

Polarised parents

In the first of a two-part consideration of intractable hostility, Francesca Massarella examines the relevant case law



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Family Practitioners all too frequently act for fixated and hostile parents, arguing over the contact and care arrangements for their children. Commonly parents will have polarised views on their children. Sadly I sometimes find that the more intelligent the parent seems, the more entrenched they are. So why do parents become so entrenched? How can we make shared care and contact work better? When resolution cannot be achieved through mediation, is CAFCASS enough?

The entrenched parent

Parents can be deeply entrenched in the care arrangements for their children and they are often totally unprepared for the range of emotions that afflict them on separation. They often feel anger, betrayal, distrust, dislike and hatred. In the middle stand the children with divided loyalties. The emotional maelstrom can often prevent parents from seeing clearly, causing them to lose sight of the child's need to maintain and develop a relationship with both of its parents following their separation.

Parental alienation syndrome

There has been much debate and consideration given to the term parental alienation syndrome (PAS), first coined by American child psychiatrist Richard Gardner.

Three types of parental alienators were defined by Douglas Darnall, PhD in 1997. The three types are:

- naive alienators – a parent who may well recognise the importance of the children having a healthy relationship with the other parent, but that parent refuses to acknowledge it openly.
- the active alienator – a parent that means well and believes that the children should have a healthy rela-

tionship with the other parent, but cannot control their frustration, bitterness or hurt. Their concerns relate to their children's adjustment to divorce.

- the obsessed alienator – an alienator with a cause; to align the children to their side and, with the children, campaign to destroy their relationship with the targeted parent.

The courts and PAS

So, do the courts in England and Wales recognise PAS as a psychological illness, and do they show regard for the concept?

Re O (Contact: Withdrawal of Application)

In the case of *Re O* [2003] Wall J (as he then was) found that the father's reliance on PAS was misplaced. The case concerned the parents of a 12-year-old child who had separated and divorced. Contact took place initially by agreement. The father applied for increased contact, which was ordered by the court, and subsequently he applied to enforce the order, arguing that it had never been wholly followed. The child was joined as a party to the proceedings and an independent social worker was appointed. At a full hearing a judge found the child had divided loyalties and that the mother was deliberately thwarting contact, as the father alleged. Contact was reduced in accordance with the child's wishes and subsequently suspended.

The trial judge at a further hearing rejected the father's case that the social worker was unprofessional and biased and that the mother was seeking to alienate the child from the father. The judge found the father accepted no responsibility for the child's position and ordered indirect contact only. The father appealed. The appeal was allowed in part, with a direction for an expert to assess the child. The expert

provided a report and the father sought a second opinion. The case was transferred to the High Court and directions given for the father to instruct an expert. The father also applied to be released from his undertakings not to go to the child's school or the mother's home. The application was refused and consequently the father applied for leave to withdraw his application for direct contact, arguing that the refusal to release him from his undertakings made it impossible for him to continue with the final hearing.

Wall J held that:

- The father's allegations against the mother were without foundation and he completely failed to appreciate that the principle reason why the court was forced to terminate contact was because of his conduct towards the boy and the mother. There was no prospect of change in the father's attitude and, accordingly, there was no prospect of contact succeeding in the short to medium term. The protracted proceedings had caused undoubted stress on the mother and the boy and so there was no alternative but to bring them to an end.

- The court particularly adhered to the conclusions set out in the original order to make contact work. It was not enough though for the father to blame the system where a substantial share of the responsibility for contact breakdown emanated from the parent who complained that the system was the cause of all his ills.
- The case was not one of parental alienation by the mother against the father. All the professional opinions in the case, including those of the two circuit judges who saw and heard the mother, negated the possibility of parental alienation. To suggest otherwise was part and parcel of the father's attempt to absolve himself from responsibility. The principle reason that the child was hostile to contact with his father was because of his father's behaviour and not because his mother had influenced the child against his father.

Re Bradford; Re O'Connell

Wall LJ also gave the leading judgment in the case of *Re Bradford; Re O'Connell* [2006]. In *Bradford* the father had been engaged in a long-standing dispute with

the mother in relation to residence and contact. An order had been made under s91(14) of the Children Act 1989. The father applied for permission to pursue a number of applications: specific orders relating to the child's schooling and attendance at religious services; a consent order for the child to attend at a half-sibling's baptism; and a request for a transcript of the father's cross-examination of the child's guardian at the earlier hearing. The court refused the father permission to pursue the applications and dispensed with service of each of them on the mother, but offered the father an oral hearing to review any part of the order made on the papers.

In *O'Connell* the father had, likewise, been engaged in a dispute of many years duration over residence and contact. The two children were now in their early teens and refusing to see their father. Following a successful appeal to the Court of Appeal against the original judge's refusal to allow the father the assistance of a *McKenzie* friend, the father proceeded with his many applications, including *inter alia*, an application for the removal of the children's guardian from the proceedings; to instruct a child psychologist; and for contact, residence and shared residence, all of which were dismissed. The judge also made a s91(14) order to continue for over three years, until the elder of the two children reached 18, and the younger 16.

In both *O'Connell* and *Bradford* the fathers (acting as litigants in person) made without notice oral applications for permission to appeal the decisions and both alleged serious flaws in the judicial system, and serious misconduct by the respective mothers.

Both applications were refused and Wall LJ held:

- These two cases were typical of many in which fathers had been refused either a residence order or direct contact with their children and it was in the interest of the open justice to discuss these cases, not least to dispel the myth that there was a gender bias in the family court system which operated to deny contact to non-residential fathers. While contact did break down sometimes because of implacable hostility of the mother, in the court's experience it broke down more often because of the behaviour of the father.

The statistics

Government statistics were set out in the Green Paper *Parental separation – children's needs and parents' responsibilities* published by the Department for Constitutional Affairs (DCA), the Department for Education and Skills (DES) and the Department for Trade & Industry (DTI) in 2004. The report drew upon various sources of national statistics and set out, *inter alia*, the following information:

- there are 12 million children in the United Kingdom;
- 3 million children experience their parents separating;
- each year between 150,000 and 200,000 parental couples separate;
- in 2004, the courts made 67,000 contact orders;
- most children live with their mothers;
- 60% of the applications are made by fathers;
- 50% of young offenders come from separated families;
- children living with a lone parent are twice as likely to run away from home;
- girls from separated families are at greater risk of teenage pregnancy;
- By the age of 33, adults who had experienced parental divorce as children (age 16 or under) were almost twice as likely to lack formal qualifications.
- By the age of 33, men who had experienced parental divorce as a child were almost twice as likely to be unemployed.

- Although not strictly necessary, the judge's offer of an oral hearing to review the order made on the papers was the correct procedure. It mirrored that used in the Court of Appeal following a refusal of permission to appeal on paper, when an applicant for permission to appeal was entitled to an oral hearing and had recently been approved in the case of *Re E (children) (restriction on applications)* [2006].
- In each case the behaviour of the father had been responsible for the breakdown in contact. Neither case illustrated PAS on the part of the residential parent.

In summary, Wall LJ said:

... these two cases are, in my judgment, clear examples of...[Contacting breaking down due to the behaviour of the non-resident father]... The findings of the trial judge in both cases are that the reason these children are not having contact with their fathers is exclusively due to the father's own behaviour. It is ideal for either for Mr Bradford or Mr O'Connell to blame either the system or the children's mothers. The judicial findings in both cases are clear. These are not cases of parental alienation syndrome on the part of the residential parent, and Mr O'Connell deceives himself if he persists in believing that his children's attitudes towards him is the responsibility of his former wife and her husband.

Re M (Intractable Contact Dispute; Interim Care Order)

In the case of *Re M* [2003] Wall J (as he then was) found that 'wholly unreasonable, implacable hostility' had taken place. The parents were involved in a contact dispute in respect of two children aged 13 and 10. The parents separated in 1996 and divorced in 2001. The children resided with their mother and the father applied for contact. Contact was ordered and took place until 1999, although not at the level ordered by the court.

The mother then falsely persuaded the children that the father and paternal grandmother had physically and sexually abused them. The result was a cessation of all contact between the children, their father and the wider paternal family. The father applied to enforce the contact order and a detailed s7 report was

provided by social services. The judge at first instance found that the allegations of abuse were untrue and described the mother as an 'extremely unsatisfactory witness'. The judge ordered contact between the children and their father. The mother refused to obey the order and a penal notice was attached to the order for contact. The mother further disobeyed the order and made a further allegation of sexual abuse by the father. Upon investigation the court again found this allegation to be untrue and the mother to have emotionally manipulated the child into making the allegation. The court went on to order the mother's committal to prison for 42 days but delayed the execution of the warrant for committal pending a further hearing. The elder child then made an application for permission to apply for a prohibited steps

order against contact. All matters were consolidated, transferred to the High Court and the mother's committal was stayed. Permission to make the application for a prohibited steps order was refused. A CAFCASS officer was appointed as guardian and the children were joined as parties.

There then followed an investigation under s37 of the Children Act 1989, resulting in care proceedings being issued by the local authority. The children were removed from the care of their mother under interim care orders and, subsequently, Wall J made a residence order in favour of the father and a two-year supervision order in favour of the local authority noting in his judgment that:

- One method of addressing an intractable contact dispute is by using the s37 procedure, to remove the children who are being denied all contact with the non-resident parent and are suffering significant harm because of the residential parent's fault and distorted belief system about the non-residential parent. This would be a drastic step

Re Bradford; Re O'Connell
[2006] EWCA Civ 1199

Re M (Intractable Contact Dispute; Interim Care Order)
[2003] 2 FLR 636

Re O (Contact: Withdrawal of Application)
[2003] EWHC Fam 3031

Re E (children) (restriction on applications)
[2006] EWCA Civ 1190

however and should be used with great caution.

- When considering whether to use the s37 procedure the court must be satisfied that criteria for invoking s37 are met and the action contem-

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plated must be in the children's best interest. The consequences must be thought through; there must, in short, be a coherent share plan of which temporary or permanent removal is an integral part.

- In an intractable contact dispute where the residential parent is putting forward an allegedly factual basis for contact not taking place, such as allegations that the children have been abused by the absent parent, the court must address those issues and make findings. The local authority, in carrying out their assessment, should know the court's findings and prepare its report on the basis of those findings.

As a result of the acrimony between these two parents and the mother's hostility, the children had been alienated from their father and parental grandparents although Wall J did not specifically refer to PAS.

In part two I shall consider the options available to practitioners when dealing with potential PAS cases and intractable children disputes. ■