PARENTAL ALIENATION SYNDROME - A JUDICIAL RESPONSE?

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from Family Law, May 1998, p. 264-6

Practitioners will have recognised immediately the emerging problem of parental alienation' as discussed by Caroline Willbourne and Lesley-Anne Cull 'The Emerging Problem of Parental Alienation' [1997] Fam Law 807. The question is put succinctly in that article: '. . . what can a court do when a parent has alienated a child to the point where he is expressing what appears to be a genuine desire not to have any contact with the non residential parent?'.

THE PROBLEM

Practitioners may not, until now, have had a label for this type of situation, but they will certainly have come across the problem. An otherwise perfectly 'good enough' father (the non-residential parent commonly is the father) is faced with a child saying adamantly that he will not go to contact. What can the court do about it, particularly if the child is older? The mother rarely admits to being opposed to contact; indeed, she may say with conviction that she agrees with the principle of contact and that she is not opposed to it 'as long as the child wants to go'. She may even, and often will, comply with the letter of any order made by the court for contact by, for example, taking the child physically to the contact venue, but will fail miserably to act in the spirit of the judge's decision in such a way that contact can actually take place or be successful. Alternatively, she may argue strenuously about the (short term) distress the child shows when going to contact, while ignoring all invitations to take a long term view as to the benefits of the child knowing his other parent.

ENFORCEMENT OF CONTACT

'Parental alienation' is a subtle subversion of the spirit of all the developments in the law relating to access and contact since *M v M (Child: Access)* [1973] 2 All ER 81, in which Wrangham J defined access as the 'right of the child' to the companionship of his other parent. This judicial approach has been developed and reiterated over the past 25 years, and continues up to the present day. It is set out clearly in many recent cases, but in particular in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 where it was said, with great poignancy, that parents should remember that they were once close enough to have conceived their child, and in the by now numerous cases deciding that the court has a duty not to abdicate its responsibility in the face of a recalcitrant parent. This has led most recently to judges even being prepared to commit mothers to prison for breach of contact orders, such as in *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533.

Where a contact order is being breached, the court's ultimate sanction within its private law jurisdiction is to order a change of residence. This solution is suggested by Willbourne and Cull (above) on the basis of expert psychiatric opinion in the USA, and is beginning to be adopted in the UK by some psychiatrists as being the last resort for cases of 'insidious and long-term' damage caused by strategies of parental alienation. It is strongly arguable that an otherwise

'good enough' mother who adopts such a strategy is guilty of 'emotional abuse' of the child, since the child will suffer certain damage as a result of losing contact with the other parent. This approach is, in effect, merely the other side of the coin of the view adopted overwhelmingly by the courts that 'it is almost always in the interests of the child whose parents are separated that he or she should have contact with the parent with whom the child is not living' (per Wall J in *Re P (Contact: Supervision)* [1996] 2 FLR 314). A parent who cannot recognise or support that view is failing in her parental responsibility to the child.

CHANGING RESIDENCE OR OTHER METHODS OF ENFORCEMENT

A change of residence is, of course, a radical solution, which many judges may currently find unpalatable. One may predict, perhaps, that in the same way that committal for breach of contact orders was once regarded as extreme but is now seen as appropriate in exceptional cases, a change of residence may also become a more acceptable remedy in the future. The fact is that in these cases the father is very often good enough' as a father (although, perhaps, he was not so, as the mother would say, as a husband), thus making a change of residence a real alternative.

It is possible therefore that, all other things being equal, a change of residence is a satisfactory resolution of the problem, although the father may need expert assistance to overcome the effects on the child of the parental alienation. It may be more appropriate for a child to stay with his mother, but receive treatment to counter the effects of the parental alienation, so that contact can take place with the father. Although this raises the issue that the court cannot order treatment of the child in a private law case, it could be the exact remedy to the deadlock between the parents. The High Court and county court have the power, in the absence of agreement between the parties, to appoint their own independent experts under RSC Ord 40, as applied by the (court of Appeal in *Re K (Contact: Psychiatric Report)* [1995] 2 FI.R 432 to children's cases. While this could be a helpful intervention although little used it is doubtful whether it is a solution to the need of the child for more long-term treatment to overcome the damaging effects of a mother's parental alienation.

So far, the notion that children who are subjected to 'parental alienation syndrome' are suffering 'significant harm' in the terms of s. 31 of the Children Act 1989, and thus worthy of consideration for care proceedings, has not been explored in detail, although judges have often threatened to do so. This represents another radical solution, which may, in time, find its place in the list of possible outcomes in these types of cases.

The evidential difficulty in cases of 'parental alienation' will always be to persuade the court to accept that this is a proper diagnosis of the mother's behaviour which has led to the child's aversion to contact. Committal applications will be problematic because the mother may technically have complied with the order for contact, but done nothing to encourage the child to have contact with the father. The emotional 'control' that the mother has over the child, and the refusal of the mother to give 'emotional permission' to the child to see the father, are 'insidious', but difficult to prove. Most importantly, the signs may be slow to detect, and by the time the diagnosis of 'parental alienation' is realised, the damage may already have been done, and the child adamant in his refusal to have contact with the father.

THE DUTY TO ENCOURAGE

Surprisingly, the very important decision of the Court of Appeal in *F v F* (1996) 13 May (unreported) has still not reached the case reports (the full name is withheld here in accordance with the practice of the Court of Appeal to refer to cases by initials only, although the full name appears on the official transcript). The unanimous judgment was given by the President of the Family Division, Sir Stephen Brown, sitting with Kennedy and Phillips LJJ. The case concerned an 'emotional impasse' between the mother and father of four children aged 10, 9, 8, and 5. On separation from the father, the mother indicated that she was agreeable to contact taking place, but it did not in fact take place, despite orders. The children subsequently wrote letters to the father saying that they did not want to see him. They were 'violently unwilling' to go with the court welfare officer (appointed by the court) to contact. On an application for committal for breach of the contact order, the judge at first instance found a wilful breach. He said:

> 'I have come to the conclusion that the mother never intended to comply with this order; she never set about preparing the children in the way that was necessary and she was confident the children would not go . . . I find that if this mother had decided that she would talk to the children positively about their father and had used all the 15 days available to explain to the children why she had been wrong about it before, there was a good prospect that she could have succeeded. Indeed, that was the assumption lying behind my order . . . Here we are dealing with children who are of an age where a mother would normally be expected to be able to influence them and indeed to exercise authority over them. Therefore it was not necessary to make a specific order that the mother would say a particular thing to a child or adopt a particular attitude to a child. The order is that she will produce the children and hand them over on a certain date for contact. *That order has having been made, it is up to her as a parent and a responsible person to work out for herself how she will go about complying . . .* People can only be supported if there is a measure of co-operation, if they are willing to accept that they have a problem which needs help. This mother never was. I found she was very hostile to the idea of contact. She was saying, of course, that the children were refusing, that she was not refusing, but I rejected that. Although the mother was constantly maintaining that it was the children who were refusing and not her, my finding was that that is not the reality of the case. The reality of this case is that it is the mother who is refusing and she is communicating her views about the father and her hostility towards contact to the children. They are responding to what she communicates. They therefore tell the welfare officer and other people that they do not want to see their father; it all goes back to the mother's views and not the children's views. That was my finding and that remains my finding . . .' (emphasis added)

The judge at first instance then made a fresh, defined contact order and a suspended committal order. The mother appealed against the committal order. The President on behalf of the Court of Appeal said: *'there was, as the judge made clear, a clear obligation upon the mother to assist the children to come to terms with having contact with their father'* (emphasis added). The President affirmed the leading judgment of Sir Thomas Bingham MR in *Re O (Contact: Imposition of Conditions)* (above) that:

> 'the court had a duty to make orders where it was appropriate and that there was a duty, and a clear duty, upon the parent or parents upon whom the obligation of allowing contact was laid, to obey the order of the court.'

The President said on the facts of this case:

> 'The judge found that it was plainly in the interests of these children that they should have contact with their father. He further found that the mother had, in effect, sabotaged the climate for contact by effectively indoctrinating the children against the idea of contact with their father.'

The President upheld the decision of the judge to make a suspended committal order:

> 'This was, in my judgment, a case where the judge was ultimately obliged to make an order for committal. He was able on the facts of the case to provide it should be suspended. It was not in any way a harsh order. It was made sensitively in the hope that the mother, even at this stage, would come to her senses and actively promote contact through the agency of the court welfare service.'

The significance of the case therefore is that the Court of Appeal approved the judge's finding of a wilful breach of a contact order in circumstances where the mother had failed, according to the President, in her 'clear obligation . . . to assist the children to come to terms with having contact with their father'. As the judge had said (and which was approved by the President): 'the order having been made, it is up to her as a parent and a responsible person to work out for herself how she will go about complying'. These are strong words, and worth repeating.

JUDICIAL PRACTICE

In practice, while the Court of Appeal and High Court have been leading the way for some time in very strong terms that they will not tolerate mothers who sabotage contact orders made in the long-term best interests of the children, in reality practitioners appear to encounter difficulties in the county courts that firm decisions are not always made, or at an early enough stage in the proceedings, before 'the rot has set in' and parental alienation has occurred. Court welfare officers, often appointed to assist in the setting-up of a contact programme, vary in temperament, and those weaker officers give up in the face of recalcitrant or difficult mothers. In other words,

the lead of the higher courts, while being honoured in its sentiments, is not always followed in its implementation.

It is strongly arguable that when a contact dispute shows all the signs of becoming protracted when the principle of contact is in issue, or the actual taking place of contact (for whatever reason) is not occurring - then the matter ought to be transferred to the High Court in London. There is an authority and dignity present in High Court judges which has been seen in these types of cases to break the deadlock - qualities which a county court judge simply does not have. For some reason the county courts are loath to order such transfers, but the benefits of doing so should be obvious.

Similarly, the Official Solicitor, who under his terms of reference set out in *Practice Note: The Official Solicitor: Appointment in Family Proceedings* (8 September 1995) [1995] 2 FLR 479 may accept appointment in private law cases where a child's interests cannot be sufficiently safeguarded by a court welfare officer's report, in practice does refuse to act even though the court welfare officer has been unable to progress the matter so that contact actually takes place.

SOLUTIONS?

The practical implementation of the law is not happening in difficult cases, where implementation is all the more important. The law stressing the importance of contact for the long-term welfare of children, and the duty of parents to ensure that it takes place as set out in F v F (above) (a decision which was not even considered significant enough to be reported), is being negated in these cases because the lower courts do not use the armoury of powers they have to enforce their contact orders. As long as the judicial 'bark' is louder than its 'bite', mothers will continue to flout contact orders to the detriment of their children. In addition, if the 'parental alienation syndrome' continues to be unrecognised, and fails to be 'nipped in the bud' as so often happens, then the worthy spirit of the law will fail those whom it is beholden to protect.