Parental alienation: where are we now?

Francesca Wiley QC, *1 GC Family Law*

Francesca practises at the highest level in both private and public law Children Act and inherent jurisdiction Wardship cases where there are profoundly serious allegations against parties. She specialised in criminal law for 10 years before joining the family bar. A large part of her work involves cases where there is a need for fact-finding and consequential applications and consequences between the criminal and family jurisdictions.

Name recognition

The landscape in cases of parental alienation has now changed in the family courts in a profound sense. Professionals and judges no longer consider the words 'parental alienation' an immediate defence to bad parental behaviour and decisions at all tiers of the family court are routinely using the term 'alienation' explicitly. *Re B (change of residence; parental alienation)* [2017] EWFC B24 (22 March 2017) is a good example which does not shirk from the terminology.

Whether all professionals instructed in the cases understand alienation and how to case manage it, remains a concerning question. 'No-contact' cases have been described in several courts recently and in the authors own experience as now 'not particularly unusual' or even the 'bread and butter' of the family court, a phrase used recently in one hearing. These cases are now routinely allocated to the lower courts, which presently have far less experience of the mental health and psychological difficulties often present in one or other of the parties, which can cause the phenomenon. On occasion the lower courts can be in ignorance of the urgent need for oral evidence and expert instruction to determine issues before simply acceding to the wishes and feelings of subject children.

Cases reach the High Court often after years of litigation and when there is often more than enough evidence (spanning years), which supports a clear finding of alienation. High Court judges are robust, experienced in this field and can be pragmatic in their approach. The difficulty can be in reaching them. Some answers may lie in professional and judicial education across the tiers of court, judicial continuity and more understanding around the real significance of emotional harm for alienated children

Re M (Children) (Ultra-Orthodox Judaism: Transgender Parent) [2017] EWCA Civ 2164, [2018] 2 FLR 800 is a case, which explicitly acknowledges the need for a strong approach in cases of alienation. The former President (sitting in the Court of Appeal) set out in the clearest terms how the courts are expected to deal with the problem and the responsibility on the court to do so. In that case the father, a transgender woman, brought an application for contact with her five children after being forced to leave the North Manchester Charedi Ultra-Orthodox Jewish community in 2015. She was shunned as a result of her trans status, and there was a concern that her children would be too if they remained in contact with her. At para [64] the former stated the following:

> 'That is not the approach of courts where religion is not in play. Where an intransigent parent is fostering in their child a damaging view of the other parent, and thereby alienating the child from the other parent and denying contact between them, the court does not hesitate to invoke robust methods where that is required in the child's interests. Thus, the court may make an order transferring the living arrangements (residence) from one parent to the other, either to take immediate effect or (see *Re D (Children)* [2009] EWCA Civ 1551 and *Re D (Children)* [2010] EWCA Civ 496) suspended so long as the defaulting parent complies with the court's order for contact. The court can make the

> child a ward of court. The court can make an order under section 37 of the Children Act 1989 for a report from the local authority with a view to the commencement of proceedings for taking the child into public care.'

Re D (A Child: Parental Alienation) [2018] EWFC B64 (19 October 2018) is yet another good example of the recent progression of the courts towards the idea of 'alienation'. The following is quoted directly from the body of the judgment:

> 'Parental alienation
>
> 165. . . . Most experienced Family Court judges would acknowledge that there is a category of private law Children Act disputes which present profoundly difficult challenges to the court and which frequently cause judges near despair as they endeavour to achieve a positive and enduring outcome for the child. Descriptive language is used to highlight the complexity of these cases – for example, implacable hostility, intractable dispute, high conflict dispute. In some of these cases the judge's sense of despair at having failed to achieve a positive outcome for the child is palpable. In *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam) Munby J memorably began his judgment by saying: "On 11 November 2003 a wholly deserving father left my court in tears having been driven to abandon his battle for contact with his seven year old daughter D."
>
> 166 . . .
>
> It is within this category of case that reference is sometimes made to "alienation", parental alienation' and 'parental alienation syndrome'. Use of such expressions frequently gives rise to criticism, profound scepticism and doubt. Parental alienation syndrome is a theory first propounded by American child psychiatrist Richard Gardner in 1985. For the mother, Mr Hadden MBE has produced an article published by Carol S Bruch in 2001, Parental alienation syndrome and parental alienation: getting it wrong in child custody cases, in which the author systematically demolishes Gardner's approach, which she refers to as "junk science". For my part I have no difficulty in accepting Bruch's criticisms of Gardner's work in that area. That does not, though, diminish the very real concerns about the problem of alienation in general and parental alienation in particular.'

Cafcass in 2018 published on its website a new assessment framework for private law cases. The assessment contains a section headed 'Resources for assessing child refusal/assistance' which in turn has a link to a section headed, 'Typical behaviours exhibited where alienation may be a factor'.

In April 2018, a team from the Cardiff University School of Law and Politics, headed by Julie Doughty, published a review of research and case law on parental alienation. The work was commissioned by Cafcass Cymru it's intention was 'to guide practice'.

Recently there have been seminars, articles, books, programmes and lectures on the topic and the internet is awash with different information about the problem.

What's changed?

So far so good, however this shift in emphasis and understanding does not unfortunately mean that the justice in these cases is now being regularly met. Increasing and very significant pressures on the courts, judges and professionals means the inevitable fact-finding hearings required in private law cases in order to demonstrate alienation, are routinely delayed (in the author's experience, for as long as 2 years) whilst care cases and other urgent business takes priority. In some instances well-meaning tribunals have suggested that the significant delay occasioned by waiting for a fact finding hearing may now allow the family to avoid the need for the same if they can somehow 'make progress' in the interim.

The consequences of this type of delay can be profound. Children aged 14, 15 and over

can be extraordinarily difficult to reconnect with parents once influenced views are entrenched and hardened. If the court ultimately concludes the children are safer with the other parent and needs to proceed by way of residence transfer or other draconian order, there can be little point in continuing the litigation at this age. In some cases, the emotional harm is so profound that care proceedings and/or wardship are now being considered but it still proves too hard to reunite the absent parent.

Expert psychological opinion also remains less than uniform as to how to resolve the problem. The recent creation of a European Association of Alienation Practitioners is a useful step to try to combat the same.

The decision of *MFS (Appeal: Transfer of Primary Care)* [2019] EWHC 768 (Fam) is a case where a mother appealed a decision of a circuit judge to transfer the residence of the child to the father from the mother with contact with the mother supervised in the first instance. The judge had relied upon expert psychological evidence in determining the case. The mother persistently portrayed the father negatively and as violent, mentally unwell and denigrated him as the father. The child was found by the psychologist to have identified with the negative and hateful feelings expressed by the mother towards the father, which in turn made the child make allegations against the paternal family and reject the father. The 'jigsaw pieces' in the case which allowed for clear evidence-based conclusions to be reached by the court finally included a s 37 assessment by the local authority, a psychological assessment, a psychiatric assessment and litigation history which had been going on for the preceding 7 years.

Many cases do not have the luxury of this level of evidence and much will simply turn on what the children report they 'want' by way of contact.

I'm an alienated child get me out of here

There is often a common refrain from the children and alienating parent that the litigation process is significantly harming them and that in every other area of their lives they are flourishing. It is not difficult to see why such arguments can be very persuasive to judges and professionals who may not have significant experience of this type of case and extremely heavy court lists to manage. If a child is performing very well at school, socially and in every other area of their life the court can be initially be concerned not to impact the same. Sometimes the children in these types of cases are relatively biddable and school and sport are a safe haven from the psychological conflict they find themselves in.

Alienation cases are usually wholly unsuitable for arbitration (even under the new children arbitration scheme) as they can raise significant safeguarding and child-protection issues, which often require strong court orders and involvement of FPR 2010 r 16.4 guardians to independently represent the subject children, and on occasion the involvement of local authorities by way of care proceedings in order to reconstitute relationships with alienated parents.

It is hoped in the future there may be discussion and thinking about how to manage these cases. One silk at 1 GC Family Law has suggested a specialist court with judges and professionals who have been specifically trained to manage them. These cases take up a disproportionate amount of court time and often require multiple case management hearings and evidential hearings. The need for judicial continuity cannot be overstated.

At present many parents are actively encouraged to leave the court arena and try out of court methods such as family therapy at an early stage. In an alienation case that is inadvisable. However, if you and/or your client are perceived as deliberately perpetuating the litigation and unwilling to consider therapy or other out-of-court suggestions, be prepared to stand strong in court.

In the absence of a fact-finding hearing, therapeutic efforts to assist the children,

which are often advocated for by the court and others such as Cafcass at first or second hearings, will simply not work unless the therapists are aware they must not attach validity to children's wishes and feelings or fall into the trap of approving and endorsing a child's 'lived experience' which may well prove to be false in due course.

Practitioners are advised not to be scared to apply for prohibited steps order stopping all therapeutic work until the court has a clear grasp of what has befallen the children. Suggestions that the alienated parent should re-start contact by way of an apology are common, and can be misconceived and unhelpful.

Fact-finding

Fact-finding remains wholly fundamental in cases of this nature. The case of *Re J (Children) (Contact Orders: Procedure)* [2018] EWCA Civ 115, [2018] 2 FLR 998 repeats what several previous cases have made plain, namely that a failure to determine underlying facts, including arguments made by a parent about alienation means the court is not in an informed position to decide which of the range of options would best meet the needs of the children. A finding of fact hearing should take place before a s 7 report is ordered. PD 12J is intended to improve formerly inconsistent practice by more rigorous attention to an early determination of the issues.

Put simply the court cannot cure the problem if you have yet to diagnose it.

In delivering his judgment (with which King LJ agreed), McFarlane LJ reviewed the court's developing use of fact-finding hearings from 2000 onwards and set out the most relevant provisions of FPR 2010, PD 12J ('Child Arrangements and Contact Orders; Domestic Abuse and Harm'). He then asked himself how, given that there was no fact-finding hearing, the courts had complied with their duty under s 1 of the Children Act 1989 to promote the welfare of the children in this case. Attention was explicitly drawn to three recent decisions (*Re CB (International Relocation: Domestic Abuse: Child Arrangements)* [2017] EWFC 39 (Cobb J); *H v D (Appeal – Failure of Case Management)* [2017] EWHC 1907 (Fam) (Peter Jackson J); *Re M (Children) (Ultra-Orthodox Judaism: Transgender Parent)* above) and the court endorsed the approach of the relevant court in each case, to the effect that the court had a positive duty to strive to achieve contact between a parent and child.

In relation to the non-molestation order, helpfully attention was drawn to the guidance issued by the President on 14 October 2014 to the effect that without notice orders should not normally last for more than 14 days in the first instance and that the respondent's request for a hearing to dispute the order should be heard as a matter of urgency.

The salutary lessons in the case are underscored by the case concluding with no order for contact as a result of the ages of the children and the limitations on the court to effect child arrangements orders.

Wishes and feelings

The wishes and feelings of children in these cases can prove a very significant stumbling block for practitioners and courts. It is the responsibility of the lawyer or litigant to ensure the court understands that it is not a case of a child being 'disbelieved' as is often complained of by alienating parents, the children themselves and even s 7 reporters (sometimes even by the judge) but rather that the court is being invited to carefully consider the environment and context that a child inhabits when expressing their wishes and feelings.

Chronologies and proper evidence are essential tools for the practitioner even at this early stage. Too often parties in the lower courts have not even filed statements of their respective cases while s 7 reports are undertaken. This practice is unhelpful but seems to represent an understandable desire to limit the blood-letting the tribunal thinks the litigation may represent.

Ironically the more serious allegation cases where a child or parent may now complain of sexual or serious physical abuse can be better case managed as they are dealt with in a more straightforward fashion when the case arrives in the family court. There is little debate around disclosure in such cases. The court and lawyers normally recognising the importance of obtaining GP, school and police records as soon as possible in order to determine issues.

However, there are now many cases where it is asserted that despite both parents having parental responsibility 'the children' do not want the alienated parent to have the relevant data and disclosure.

Even a straightforward subject access request (outside of the litigation) can become a battle ground as schools and GP's have suggested in cases, in the author's experience, that children as young as 10 are Fraser / Gillick competent and will not provide the relevant data. Often the resident parent has by now aligned the school, GP and others to their narrative, which can make situations more complex. Schools are sometimes consulting their own lawyers and delaying a process where speed is of the essence. It seems clear to a family lawyer that Fraser / Gillick competence cannot be adequately assessed unless the assessor is aware what influences, malign or otherwise, the children are being exposed to. The same level of understanding is not available in the general public.

The court needs to be robust in these circumstances and not be put off by hybrid suggestions such as 'I the judge, or the guardian if a r 16.4 guardian is involved, will see the information and determine its relevance'. The judge or guardian is unlikely to know all the details of your case and be in a position to determine whether a comment to a GP or teacher on a particular day, when seen in the context of a chronology and other evidence, is relevant to your case.

It is also worth considering the legality of such a stance, if a party seeks to withhold such information from a parent with parental responsibility, arguably they should seek a prohibited steps order as opposed to you having to make the application for disclosure of information your client is entitled to as of right.

In several of these cases the children have been taken for 'counselling' or other therapy to deal with the anxieties they and/or the other parent, report contact and involvement with the absent parent is engendering. Similarly trips to the GP before and after contact to support an alienating parent's case that the children are adversely impacted by contact, (have anxiety, stomach upsets, night terrors) need to be urgently seen by the court and such involvement stopped in appropriate circumstances. Only with proper evidence can a determination be reached by the court as to whether such conduct is in itself emotionally harmful. The court needs to know whether such conduct is a device conscious or subconscious by a parent to provoke fear and concern in the subject child or evidence of genuine upset through contact with a deficient other parent.

In *Re E (A Child)* [2011] EWHC 3521 (Fam), at para [31], Hedley J said:

> 'It is important for me to recognise in cases such as this that one must take seriously the fact that child expresses firm opposition to contact, but one must ask seriously: why that is the case? It may be that the child genuinely opposes contact. In those cases it is usually relatively simple, but not always, but usually relatively simple to identify a reason or reasons why that should be so. In other cases one finds opposition that is, of course, superficially real and genuine but is in fact a protection for the child against finding herself in endless conflict with the residential parent, upon whom, as in this case, she is wholly dependent'.

Re N-A (Children) [2017] EWCA Civ 230 is an interesting decision and reinforces that it is the court that makes welfare decisions and not children. Children aged 16 and 14 had their expressed wishes and feelings overridden and the father did not obtain

permission to relocate to Iran. The Cafcass officer concluded that there would be a negative impact on the children's relationship with their mother and education and the move would cause further emotional harm. The children were already significantly impacted as a result of the negative parental relationship. Hogg J found that neither boy gave her the impression that they really understood what a move permanently to Iran would entail, nor was the judge convinced that they really understood the implications of the move indicating she had the 'gravest doubts' regarding the level of contact if the children were to move to Iran. Hogg J concluded that the boys' best interests 'demanded' that they stay in the UK. A new order for contact with their mother was also made.

Re R (A Child: Appeal: Termination of Contact) [2019] EWHC 132 (Fam), [2019] 2 FLR 162 is a decision that also looked closely at the wishes and feelings of the subject child again in the context of years of court and professional involvement. The case was an appeal against the decision that R should have no direct contact with the father, an order as to indirect contact and an order under s 91(14) of the Children Act 1989. There were allegations the father had been physically abusive which were found to be untrue and findings against the mother of a very serious nature, including a finding in the language of the threshold criteria per s 31 of the Children Act 1989:

> '. . . the mother has alienated R from his father . . .as a result R has suffered and/or remains at risk of suffering from significant long term emotional harm as a result of his mother's manipulation; this is against the background of the mother's strong and firmly held (although incorrect) belief that the father presents a risk to R.'

However it was ordered that R was to continue to live with his mother, and was only to have indirect contact with father. A s 91(14)order was made in respect of R's 'spending time' with arrangements, and for a period of two years in relation to R's 'living' arrangements. Baker J granted permission against the decision that R should have no direct contact with father, the order for indirect contact and the s 91(14) order.

Williams J who heard the case helpfully rehearsed the case law relating to 'no-contact' orders, principally *Re G (Residence: Same-Sex Partner)* [2006] EWCA Civ 372, [2006] 2 FLR 614; *Re M (Children) (Ultra-Orthodox Judaism: Transgender Parent)* (above); *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494; and *Re Q (Implacable Contact Dispute)* [2015] EWCA Civ 991, [2016] 2 FLR 287. He further noted the psychologist was not asked in her report or in her oral evidence to articulate precisely in psychological and developmental terms the possible or likely consequences for R of:

(a) growing up and reaching adulthood without having any relationship with his father or paternal family;

(b) continuing to hold set of beliefs about this father that were at best inaccurate at worst fundamentally wrong; and

(c) growing up and reaching adulthood being parented solely by his mother who had been identified no only as having caused emotional harm to him through her alienation of him from his father but also and as significantly whose parenting was identified as creating an enmeshed relationship where R was unable to developmentally separate, to develop his own identity separate to that of his mother.

The judge noted that the overall evidence was of extremely significant medium to long-term harm arising from a number of sources and that the psychologist had characterised the on-going harm as potentially outweighing the harm of separation. He further concluded that the evaluation the judge in the lower court undertook had failed to give due weight to the on-going long-term emotional harm that would be caused to R by him remaining in the mother's care in the context of the serious findings of her emotional abuse of R, her denial to R of a relationship with his father and the paternal family, and the psychologists concerns about the

emotionally neglectful parenting that R was likely to receive from his mother in the future.

The judge further concluded that the decision to make a final order in respect of direct contact was wrong because the combination of the consequences of the findings of fact that had been made and the lack of full exploration of the options available (in particular in relation to therapy for mother) meant that not all options had been adequately considered,

In relation to wishes and feelings the following was recorded in the judgment:

> '80. . . . His Honour Judge Thorp noted that the views of a 12-year-old child would in many cases be given a very high degree of recognition. He noted that by reason of R's ASD his understanding is not the same as it would be for another child of his age. He also explicitly noted that his views have been affected by the hostility of his mother towards his father and by him being provided with information, which is not true. Notwithstanding those caveats His Honour Judge Thorp accepted the evidence that demonstrated the high levels of distress caused by trying to encourage him to have contact with his father.
>
> 81. Ms Hylton on behalf of the father argues that this approach failed to take into account that if one [excised] the mother's negative influence there was a wealth of evidence that R's true wishes and feelings were to see his father. The evidence suggests that this is true.
>
> 82. However as Ms Phillips submits those wishes and feelings were R's genuine wishes and feelings even if they were tinged with influence. She points out that it is clear from His Honour Judge Thorp's overall analysis that R's wishes and feelings did not weigh more heavily in the balance than other considerations.
>
> 83. I agree with Ms Phillips analysis in this respect and do not consider that His Honour Judge Thorp gave either the mother's reports of R's wishes and feelings or his highly manipulated wishes and feelings undue weight. There is nothing in the judgment in particular in the final evaluations in respect of contact that R's wishes and feelings, per se, were given undue weight. The real impact of his views was in terms of the harm that was caused to him by attempts to raise contact with him or to reintroduce contact.
>
> 84. Whilst I therefore do not agree that His Honour Judge Thorp was wrong I do not think this is the whole answer. The consequence of the finding that R had been primed with information about his father that was not true and had been alienated from his father meant that unless steps were taken to address this in some way that erroneous belief would endure, perhaps for life. The evidence was that the mother was not likely to change without therapeutic input. Even with therapeutic input the prognosis was not good.
>
> 85. It seems to me that this finding is also inconsistent with the conclusion that the findings would not affect the welfare outcome. Whilst I entirely accept that the overwhelming evidence at that point was that immediate work with R was not something anybody wished to contemplate because of the harm that it would cause that is only part of the picture. Work with the mother was a prerequisite to redressing the false picture. If that work failed to yield results the court would need to grapple with the issue of how the harm that had been done and was being done was otherwise to be addressed. That it appears to me adds further weight to the conclusion that further consideration needed, and needs, to be given to the way ahead for R, the mother and the father.'

There has been a significant shift in the approach of the courts (at all tiers) to cases where alienation is ultimately identified. It remains however an arduous and oftentimes emotionally and financially exhausting endeavour for a parent to prove alienation

and to obtain a remedy. The situation is complicated by a lack of family court judges and a lack of legal aid for proceedings and expert psychologists and other experts in the field.

Overworked local authorities remain loath to issue proceedings for care or supervision orders in private law cases with these hallmarks. If they did so this would at least mean there was oversight of the children whilst the court proceedings are on-going, however very experienced practitioners are needed to do the same or problems can be compounded with children and parents repeating or raising new allegations and complaints. Again, it is often safer for local authorities to become involved only after a clear fact-finding judgment is available as a base line for work with the family.

In very many of these cases a parent is completely unable to see the child and unable to exercise any parental responsibility for them. Very often psychological and psychiatric experts compare the emotional harm being occasioned to children as equivalent to physical harm such as the breaking of arms and legs although it is often said that physical injuries heal quicker than emotional ones. In terms of significant harm the impact on children in serious emotional abuse cases cannot be overstated, as some of the recent cases now make plain.