

δ Articles

PARENTAL ALIENATION SYNDROME AND UK FAMILY COURTS – THE DILEMMA

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It is rarely possible to deal with a problem effectively until it, and its key components, are adequately recognised for what they are.

Part 1 of this article (at [2002] Fam Law 182) addressed these issues with regard to the effect that parental alienation syndrome (PAS) has within the UK family courts, and was a part of the bundle of relevant papers on PAS submitted to the Court of Appeal on 20 February in *Re C (Prohibition on Further Applications)* [2002] EWCA Civ 292, [2002] FLR (forthcoming).

PAS is a condition through which one parent will, by any means available, inappropriately seek to subvert the other parent's power and consequent ability to care for, or even to continue to have any relationship with, their child. This is done at immense cost to the child. Such is the nature of PAS that these parents will seek to exploit any potential opportunity to further their cause within the legal system; as, indeed, they also do within any other system in which they are involved (for example medical, educational, social, etc). It is in the family courts that the relevant legal power lies, and so it is here that many alienating parents seek to achieve the ultimate subversion of the other parent and to gain judicial sanction of themselves.

PAS AND THE COURT OF APPEAL

Since the publication of Part 1 of this article, the Court of Appeal in *Re C* (above) has now acknowledged the existence of PAS. This is a significant development in UK family law practice.

The appeal in *Re C* addresses, among

others, issues relating to contact and residence for the family's two youngest children T-A, born in August 1988, and M, born in December 1987. The parents separated in 1997. At this stage both children resided with their mother and continued to see their father, staying overnight. The parents attempted reconciliation and lived together again for a 5-week period in February and March 1998. However, this was not successful and the parents then separated finally. There having been no contact since the March separation, the father sought contact and a court welfare officer's report of 8 June 1998 showed 'there was no objection to contact in principle. Both the younger girls wished to see their father. They did not at that stage wish to meet the father's new [partner]' (at para [3]).

Difficulties continued, however, and in August 1998 the father withdrew his application for contact from the court 'as he said that he did not wish to impose emotional strain on the family' (at para [4]). A second report from the court welfare officer, in September 1998, showed that T-A had been seeing her father occasionally but M was refusing to see him: 'The approach of the girls as expressed to the father appears to be that the two girls did want to see their father but not yet' (at para [4]). There was also some question over whether M was subject to parental pressure over contact, and if so from which parent. The father made a further application for contact in June 1999 and a third report from the court welfare officer supported an agreement

between the parents on contact. The difficulties none the less continued. In November 1999 the father once again applied for contact, and also for leave to instruct a mental health expert. Contact commenced with T-A, but not M. The father was unsuccessful in his bid to instruct a mental health expert, despite two applications and twice appealing the courts' decisions. He was also refused leave to appeal to the Court of Appeal.

On 15 March 2000 the court welfare officer made her fourth report. Dame Elizabeth Butler-Sloss P observes:

'At this stage the father was alleging that this was a case of parental alienation syndrome in relation to the younger girl. At that stage he applied for a residence order. The purpose of the residence order was to break the impasse in relation to the refusal of contact. He said that this was based upon the blockage which had been created by the parental alienation syndrome which involved the mother and her approach to contact in relation to her youngest daughter. The court welfare officer reported that M was refusing to see her father but that T-A continued to see the father and wanted to do so but that T-A objected to a change of residence. The court welfare officer, whose report was based largely on the question of residence, advised the court that there should be no change of residence.' (at para [5])

Despite her prior refusal to see her father, M then spent a fortnight in Florida with him and his (by then) new wife, and then refused all contact once again.

In February 2001 the father once again sought appointment of an expert in parental alienation and transfer of the case to the High Court. His Honour Judge Morgan 'indicated to the father that if this is what he wanted to do he should make his application, this time not for residence but for shared residence' (at para [8]). Dame Elizabeth Butler-Sloss P addressed the residence applications as follows (emphasis added):

'The questions of problems over contact are really the basis for Mr C asking for

either a residence or shared residence order ... , he is undoubtedly saying that he has only asked for those orders in order to break the deadlock in relation to contact and that these were orders of last resort, if I may paraphrase what he has been saying to us ... It is against the background of the perception of all four children that one has to appreciate that it is not surprising that there were issues over contact. The reasons that M has given for her refusal to see the father are not accepted by the father because he sees them in the context of parental alienation syndrome. He sees them entirely as coming from the mother and not coming from the daughter. He does, however, accept that the daughter is suffering considerable distress over the issue of contact. I would say to Mr C that his view of the significance of parental alienation syndrome may have obscured other more obvious indicators that M herself is giving.' (at para [12])

Study of other cases where PAS has been alleged (see, for example, *Elsholz v Germany* [2000] 2 FLR 486, *Sahin v Germany*; *Sommerfeld v Germany*; *Hoffmann v Germany* [2002] 1 FLR 119) reveals how the parents who persist in their requests to continue their parent-child relationships become viewed as irritants by the courts. Here, Butler-Sloss briefly criticises a similar tendency earlier in this case, before introducing key developments into UK family law practice. At para [13] she states (emphasis added):

'I think that the time has come for this court and for future courts to stand back and look at this case on the issue of contact. I would say in general terms that it may not have been as well handled as it might have been. *The issue of contact in relation to M is not going to go away*, although there is no actual new application before any court because Mr C is relying upon this court to do something effective today on all these applications. It seems to me that the only appropriate way to go forward in this case is for there to be one judge, exercising firm control, to deal with any future applications that may come before the court and that should now at this

stage be a High Court judge ... In my view, this court should invite CAFCASS Legal to act as guardian for both children and that the CAFCASS Legal guardian should now read the papers so that CAFCASS Legal will be up to speed whenever there is any future application or restoration of application, as it seems inevitable there will be; that CAFCASS Legal should have leave to instruct a mental health expert, either a psychiatrist or psychologist, if so advised, (that would be a matter for CAFCASS Legal with no impetus from this court but the opportunity for CAFCASS Legal to do so), with a view to looking at the entire family to see whether there is any way out of the problems and not to concentrate upon the issue of parental alienation syndrome. That will of course take its place in any consideration but not to obscure the other matters that may need to be looked at ... I cannot stress too much that in my view it is crucial that CAFCASS Legal should be given the opportunity to see these papers as soon as possible.'

The Court of Appeal, therefore, acknowledged that this case should be reviewed (significantly, but necessarily not solely) with regard to whether PAS was responsible for the contact failure in this specific family's situation.

THE DILEMMA FACING UK FAMILY COURTS

It needs to be recognised that there are aspects of the current mode of practice within the UK legal system that make it particularly vulnerable to the dynamics through which PAS has its effect. Together, these have promoted the likelihood of a PAS-afflicted parent 'successfully' removing the other parent from their children.

(1) Until *Re C*, UK family courts had denied the existence of PAS. Without the capacity to recognise what they were dealing with, courts were simply unable to address this issue appropriately.

Previously, the position for the Court of Appeal on any reference to PAS was as held in the case of *Re L (Contact: Domestic Violence)*; *Re V (Contact: Domestic Violence)*; *Re M (Contact: Domestic Violence)*; *Re H*

(*Contact: Domestic Violence*) [2000] 2 FLR 334. In *Re L* the court had relied heavily on a report from Dr Sturge and Dr Glaser with regard to issues of contact where domestic violence has genuinely (unlike in PAS) been a real issue (see 'Contact and Domestic Violence - The Experts' Court Report' [2000] Fam Law 615). Sturge and Glaser's report was generally of exemplary quality. Unfortunately, with regard specifically to PAS, their report was uncharacteristically poorly researched and this resulted in their outright dismissal of PAS as a valid entity; their dismissal was adopted by the courts as part and parcel of the report. This issue was addressed in some detail in Part 1 of this article. It is, therefore, significant that the recent judgment in *Re C* makes no reference whatsoever to Dr Sturge and Dr Glaser's report.

The judgment in *Re C* now moves the UK more closely into accord with other legal systems around the world that have also acknowledged the existence and impact of PAS. These other systems are now in the process of altering judicial practice accordingly and the UK will need to follow suit. Much education and training now remains to be done in order to enable our courts and related services to recognise and address PAS effectively when it is a factor in cases before them.

(2) Family courts rely heavily on the professional opinions of their main advisers. These dedicated personnel, drawn from a combination of probation and social work backgrounds, have recently been regrouped in the UK as the Children and Family Court Advisory and Support Service (CAFCASS), under the Criminal Justice and Court Services Act 2000, chapter II. There are acknowledged difficulties as this new service struggles with issues of finance, training and the integration of previously separate personnel (see Gerlis 'CAFCASS - Twisted Knickers' [2002] Fam Law 144 and compare the two webpages at: www.cafcass.gov.uk/faq.htm and www.nagalro.com/cafcass_page.htm). No disrespect whatsoever is intended to these officers, but without the benefit of carefully designed and appropriately implemented intensive training - including now on PAS - plus essential professional supervision and

regulation of practice, no one could be expected to be able to perform such an immensely challenging task properly. Indeed, some reporters may be working beyond their level of competence, which could damage, rather than ameliorate what are extremely complex child and family situations. An accredited training scheme urgently needs to be devised and implemented to support these officers in their vital work.

(3) Despite Lord Woolf's recent attempts to achieve reforms to the contrary (*Access to Justice: final report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO, 1996)), the UK courts still operate an adversarial system in which lawyers vie to present their clients in the best light possible, and to portray their opponents as negatively as possible. This provides a worrying incentive to exaggerate and effectively to misrepresent the family reality. Such adversarial practice can act as a potent fuel where PAS is involved, despite the Family Law Bar Association's and the Solicitors Family Law Association's ethical codes of practice.

The common public experience of this adversarial system is that it serves to enhance the anger already prevalent in the situation. Some court users are cynically convinced that this is intentional, as it operates to the pecuniary advantage of legal practitioners. Recent media articles have reported that a growing number of affected parents, including many from professional backgrounds and even some grandparents, are taking to the streets and picketing outside the houses of some family court judges in direct protest at what they are now claiming to be a corrupt and unacceptable system (see, for instance, 'Fathers picket judges over child access' <http://society.guardian.co.uk/children/story/0,1074,583360,00.html> and 'Briefs' <http://www.independent.co.uk/story.jsp?story=110601>). There also seems to be an increasing tendency for litigants to represent themselves in person, supported by *McKenzie* friends. Indeed, this was exactly the situation even in the Court of Appeal in *Re C*, where Mr C presented his own appeal and was assisted by no less than three *McKenzie* friends. In March 2002

the Equal Parenting Council (website at www.equalparenting.org) announced a new national telephone helpline designed to offer lay support at minimal cost from parents, who are already experienced in the *McKenzie* role, to other separated parents, who are still struggling through the courts, to be able properly to maintain their parent-child relationships. One of the aims is to support these parents in assuming the role of litigant in person. There can be no doubting that there is, indeed, a significant crisis of confidence in our family court system.

What is important is to attempt to confine anger to within the parent-parent relationship, and subsequently to minimise its ability to impose and have a destructive effect on the parent-child relationships. At such a traumatic time children will greatly need the stability of maintaining, and even increasing, physical and emotional closeness with both their parents in order to assist them in surviving this tremendous upheaval in their own lives. This will particularly apply to those children who have previously enjoyed close, loving relationships with both their parents. Children need to know, and to feel, at first hand that it is their parents' relationship that has broken down, and not their own with either parent. Sturge and Glaser observed:

'If there is a strong relationship, bond or attachment, that is a good reason to continue and promote contact as failure to do so will be an emotional loss for the child and much more likely to be experienced as an abandonment or rejection' (Sturge and Glaser (above), at p 622)

Children quickly pick up on their parents' emotional state; the manner in which they do this differs according to age and other factors. Children sense each parent's feelings for them when they are with them and, therefore, need the significant personal validation and reassurance from time spent with each parent, particularly where they have enjoyed a good relationship previously. Additionally, where the alienation process has begun to affect the

child, he will benefit from frequent opportunities to reality-test the other parent's imparted negative views, if this can be sensitively handled by the non-resident parent.

A degree of support and education may be relevant for both of the parents and the children. In the US a body of knowledge is accruing on the successful management of PAS. This success is assisted, in many cases, by appropriate parent education, although it remains fundamentally dependent on effective judicial action, combined with necessary training of all relevant professionals.

(4) The problem facing the UK family courts is, in part, a consequence of the structure of family law in the UK. In particular, as soon as couples separate, the non-resident parent has no right of access to his children, with whom he may have enjoyed many years of close, loving relationships. Non-resident parents may be forced to engage in legal dispute for months, or in some cases for years, simply in order to be able to continue their parent-child relationships. In addition, it is a most peculiar quirk of the current law that although the non-resident parent's automatic right to continue his relationship with his children effectively ends, if the resident parent forms a new relationship, this comparative stranger has no restriction placed on his ability to be with the children 24 hours a day. The absurdity of this situation, created by the law itself, lends itself to exploitation and provides further grist to the PAS mill.

TOWARDS A RESOLUTION?

There is, of course, no easy solution to the existing problem. My argument is that all those involved with the family legal system should have knowledge of PAS appropriate to their role. The recent case of *Sahin v Germany*; *Sommerfeld v Germany*; *Hoffmann v Germany* (above) aptly demonstrated the need for the judiciary, lawyers and mental health professionals alike to know what they are dealing with. In *Sahin v Germany*, a PAS case that is, in many ways, comparable to that of *Elsholz v Germany* (above, and discussed in some detail in Part 1 of this

article), the European Court of Human Rights held that the German national authorities had violated the appellant's rights under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and under Art 14, taken together with Art 8. A psychologist was appointed by the Wiesbaden Regional Court to provide expert opinion; astonishingly, having already made her recommendations to the court, this expert later 'indicated that she had not directly asked the child about her father' (at para 18).

Consequently, it is apparent that employees of CAF/CASS, and other relevant mental health professionals, will require appropriate training in order to manage assessment and/or later therapeutic interventions. In the most severe cases complex skills of systemic family therapy will be required. Family courts need to demand high quality, consistently non-adversarial representation by all who take part in the court process. They will need to enforce their orders robustly, unlike the grossly undermining practice prevalent today, where the alienating parent is allowed to disregard such orders. To allow any court order to be treated with such contempt diminishes respect for the decisions of all courts.

The author's own clinical experience in the training and management of trauma and crisis psychology suggests that effective PAS training will need to address the intensely personal challenges inherent in such work. Some of the psychological factors involved in PAS are based in the vulnerability, dependence and interpersonal rivalry known to each of us during our own childhoods, and carried onward, in differing forms, throughout life. These serve to construct strong personal attitudes that operate at both conscious and subconscious levels. Those engaging in this work will require a reasonable degree of understanding of the effects of these processes within themselves and on their own professional work if they are to be able to detach these personal biases from their necessarily objective assessments of the dynamics of other families.

Professionals of all disciplines should, in every case, be required to adhere to strict

codes of professional practice. Effective action should be taken where these codes are transgressed. In Canada, for example, Senator Cools seeks to criminalise the intentional manipulation of the legal process by lawyers who collude with false allegations, suggest or promote them, in order to win the case for their PAS-afflicted client (see Cools, Canadian Senate Debate, 2nd Session, 36th Parliament, *Hansard*, vol 138, issue 29, 'Criminal Code: Bill to Amend, 2nd reading', 17 February 2000; the *Hansard* report is available online at www.parl.gc.ca, via the 'Chamber Business' link). It is not only in Canada that some lawyers collude with alienating parents.

A NEED FOR RADICAL REFORM?

One extremely radical approach could disarm the majority of PAS-based legal battles at a stroke. First, it needs to be recognised that alienating parents operate psychologically using a process of 'triangulation'. This term describes the manner in which a parent deflects the anger felt towards the other parent, via their parent-child relationship, on to the other parent (for example by denigrating the other parent to the child). In essence, it is a natural process that occurs in many life scenarios, but, in this instance, has been hijacked in order to alienate the child from the other parent. Triangulation operates similarly through the parent-court-parent relationship, as parents currently have to look to the courts for decisions to overcome their impasse, thereby resulting in otherwise avoidable court actions. In PAS cases this could be stopped by altering the status quo.

Following separation, rather than requiring court action for contact between children and either parent to be maintained, consideration could be given to developing a satisfactory form of legal 'default' position, whereby child-parent contact continues to be shared, unless there is a valid reason to the contrary. Court action would then only need to be sought for cases where there exists such a valid reason to prohibit or restrict contact. Courts and associated services would need to be capable of swift action to complete inquiries in order to determine the veracity of plausible allegations, and on being satisfied

of the existence of such a valid reason. Where allegations are found to be false, potent remedies and retribution should be robustly enforced. If the shared parenting option was not taken up consistently in practice, then formalisation of the resident parent's real position as sole carer should be available from the courts.

Such a fundamental change in approach would need careful consideration to be put into effect in a manner most beneficial to children and acceptable to the majority of society. Implemented effectively, this would not be an escape route for those parents who are unsuitable, unable or unwilling to provide care of their children, residential or otherwise, or for those who are demonstrably abusive to their children. However, once established as the legal norm in society, it could be expected to benefit the emotional well-being of the vast majority of children (and parents) post-separation; to reduce drastically the number of legal disputes over children; and to improve the ability of children of separated parents to relate more successfully to their own offspring.

The family justice system is not a system existing in isolation. What is also required is the necessary recognition by parents that their responsibilities as parents are lifelong, not just for as long as they get on well with the other parent. It could be argued that, to an extent, both parents also retain a duty of responsibility, if not of care, to each other, specifically in order that the welfare of their offspring may be adequately protected and enhanced.

There could be significant benefit to be gained within the UK from such a change towards a shared parenting system. Could it be that approaching the problem from this direction would also free sufficient court resources to enable the necessary swift response capability?

CONCLUSION

The European Court's judgments in *Elsholz v Germany* (above) and *Sahin v Germany* (above) have influenced legal practice in the UK, as is already apparent in the judgments given in Scotland in *White v White* [2001] SLT 485 and in *Re C* (above). However, it is difficult to see how this necessary influence

can have appropriate effect while the capricious vagaries of PAS are not fully appreciated, and while relevant professionals remain untrained in its recognition and management.

The leading argument against recognition of PAS in UK law had been its non-appearance in relevant psychiatric diagnostic manuals. Part 1 of this article showed this to be anomalous, as in the UK courts a similarly destructive syndrome, Battered Woman Syndrome (BWS), has repeatedly been accepted as a defence to the ultimate crime of murder (see, for example, *R v Ahluwalia* [1992] 4 All ER 889; *R v Thornton* [1992] 1 All ER 306; *R v Thornton (No 2)* [1996] 1 WLR 1174; *R v Grainger* [1997] 1 Cr App R 369; *R v Hobson* [1998] 1 Cr App R 31; *R v Fell* [2000] 2 Cr App R 46 and *R v Muscroft* [2001] EWCA Crim 604, (2001) 9 March (unreported)). BWS is similarly unrecognised in the same diagnostic manuals.

Those involved with a PAS-conflicted family and working without knowledge of

this disorder risk unwittingly becoming inveigled into a collusive perpetuation of the alienation. Judicial recognition of this fact is crucial; this cannot be overstated. Because of the nature of PAS, courts are targeted as a key forum for formalising the desired alienation. Training requires an element of experiential self-confrontation in order to enable practitioners in this field to become aware of their own internal biases, with which they have unquestioningly grown up.

The successful management of PAS is essential in order to enable these children to benefit from continuing their relationships with both parents. Additionally, and crucially, continuing the relationship with both father and mother consequently enables them to approach other key relationships over the remainder of their lives more realistically. Without this opportunity they risk perpetuating similar disabling, irrational and dysfunctional dynamics within their own later adult relationships, and eventually passing them on through their own future families.