allegations have been made. A very real difficulty is the need for the parties to fund experts if the case is still in private law proceedings and as yet there appears no real solution to this problem.

It is worth reminding the court (on occasion) and your fellow practitioners of the words of Ward LJ (as he then was) in *M (Children) (contact: Long term Best interests)* [2005] EWCA Civ 1090 when it comes to the instruction of an expert to assist in restarting contact:

"Where as in this case the court has the picture that a parent is seeking without good reason, to eliminate the other parent from the child, or children's lives, the court should not stand by and take no positive action. Justice to the children and the deprived parent in this case the mother, require the court to leave no stone unturned that might resolve the situation and prevent long term harm to the children"

The expert selected should be suitably qualified and have the requisite experience in assessing profound alienation/ recruitment of children and how to tackle it. This is a laudable aspiration. However in reality, as indicated above, they are few and far between and are almost always psychologists, psychiatrists or

psychotherapists.

Below is an extract from "Psychology in Family Law 2007". The authors, B Mahendra and CL Van Rooyen, are both psychologists who express a clear view as to how alienation should be assessed.

"Parental alienation is an extremely complex issue in psychological assessments in cases of residence and contact disputes. Clinical interviews with all parenting figures, psychological tests and observations of contact of child with both parents, where appropriate are the basic approach when undertaking assessments. However due to the complexity of the dynamics involved in parental alienation, the clinical psychologist should go well beyond the confines of the clinical assessment model and utilize more comprehensive assessment and investigation techniques such as critically analyzing case material from a longitudinal perspective and comparing information provided by the parties during interviews with data from other sources

"When alienation becomes complete it can amount to a complete termination of parental rights, the alienated child having experienced the loss of nuclear and extended family, in addition to other long term, detrimental effects. The judgments that courts and professionals make are difficult, complex and have far reaching consequences. Therefore achieving a sound understanding of the issues by a clinical psychologist and the undertaking of a broad assessment by him is of considerable importance in advising and assisting the court."

Conclusion

In summary this type of private law case appears to be the bane of many a judge's list. They can be difficult to case manage and may be subverted through poor assessment or investigation at an early stage. There is often an over-reliance on the expressed (as opposed to ascertainable) wishes and feelings of the subject child and an absence of a fact-finding despite serious and evolving allegations. All these features can conspire to allow for a "no contact" situation to endure and become the status quo to the detriment of the child and the deprived parent and a "no smoke without fire" approach to a client from all professionals when he/she may be wholly innocent of very serious allegations.

If a therapeutic approach is taken to the children in the absence of a clear judgment or finding about the case the results can be even worse.

If the court is reminded at an early stage of its judicial powers to control the situation and fact-find, persuaded to order detailed and effective disclosure, investigation and assessment, and is dissuaded from the hijacking of proceedings by the expressed wishes and feelings of subject children and gently reminded there are, in fact, specialist experts and resources to assess and assist, there is hope.

2/6/16
