



PRACTICE POINTS

## Parental alienation in criminal cases

By June Venters QC 29 May 2019

*This article is a follow up to [Parental alienation](#), which focussed on *Re D (a child (parental alienation)) [2018] EWFC B64* and where June Venters QC represented the father*

### **Crown court: relevance of parental alienation**

Parental alienation is not confined to family cases. It can and does feature in criminal cases, where allegations are made against a backdrop of a prolonged, serious and acrimonious relationship between parents following separation/divorce.

When representing a parent in a criminal court I emphasise to my clients the need for all relevant facts to be before the jury, just as they need to be before a family court. This will require a thorough consideration of what might be relevant evidence coupled with a detailed request for disclosure from the prosecution. This is so the jury can properly understand and evaluate the family background which may have led to those allegations.

Unfortunately and very often, I find myself representing a parent who did not think, at the outset, that it was necessary to be represented at the police station and so attended without being accompanied by a solicitor. As with any criminal case, the absence of legal representation at the police station can

often cause a client considerable difficulty by the time it reaches trial. This can arise for a number of reasons but most commonly in these types of cases because the parent is often in shock and distress when questioned by the police and allegations of this nature are deeply distressing and often historical. The parent may then say something, innocently, that is either not accurate or subsequently contradictory of something else he or she may say. This can often subsequently add weight to the prosecution's case who will seek to suggest to the jury that the parent or his or her account is not credible. Other risks the client faces by attending the police station alone is that police procedures and conduct may not be properly applied and, as such, the client is prejudiced. Without knowing the rules and procedures the client will not know when or how to complain.

Cross-examining children and young people, whether in the family court or the criminal court is never easy. They are vulnerable and at all times require sensitivity and need systems in place (known as 'special measures') which facilitates them giving evidence. However, with skilled and experienced cross-examination the unreliability of their evidence can usually be unravelled.

With proper preparation and skilled representation these cases can be exposed and I am testimony to cases of this nature resulting in the acquittal of a parent, who has been facing these allegations for some considerable time, not knowing whether he or she would be going to prison and whether their entire life would be in ruins.

From the criminal cases I have represented, I am in no doubt that if parental alienation (also sometimes known as implacable hostility) goes unmanaged it can lead to child[ren] making allegations of a serious nature against the alienated parent, leading to arrest and interview by the police and in some cases, a criminal trial. In saying this I am not seeking to suggest that allegations made against a parent should not be properly investigated or that they are always untrue. They are not. However, in those cases where parental alienation is a feature, untrue allegations are made, whether intentionally or by misinterpreting a parent's behaviour so as to believe it was sinister. It is these types of cases which must be properly understood by the parent's legal representatives so that appropriate representation can be provided.

In addition, and in recent years, there has been increasing debate about whether parental alienation, if proved, should amount to a criminal offence.

## **Whether parental alienation should amount to a criminal offence**

In late 2016, 12,239 people [signed a petition](#) to introduce a law that recognises parental alienation as a criminal offence. In 2017, the Ministry of Justice on behalf of the government responded. In short, its response stated:

- The court already has the power to take effective action
- [The court] must consider the ascertainable wishes and feelings of the child[ren] concerned, commensurate with that child[ren]'s age and level of understanding
- The court may also ask the Child and Family Court Advisory and Support Service (Cafcass) to prepare a welfare report
- Cafcass practitioners understand and recognise the potential for implacable hostility by a party in high conflict cases

- [Cafcass FCAs] are professionally qualified social workers
- [Cafcass FCAs] are aware of the potential for children to be influenced by parental views and are alert to this possibility throughout the progress of a case
- Cafcass has various tools available to assist practitioners in being able to assess the presence of implacable hostility
- These include a tool for use in direct work with the family
- And a learning module
- As well as access to resources and new research via their in-house library service

As is self-evident, much emphasis and reliance was placed on CAFCASS.

In response to the MOJ concerns were raised about Cafcass training and professionalism when compiling reports for the court raised by a member of the voluntary group, the Voice of the Child, not to be confused by the Voice of the Child Group of the Family Justice Council (FJC). There further followed detailed criticism of the training and approach taken by Cafcass to the issue of parental alienation.

Without seeking to enter that arena, what is clear in practice is that there remains a continuing and increasing confusion about just how child[ren] in respect of whom parental alienation has been found to exist should be best reunited with the parent who has been alienated.

## **Confusion that exists among professionals about how to approach parental alienation**

Difficulties are exacerbated, it would seem, because there is a clear difference of opinion as to the approach that ought to be taken by Cafcass and social workers. On the one hand when attaching weight to the wishes and feelings of the child[ren], with Cafcass and social workers seemingly continuing to place heavy reliance on the 'expressed' wishes and feelings of the child[ren] as opposed to the 'ascertainable wishes and feelings of the child[ren].' 'Ascertainable' as opposed to 'expressed' being emphasised as the correct approach in the well-known cases of [H \(Child\[ren\]\) \[2014\] EWCA Civ 733](#) and [Re K \(Abduction: case management\) \[2011\] 1 FLR 1268](#).

Additionally, the need for direct contact to be re-instated quickly, following a finding of parental alienation is seldom occurring with so many Cafcass officers and social workers advocating for the gradual resumption of direct contact, beginning with indirect contact that many argue risks entrenching the child[ren]'s position against future direct contact. The views of experts instructed by the courts who advocate an opposing view about re-instating contact far more quickly are increasingly either not being followed or face professional criticism.

What this means to families involved in cases of this nature is national uncertainty around the country with obvious and, at times, unpleasant professional disagreements being aired, sometimes in public (where cases are reported). Many judges remain unwilling to go against the recommendations of CAFCASS officers, notwithstanding their training in this field continues to remain unclear, as does the training of social workers in this field.

Hasn't the time come for the whole topic of parental alienation to become a topic for collaboration between CAF/CASS, social services and professionals alleging to be experts in the field, rather than what appears to be happening, which is the range of professionals standing in two different 'camps?'

One issue that does mystify me and I know many others, is that when there has been a finding of parental alienation why it is not thereafter referred to and treated as 'child abuse' in the same way as other forms of child abuse which too has led to significant harm being caused to the child. I say this not as a lone voice but note that this was addressed by [Anthony Douglas](#), chief executive of Cafcass:

***'Recently in public we have been talking about the negative impact of parental alienation on children. I am glad we have brought this pernicious issue to the surface more. Many of our private law cases feature alienating behaviours in some form. They can cause significant emotional harm to child.. However, I am worried that public debates can easily over-simplify a complex issue. Alienation is one type of adult behaviour, which causes adverse childhood experiences. At worst, it is emotionally violent. This is why I have suggested that alienation is a form of child] abuse. It can have as devastating an impact as physical abuse and can lead directly to child] or adolescent mental health problems and other impacts like disturbances to learning, such as not being able to concentrate in class.'***

Whilst, following a fact-finding hearing, social services are ordered frequently to conduct a Section 37 Children Act 1989 assessment and in some cases recommend the issue of care proceedings, this is not happening in every such case and rarely leads to the recommendation of a care order. Instead, what is recommended more often than not is that the child[ren] remains in the care of the 'alienating/abusive' parent who continues to share parental responsibility with the 'alienated' parent and the abuse is at risk of continuing. In my experience and having being a child care practitioner the whole of my career, rarely have I seen something similar when findings of physical or sexual abuse are found to have been caused by the primary carer of the child[ren]. What is different in cases involving significant harm caused by an alienating parent in whose care the child was, at that time and it would seem, and often continues to remain?

## **What are the factors to note from all of this?**

**1. Representation at the police station:** The importance of being represented by a solicitor at the police station, and preferably one who has experience in this field. It should never be underestimated the harm that can be caused by not having the benefit of specialist legal advice at the outset of any case, including criminal. Police station interviews are the foundation/building blocks for any subsequent prosecution and things either said or not said will often be used to 'bolster' a prosecution, and particularly a weak one.

**2. Specialist legal advice and representation:** The whole topic of parental alienation, it would seem, continues to be approached around the country and by various professionals in different ways. That is another reason for ensuring specialist legal advice and representation. It was and remains a travesty that legal aid was removed from cases of this nature but that continues to remain the reality unless and until care proceedings are invoked following a finding of parental alienation when both parents then become entitled regardless of means.

**3. Greater professional uniformity:** There is a need for greater uniformity in the approach of parental alienation and that includes by judges/cafcass officers/ social workers and professionals purporting to be experts in this field. Isn't this best achieved by a collaborative approach towards training and with the training received by all those working in this field being open and transparent about how this is delivered and by whom it is received?

**4. Is there a need for a criminal offence of parental alienation:** Should we follow in the footsteps of other countries who have introduced the criminal offence of parental alienation such as Mexico and Brazil?

Some might say, we already have a criminal law which provides for this and which is included in the offence specified by Section 1 of the Children and Young Persons Act 1933 (CYPA).

Following a campaign by Action for Children in 2012 that alleged the CYPA was not 'fit for purpose' because, in particular, it did not provide for 'emotional harm,' Section 1 was amended by Section 66 Serious Crime Act 2015 (SRA). This clarified the law and makes it clear that:

(a) cruelty which causes psychological suffering or injury is covered under Section 1 of the CYPA; and

(b) the behaviour necessary to establish the ill-treatment limb of the offence can be non-physical;

Section 66 also modernised the language in section 1 CYPA by replacing outdated references to 'mental derangement' and 'misdemeanour.'

Having acknowledged this, time will tell whether any parent will ever be charged with this offence where there has been a finding of parental alienation. I am certainly unaware of this happening to date, and we are now some four years after the law was clarified to include scope for offences involving parental alienation.

**5. Fact-finding hearings in the family court:** For the time being, courts must continue to recognise behaviour that could amount to parental alienation and should list early fact-finding hearings BEFORE ordering any other form of assessment so that when an assessment is undertaken the assessor and author of any subsequent report is fully apprised of the issues which need to be addressed. The professionals involved in this field of work need to remember it is the judge who decides the facts and hence the existence or otherwise of parental alienation, not social services, not cafcass or any other professional who is instructed to assess the family.

***June Venters QC, solicitor and barrister at Law Venters Solicitors and Lamb Building Chambers***