

FOURTEEN

Obdurate carers - how do you control/ overcome the difficulty of an obdurate carer who is frustrating contact?

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Overview

- A. Why do carers become obdurate?
- B. Concepts, research and approaches relating to alienating behaviours
- C. Timing
- D. Solutions
- E. The future?

A. Why do carers become obdurate?

- The President reported (in April 2019) that 38% of separating parents end up in the Courts in relation to child arrangements
- There are now c45,000 new private law cases each year (CAFCASS annual summary)
- Presumably all of those cases ended up in the Court because the parents could not find a mutually acceptable way forward
- So when is a carer obdurate? Is it the same as implacable hostility? Is it interchangeable with the concept of alienation?

- It is said that only 4% of cases involve implacable hostility by a parent (Tinder et al, Enforcing Contact Orders: Problem solving or punishment? Exeter University 2013). Personal experience would suggest that some level of alienating behaviours are found in a far higher percentage of cases.
- It will be seen that all of the above can lead to significant and static problems with arrangements for the child which originate from the parental relationship as distinct from objective child-centred issues

- Again, personal experience would suggest a number of recurring themes:
 - Alleged abusive behavior that is not proved, but not abandoned as a narrative by the alleged victim
 - An abusive parent makes reparations and undertakes therapy but the other parent cannot move on
 - Deep mistrust between the parents (see E Halliday, R Green and B Marsh 2017)
 - Jealousy
 - Enmeshed parental-child relationship
 - Mental health

- It is important to identify at an early stage what the cause of the problems are so as to enable an approach that is appropriately tailored to the specific case
- Spending time with the client from the outset in order to understand the dynamic between the parties is critical

B. Parental alienation – concepts research and solutions

1. General
2. So what is parental alienation?
3. Relevant research
4. Relevant case law
5. CAFCASS internal guidance
6. Identifying and proving alienation
7. Remedying alienation, if proved
8. Example

1. General

- Cannot have been in practice without this issue having been raised in several of your cases
- As a concept it has made its way into the public domain
- Alienation regarded as a serious form of emotional abuse
- Detection of alienating behaviours can contextualise and explain a child's reluctance to spend time with a parent without criticism being implied into the receiving parent's actions/ care of the child
- It is also sometimes used as a weapon against a primary caregiver with legitimate concerns and as a shield by an abusive parent against those legitimate concerns
- Alienation is rarely the sole issue, but rather a factor that nests with other complex issues

2. So what is parental alienation?

- Originally defined by R. Gardner as “disturbance in which children are obsessed with deprecation and criticism of a parent – denigration that is unjustified and/or exaggerated”
- Started to achieve recognition in the Courts following a groundswell of academic support, from those such as Lowenstein (who was criticised by the Court of Appeal in the landmark case of Re L, V, M, H)

- “the unwarranted rejection of the alienated parent and an alliance with the alienating parent, characterised by the child’s extreme negativity towards the alienated parent due to the deliberate or unintentional actions of the alienating parent so as to adversely affect the relationship with the alienated parent” (Baker and Darnall, 2007, Baker and Darnall, 2006)
- Per CAFCASS: “While there is no single definition, we recognize parental alienation as when a child’s resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent.”

- Is it a pathology (see Gardner et al) or a cause and effect (see Baker et al)?
- There was huge debate prior to the WHO publication of ICD-11 (in July 2020) as to whether or not parental alienation syndrome should be included. It has been removed, having been included in an earlier draft, because it is regarded by WHO as a judicial term not a medical one
- DSM-V (a few years old now) does not mention parental alienation syndrome

- Per McFarlane P in his keynote address at the Families Need Fathers Conference 25 June 2018:
 - “I readily accept that in some cases a parent can either deliberately or inadvertently turn the mind of their child against the other parent so that the child holds a wholly negative view of that other parent where such a negative view cannot be justified by reason of any past behaviour or any aspect of the parent-child relationship”

- what is not parental alienation?
 - Alignment (Johnston 2003)
 - A child's valid concerns in relation to another parent's actions
 - A child's response to the break down of the relationship of the parents
 - It must have its seat in the conscious or unconscious actions of the parent
 - Can the alienated parent be responsible for alienation?

3. Relevant research

- Relevant research
 - There are now an almost endless array of articles and texts on this issue. The following is an attempt to highlight some of the most commonly referred-to or otherwise influential that I have come across
 - Anything by Karen and Nick Woodall (they have written extensively about, and tried to define different types of, parental alienation)
 - *Gomicide, Camargo and Fernandes, 2016*; alienation should only be considered where no other explanation exists for for the child's reaction

– *Doughty et al, Review of research and case law on parental alienation 2018*

<https://gov.wales/sites/default/files/publications/2018-05/review-of-research-and-case-law-on-parental-alienation.pdf>

4. Relevant modern case law

- (main waypoints only)
 - Re S (Parental Alienation: Cult: Transfer of Primary Care) [2020] EWHC 1940 and [2020] EWCA Civ 568
 - Re H (Parental Alienation) [2019] EWHC 2723
 - Re L (A child) 2019 EWHC 867
 - Re J [2018] EWCA Civ 115
 - Re L and M (Children: Private Law) [2014] EWHC 939 (Fam)
 - Re O (A Child) (Contact) [2003] EWHC 3031
 - Re T (A Child) (Contact: Alienation: Permission to Appeal) [2002] EWCA Civ 1736
 - Re L, V, M and H (Children) [2000] EWCA Civ 194

5. CAF/CASS internal guidance

- Be familiar with CAF/CASS internal guidance
 - CAF/CASS have an alienation ‘tool’. NB this is not a validated tool, but one which is nonetheless used by CFAs
 - Reference to the tool will inform lawyers as to what CAF/CASS officers look for where alienation is alleged or suspected

6. Identifying and proving alienation

- Identifying and proving alienation
 - Necessitates an understanding of the relevant research, the competing approaches to parental alienation and the approach taken by CAFCASS/NYAS
 - Look at the behaviours of both the child(ren) in question and the behaviours of each of the parents
 - Remember that rarely will there be a ‘one issue’ in the case

7. Remedying alienation, if proved

- Remedying alienation, if proved
 - Rapid reinstatement of substantial spending time arrangements
 - Transfer of primary base
 - Suspension of time with alienating parent for an extended period
 - Therapy
 - Criminal sanctions? MOJ confirmed in 2017 that there was no need for parental alienation to be introduced as a specific criminal offence because there already existed a route to punish offenders

8. Example

- A was aged 10 and B was aged 6
- Long history of parental acrimony
- Children hysterical at handover. Contact suspended.
- Proceedings issued
- Findings that each had been abusive to the other
- CAFCASS witness contact which is of a good quality
- Incremental re-introduction opposed on the basis of being contrary to research in relation to alienation
- Contact re-starts at a whole day each weekend
- Handover takes place through a neutral professional
- Children rapidly re-establish relationship with non-resident parent
- Case concludes once overnight contact has been set up (I hope!)

C. Timing

- Timing is absolutely critical
 - See Re J [2018] EWCA Civ 115. Sometimes the elapse of time can make it impossible to progress a case
 - Strive for judicial continuity
 - Delay can be a breach of human rights (see Re A (contact: Human Rights Violations) [2013] EWCA Civ 1104)
 - Getting the right intervention at the right time can make the difference between failure and success

- Example
 - September 2017: child born F denied any contact by M
 - October 2017: F issues application
 - December 2017: FHDRA at which CAFCASS recommend no contact at all because of allegations by M of emotional abuse and control (all of which are denied by F). Matter listed for FFH on 9 and 10 April 2018
 - On 19 March, as a result of judicial availability, hearing re-listed for 10 and 11 April 2018

- M applies to vacate the new dates because she cannot attend the second day (and nor can one of her witnesses)
- 26 March 2018: Court vacates the FFH hearing and re-lists it for 20-21 September 2018
- 20-21 September FFH takes place and none of M's allegations are found and M is substantially criticised for her approach to F and contact. Interim contact at a centre ordered (F an inexperienced new father and M hostile) pending receipt of a CAFCASS report. Court unwilling to list a substantive hearing, only lists a DRA (despite being asked to also list a final hearing)

- Substandard CAFCASS report filed recommending progression of contact as if findings had been made that F is abusive
- Dec 2018: DRA takes place. Court unwilling to make substantive decisions in light of M's opposition and the recommendations of the CAFCASS officer. Final hearing listed in June 2019
- June 2019 final hearing collapses shortly into the cross examination of the CAFCASS officer and extended arrangements for child to spend time with father are ordered

- March 2020 substantial overnight contact due to start
- Mother suspends all direct contact as a result of Covid-19 public health crisis
- CAFCASS file a report supporting the suspension in light of a mis-interpretation of the President's guidance
- May 2020 final hearing use to recommence contact. Final hearing adjourned.
- October 2020 final hearing dates listed but not notified to the parties in time for hearing to be effective. Final hearing adjourned to?????

- Probably many more examples of such systemic failings to come, given the 29% increase in private law cases in England since CAP was introduced in 2014 and the lack of increased Court funding (and still increasing at a rate of about 4% per year, year on year)
- Challenge judicial decisions not to list substantive hearings in intractable cases

D. Solutions

1. Reasoning with the parents
2. Transfer of 'residence'
3. Presumptions deriving from statute or case law
4. CAFCASS/ NYAS role
5. Punishment
6. Use of NCDR
7. Activity directions

1. Reasoning with parents

- Standard judicial practice
- Highly effective in many cases, but probably more so in those which are easier to resolve
- Can lead to a culture of pandering to reluctant primary care givers
- Can lead to ducking the core issues
- But NB perception of a pro-contact culture; 'What about my right not to be abused' J Birchall and S Choudhry Women's Aid 2018

2. Transfers of residence

- These have been used by the Family Courts for a long time
- Re S (A Child) [2010] EWHC 3721 (Fam), after ten years of litigation (almost the child's lifetime), the judge had ordered a transfer of residence from the mother to the father.
- A transfer of residence supported by a Family Assistance Order (s 16 Children Act 1989) was made in Re A (A child) [2007] EWCA Civ. The orders (in favour of the non-resident father) were upheld by the Court.

– A number of recent cases

- *Re B (Change of residence: parental alienation)*[2017] EFC B24
- *Re M (Children)* [2017] EWCA Civ 2164
- *Re C (A Child)* [2018] EWHC 557

– *Re L (A child)* [2019] EWHC 867

- Heralds a possible change in emphasis
- However, it still appears implicit that residence will not be transferred until the resident parent is ‘given a chance’

- Of course, in many cases it simply does not work because the child has been too damaged to make the transfer feasible
- Research seems to suggest that in alienation cases, the more positive results are achieved when the transfer of residence is effected whilst the children are still young and before the alienating behaviour has been long-standing

- ‘Presumptions’
 - S1(2A) CA 1989 introduced a rebuttable presumption that involvement by the parent in the child’s life will further the child’s welfare
 - Severely limited in scope
 - Rarely referred to by practitioners
 - Re G (Children) (Intractable Dispute) [2019] EWCA Civ 548 it is almost always in the interests to have some form of contact
 - Not a presumption *per se*

- Contact will only be denied when there are cogent reasons; *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 1 FCR 964
- ECHR places Positive obligation on the state to promote family life; *Glaser v UK* 33 EHRR 1
 - Again not a presumption

- The role of CAFCASS

- Use of pathway tools to recognise, at an early stage, patterns of behavior which might lead to a case being intractable (e.g. abuse, alienation etc.)

- Familiarise yourself with the Child Impact Assessment Framework. Clients need to be advised that this is what CAFCASS will be using;

- <https://www.cafcass.gov.uk/grown-ups/professionals/ciaf/?highlight=CIAF>

- Consider asking CAFCASS to recommend, and the court to direct, that the parties attend the CAFCASS Positive co-Parenting Programme ('CPPP')
 - 12 week structured program delivered by specially trained CAFCASS FCAs
 - Currently only available through the Court
 - Each session is about 1.5 hours
 - The officer meets the child(ren) as well as the parents
 - It involves at least one session that includes both parents (usually the last)

- CAFCASS have commissioned a number of studies which inform their own practice and the Court's understanding of problems and potential solutions
- All CAFCASS data has been anonymised and made available for researchers to access as of February 2020
- You can browse the research carried out by CAFCASS and the data recorded by CAFCASS at; <https://www.cafcass.gov.uk/about-cafcass/research-and-data/>

- The newly commissioned CAFCASS Research Advisory Committee met for the first time in July 2020. The stated goals are:
 - Approve and scrutinize research applications
 - Provide information and insight into emerging relevant research
 - Help set a research agenda with partners in the Family Justice system
- Keep a watching brief on research emanating from this Committee

- Culminates in the s7 report
 - Variable quality
 - Long delays
- Consider paying for an independent social worker to carry out the assessment
 - Greater expertise
 - Specific expertise
 - Trusted source
 - Time fitted to proceedings not the other way around
 - Cost
 - But N.B. no access to CPPP

- Separate representation of the child
 - a court must consider in all cases where DA is alleged whether or not the child should be separately represented; FPR 2010 PD12J
 - More generally, a Court may make the child a party if it considers it to be in the best interests of the child to do so; FPR 2010 R16.2

- FPR 2010 PD16A r7.2 gives **guidance** as to what factors may justify making such a decision:
 - Where CAFCASS so recommend
 - Where the child has a stand-point which is inconsistent or incompatible with those of the adult parties
 - Where there is an intractable dispute
 - Where the w+f of the child cannot be adequately met by a report
 - Where an older child is opposing a course of action
 - Where there are complex health or medical issues

- Where there are international issues (excluding abduction)
- Where there are serious allegations of physical, sexual or other abuse not capable of being resolved with the assistance of CAFCASS
- Where proceedings concern more than one child whose interests are in conflict
- Where there is contests issue about forensic testing
- Separate representation of the child will, however remain the exception

- When does court exercise its discretion in practice?
 - When there are two litigants in person and funding for an assessment is needed, or the Judge needs the assistance of an advocate to help manage the case
 - Intractable cases
 - Medical/ health cases

- Tactical advantages of asking the court to join the child as a party
 - CAFCASS/ NYAS will usually recommend the instruction of an expert
 - NYAS have particular experience in navigating high-conflict cases (see below)
 - Separate representation of the child may lead to a more careful review of the evidence than may be undertaken through the s7 process
 - Having a lawyer acting for the child may lead to greater challenge to the rigour and conclusions of the investigation than might occur without it
 - It is likely to garner support for one party and advantage them in litigation

- CAFCASS or NYAS?
 - Unless the child obtains the Court’s permission or a solicitor considers that the child is able to give instructions directly (FPR 2010 r16.6) then a guardian must be appointed to act for a child
 - In private law proceedings this will usually be CAFCASS
 - However it can on occasion be the National Youth Advocacy Service (‘NYAS’)

- NYAS
 - is a multi-function independent non-governmental charity set up in the 1970s
 - can provide a case worker and a lawyer to represent children who have been made parties to private law proceedings; Re A (Separate Representation) [2001] 1 FLR 715.
 - There is a protocol between CAFCASS and NYAS (Entered into in December 2005) which stipulates that usually CAFCASS will be approached first.

- The protocol envisages that NYAS would be asked to act where, for example, a family member can no longer work with CAFCASS (see the 2005 protocol para 14)
- In the author’s experience the use of NYAS is far more widespread and is most often seen as a more ‘heavy weight’ solution in particularly difficult cases
- NYAS offer a broad range of services that can compliment the function of acting as guardian for the child in care proceedings (see e.g. Re C (Contact: Moratorium: Change of Gender) [2007] 1 FLR 1642 where they were also asked by the Court to impart sensitive information to the subject children)

- As with all decisions in litigation, choosing between CAFCASS and NYAS can be a tactical decision (albeit one which cannot be approached from a concrete perspective)
- If the decision is made to approach NYAS, the first step is usually for the Court to order the disclosure of the papers to NYAS and to invite them to consider whether or not to act (in a similar way to the views of CAFCASS should be sought)

5. Punishment

- Committal to prison
 - Court of Appeal has encouraged Courts to be prepared to take punitive action; Re A (Intractable contact dispute) [2013] EWCA Civ 1104, [2014] 1 FLR 1185
 - However, still rarely used
 - Does not address underlying problems
 - Often more useful as a threat (e.g. suspended term)
 - Can be damaging for the child or counter-productive to the ultimate aims of establishing a relationship; L-W [2010] EWCA Civ 1253

- Fines
 - See all of the above above and also it is subject to means
- Community service (s11J)
 - Still not frequently used
 - Does not address underlying problems
 - Easy for determined parent to take the punishment and continue to breach orders

6. Use of NCDR

- MIAM (severely limited function)
- Power to adjourn proceedings pending NCDR (see FPR 2010 r3.4 in particular)
 - Deciding to adjourn requires some hope that the work will be used successfully
 - It also requires some confidence that the early resolution of disputed facts is not needed in order to move matters further forward
 - No power to deal with funding (compare this to the US Courts)
 - Can lead to significant delay

- Arbitration can lead to swifter outcomes but NB problems with enforcement etc.
- Mediation is unlikely to work in intractable cases
- SPIPs are useful but are simply not enough to make a significant difference in intractable cases
 - 2014 study by Trinder L. indicated a ‘modest but broadly positive’ impact on children from SPIP intervention

- Consider using the new CAFCASS Co-Parent Hub, launched in April 2020.
 - It is free and can be accessed from <https://cafcass.clickrelationships.org>
 - It provides assistance in preparing a parenting plan, communication between parents and co-parenting in the context of parental separation
 - It is unlikely to be useful to reverse cases which have become intractable but it will be interesting to see if it helps prevent cases from going down that route

7. Contact activity directions

- Cannot order a party to pay for the activity
- Availability of remedy is heavily resource dependent
- Courts are often not familiar with what is available in their area
- Cannot require non-consensual involvement in 'medical or psychiatric examination, assessment of treatment'; s11A CA 1989
- Rarely used

E. The Future?

- Recent developments
 - Private Law Working Group report, dated June 2019 (Cobb J)
 - President's address to resolution in April 2019
<https://www.judiciary.uk/announcements/speech-by-president-of-the-family-division-to-the-resolution-conference-2019/>
 - Studies of the Australian system

- What is unlikely to change in the future?
 - No 26 week (or other) time limit for proceedings
 - See the private law working group report
 - No statutory presumption of shared care
 - Australian model has been subject of academic criticism and, in any event, is still working out its teething problems
 - No ‘default’ or ‘standard interim’ child arrangements order
 - No proposal for the Court to be able to force ‘alienating’ parent to pay for therapy

- So what changes might there be?
 - A non-Court dispute resolution system ‘Family Solutions’
 - Strengthening of MIAMS
 - Greater emphasis on early intervention and NCDR
 - Early ascertainment of a child’s views
 - Allocating Court applications to a ‘track’
 - Introduction of Court ‘triaging’
 - Public education
 - Domestic Abuse Bill 2020

- NCDR
 - Family Solutions
 - Still in infancy, recommendation by Private Law Working Group that there is an ‘evidence-based investigation’ of this as a possibility
 - Only possible to progress with substantial government funding
 - The creation of local alliances of support services for separating families which will provide a single-access portal to educate, support and assist families in resolving arrangements for the children post-separation
 - General education of the public as to the impact of parental conflict and the need for co-parenting

– MIAMs

- CAFCASS report that 25% of all cases have no child protection or welfare concerns.
- CAFCASS report that 33% of all cases return to Court within 12 months
- President made it clear in his April 2019 speech that the system must look to prevent such cases being heard in Court
- As part of this, role and function of MIAMS to be strengthened
- Gatekeepers to scrutinise MIAMs exemptions more closely
- MIAMs to be conducted on an open basis?

- Early ascertainment of a child's wishes and feelings
 - Recommended by the working group
- Allocation of proceedings to a track
 - Three track system suggested by McFarlane J
 - Track one no s7 report (no safeguarding)
 - Track 2 standard track for most cases
 - Track 3 returning cases
 - This will likely be piloted before any attempt to roll it out nationwide

- **Triaging**
 - This is intended to be a more systemic examination of a case, and how (and if) it should be progressed, than currently occurs under the allocation procedure. This could include directing a s7 report, not listing a FHDRA and require attendance at an SPIP
 - Those undertaking triage would also allocate the case to a track as a preliminary step

- Public education

- Theis J's address to the ALC on 22 November 2019 emphasised the need for wider public education as to the importance of co-parenting and co-operating for the benefit of children
- c90% of SPIP attenders reported that they learned something that helped them understand parental conflict and which could be used to make things better for their children

- Domestic Abuse Bill 2020
 - Statutory definition of DA
 - Creation of a Domestic Abuse Commissioner
 - Create a new Domestic Abuse Protection Notice and Domestic Abuse protection order
 - Local authority duties to provide support and refuges
 - No cross examination in person by allege abusers
 - Statutory presumption that alleged victims are entitled special measures

- A person cannot consent to infliction of serious harm on themselves (or consent to their own death)
- Extend extra-territorial jurisdiction of criminal courts in relation to violent and sexual offences
- Introduce mandatory polygraph testing for DA offenders on licence
- Place ‘Clare’s law’ on a statutory footing
- Give eligible homeless DA victims priority need for housing and secure lifetime tenancies

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