

The Challenge of High Conflict Separations, Contact Disputes & Alienation of Children: A North American Perspective on UK Cases

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Summary

- High conflict separations are distressing to children. Often both parents are hostile, with each trying to undermine the child's relationship to the other parent. Some children maintain a good relationship with both parents, despite the parental hostility. Many children in high conflict cases, however, become resistant to contact with one parent, often starting when 8 to 12 years of age. In some cases the child's rejection of one parent is justified by abuse, poor parenting or tensions within a step family. Alienation occurs when one parent (invariably a residential parent – usually the mother) undermines the child's relationship with the other parent, resulting in the child's rejection of that parent based not on the child's own experiences with the rejected parent but rather as a reflection of the alienating parent's attitudes. Alienation is emotionally damaging to children, with the harm extending into adulthood.
- Comparison of judicial approaches to alienation cases suggests that the profile of alienation cases in the UK and Canada is similar, but UK courts are less likely to change residence from an alienating parent and suspend contact with that parent. The UK approach may be less effective in dealing with serious alienation cases. While some recent UK decisions show greater understanding of problems of alienation, there is a need for earlier identification and more effective judicial responses to alienation and other contact problems. More education is needed so that parents and professionals can be aware of the damage of alienating conduct. Some court connected programs in North America might be adapted for use in UK to improve response to cases where there are contact problems; these responses require better collaboration of courts and mental health professionals. There are some cases, a relatively small portion of all separations, where contact is not appropriate or cannot be achieved.

Outline of Presentation

- **Introduction**
 - Concepts: Alienation vs. Justified Rejection
 - Emotional damage to children from high conflict & alienation
- **Court Cases & Responses (Canada/UK comparison)**
 - Profile of alienation cases
 - Understanding individual cases
 - Role of experts & CAFCASS
 - Court-ordered interventions: counseling & parenting education
 - Change in residence – “the stark dilemma”
 - Innovative responses: Canada & USA
- **Conclusions**
 - Complexity of cases
 - Need for earlier identification & more effective responses
 - Courts need to address delay, maintain better control & collaborate more with mental health professionals

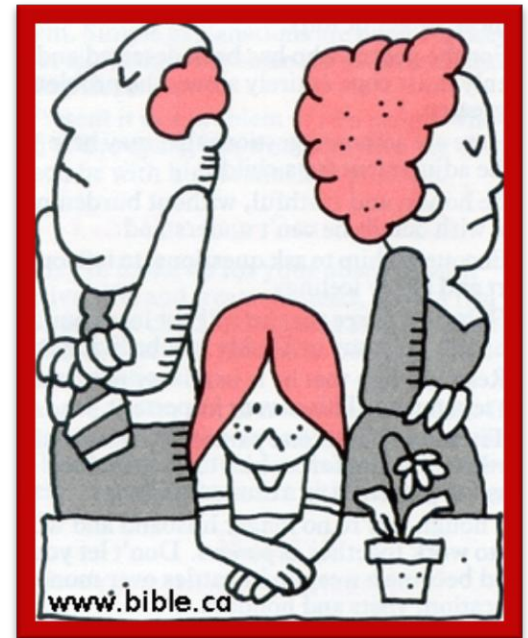
Concepts & Context

High Conflict Separations (USA research)

- High Conflict declines over time, but does not disappear (Kelly)
 - 30% of couples are “high conflict” at separation
 - 10% -15% are high conflict after 3 years
- High conflict cases characterized by mistrust & repeated litigation
 - Often reflects unresolved feelings at separation of anger or rejection
- Children distressed by high conflict separation
 - High conflict may cause alienation, but not necessarily
 - High conflict is worst for children if parents engage them in disputes
 - Effects of high conflict moderated by effective parenting e.g. warmth
 - More time with a supportive father (non-resident parent) may help child despite high conflict , but if parenting is not strong, less contact may be best for child (Fabricius & Leucken, 2007; Sandler et al, 2010)

Old Problems & New Concepts

- Resistance of children to visitation, esp. in high conflict separations has always been an issue
 - c.1900 concern about “poisoned minds”
- 1987: Richard Gardner - “parental alienation syndrome”
 - important concept but original articulation was simplistic
- 2001: Janet Johnston & Joan Kelly
 - Not a “syndrome”
 - DSM issue
 - Not “mental disorder” of the child
 - Often not all fault of one parent
 - The “alienated child:” consider
 - Conduct of both parents,
 - Vulnerability of child
 - Age
 - Anxiety, dependency
 - Siblings etc.



Significance of “discovery of alienation”

- Heightened awareness
 - more recognition by mental health professionals, courts & parents
 - also more unfounded claims of “alienation” in the courts
 - claims of “alienation” can heighten conflict
- May help parents understand harm that they are causing child
- Research on long and short term harm on alienation
- Research on intervention strategies
- Alienation of child may result in rejected parent “dropping out,” but many “disappearing Dads” despite supportive Moms.

Concepts

- Kelly & Johnston: Alienated Child: “child who freely and persistently expresses unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are disproportionate to their actual experience of that parent.”
- Alienation vs. Justified Rejection [“estrangement”]
 - Need to determine whether child’s conduct is justified (e.g. by abuse, poor parenting, step parent rejection etc.)
- Many cases are “mixed” with both parents engaging in alienating conduct or having some responsibility for break-down in relationship with one parent.

Alienating Actions of Parents - Examples

- Verbal, non-verbal, conduct
- Denigrating other parent, extended family & even pets
- Asking child to carry hostile messages
- Asking child intrusive questions about other parent (“spying”)
- Creating a need for child to hide information & conceal positive feelings about other parent
- False empowerment
 - “You can decide whether you want to see your Dad” [but not whether you go to school, church etc.]
- Creating fears
 - False allegations of abuse
- Borrowed or exaggerated stories:
 - “My Dad beat my Mom when I was in her tummy”
- Arranging fun events that conflict with visits

Alienating Behaviour & Alienation

- In high conflict cases, alienating behaviour is common
 - Disparaging comments about other parent are common
 - May escalate to active undermining of relationship to other parent
 - Often both parents are engaging in poor parenting, but one parent who has primary responsibility
- Despite alienating conduct by one or both parents, many children not alienated
- Alienation often starts as child ages & personality becomes integrated (e.g. 8-12yrs)
 - Cases may change over time – sometimes quickly
 - Alienation may be mild, moderate or severe
- Abusive and alienating behaviour may be related (sabotage)
 - Abusive father may undermine relationship with victim parent
 - Child may identify with abusive, powerful parent

Range of Reasons for Child to Resist Contact

- Normal development
 - Infants may have difficulty with transitions
 - In teen years, stronger identification with one parent
- High conflict and child “dropping out”
- Reaction to separation
 - Child’s loyalty reaction to discovery of affair
- Rejected parent is too rigid or lacks insight
 - is parent not attuned to child?
- Child has genuine fear due to abuse
 - even an abused child is likely to have some positive feelings
 - alienated child likely to express all negative attitudes
- Alienating conduct of favoured parent

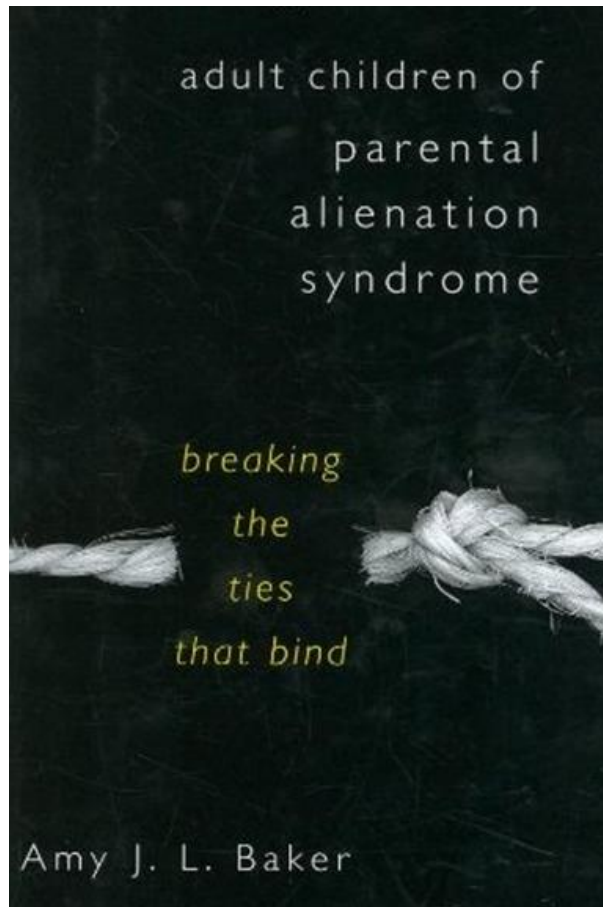
Mixed Cases Common

- Alienating conduct by both parents with child aligning due to circumstances of separation (e.g absence of parent or new family soon after separation)
- Alienating conduct by favoured parent lack of warmth and poor parenting by rejected parent
- Spousal abuse leads favoured parent to react to other parent & causes fear in child
 - Alienation & abuse are not mutually exclusive
- As children start to become alienated they can become obnoxious, hard to discipline etc. -> other parent may have “poor reactive parenting”

Negative Effects Of Alienation

- Most kids want contact with both parents (even if abuse)
- Alienation is emotional harmful to children
- Loss of contact with parent & extended family
- Guilt, self hatred, self-esteem issues
 - Continued unconscious identification with rejected parent
- Child may come to believe unfounded abuse allegations
 - Suggestibility
- Behavioural disturbances in alienated children
 - Aggression & conduct disorders
 - Poor impulse control
- Alienating parent is often personality disordered -> perception of reality is in some respects distorted & will not respond “rationally” to court orders

Young Adults Alienated as Children



- Amy Baker (2007)
- Higher rates of depression, relationships difficulties
- Regret that when they were children their wishes were not ignored

Prevalence of High Conflict & Alienation

- No reliable data on alienation, contact problems or high conflict
 - Lack of consensus about definitions (Kelly; Birnbaum, Bala et al.)
 - Variation over course of recent history
 - More today as dads more involved in intact families & post-separation
- 50% + of high conflict separations have disagreements over kids
 - American Bar Association
- USA estimates:
 - 1% of children & youth suffer alienation (Benet, 2010)
 - 20,000 – 250,000 new cases a year (Warshak, 2010)
- Though exact numbers unknown, significant

Gender Politics

- Father's groups are increasingly raising concerns about contact problems and children suffering from lack of involvement with Dads. Concern about alienation of children and “manipulative mother syndrome.”
- Child support is state enforced, why not contact?
- Some feminists reject alienation as a concept and argue that mothers only deny access if fathers are abusive.
- UK mothers and fathers both use “welfare rhetoric” to deny and seek contact.

Kaganas & Day Sclater, 2004

Court Cases Responding to Contact Problems & Alienation

Frequency in Reported “alienation” Cases

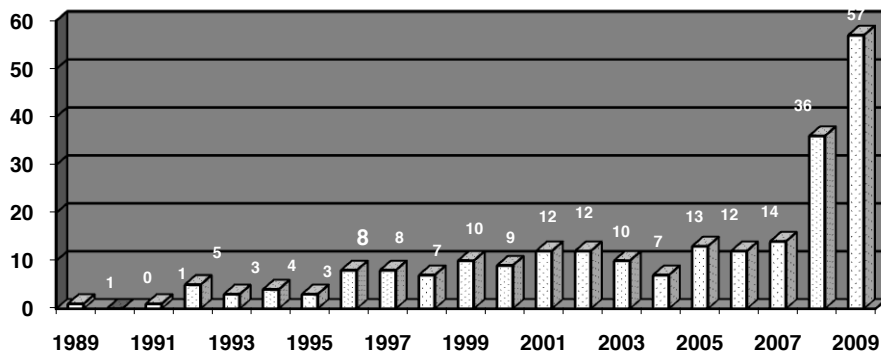
- Many more cases found in Canada than UK
- Why? Professional Awareness? Research methodology? Reality?

• Canada 1998-2009

Westlaw & LexisNexis Canada data bases. Search string “parental alienation” or “alienated child!”

- Court finds “alienation” in 59% (137/232)
- Dramatic increase over 20 yrs.

Canadian Cases Where PA Claimed

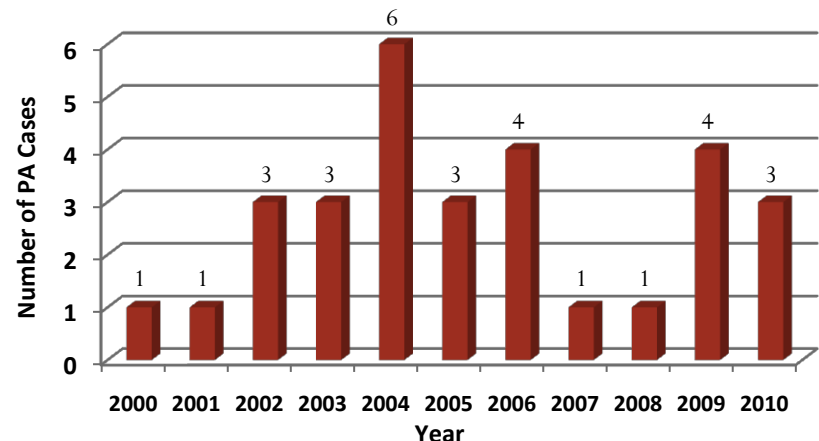


• UK 2000-2010 (May)

Westlaw & LexisNexis UK databases. Search string: "parental alienation" or "alienated child!" or "alienat! parent" or (alienat! /10 (parent! or child! or father or mother))

- Court finds “alienation” in 70% (21/30)
- Random fluctuation over 10 yrs.

UK Cases Where PA Claimed

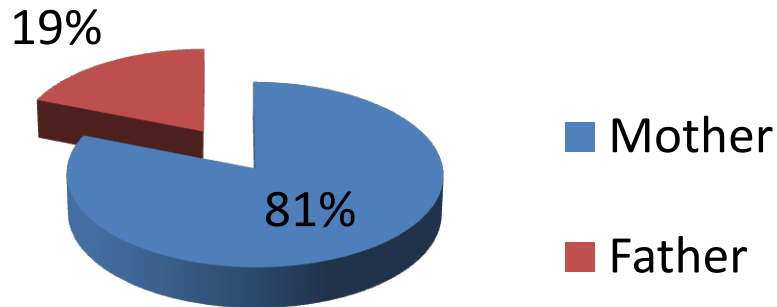


Who Alienates Children?

(UK cases in law reports – court finds alienation - 2000 to 2010: n=21)

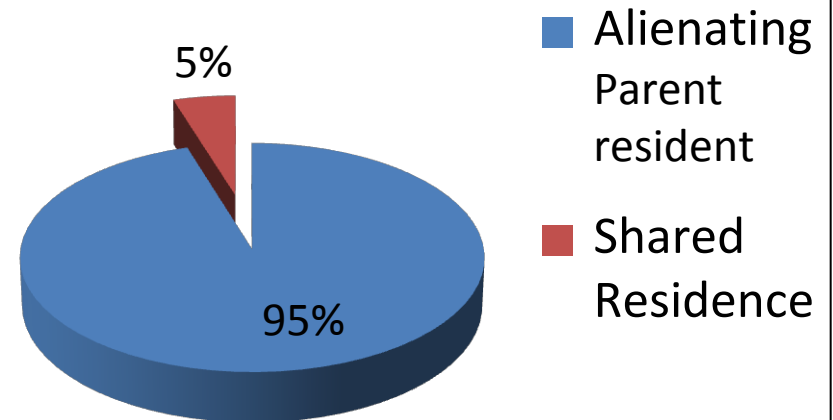
Mainly mothers

Gender of Alienating Parent



But even more so, residential parents

Alienating Parent's Degree of Control



Gender Breakdown Similar

Canada

Who does what?

- Mom is “alienating parent” in 2/3 of cases
- Dads make 3/4 of unsubstantiated claims of alienation

UK

Who does what?

- Mom is “alienating parent” in 4/5 cases
- Dads make 4/5 of unsubstantiated claims of alienation

Presumption of Contact with Both Parents

- Contact as “basic right of the child”
 - *M v M (Child Access)*, [1973] 2 All E.R. 81
 - Need for caution with “rights” rhetoric in alienation cases, as alienating parent may claim that it is child’s “right” to not have contact. Better to use rhetoric of each parent having “**duty**” to support the other.
- “Assumption” of contact. Contact is “almost always” in the interests of the child.
 - *Re O (Contact: Imposition of Conditions)*, [1995] 2 FLR 124, per Bingham J.

“Implacable hostility” Not Reason to Deny Contact

“Judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order) to deter them from making a residence order where the child’s welfare requires it. The danger of allowing the implacable hostility of the residential parent (usually the mother) to frustrate the court’s decision is too obvious to require repetition.”

Re J (A Minor), [1994] 1 FLR 729, per Balcombe LJ

Initial Legal Issue: What is the Problem?

- Alienation vs. justified rejection
- “not wrongful denial of contact if”
 - Parent impaired by alcohol or drugs;
 - Repeated or significant lateness or failure to exercise contact
 - Illness of child
- Consider attitudes & capacities of favoured & rejected parent
- Abuse allegations
 - Founded and fabricated
- Expert evidence
 - Court-appointed vs. party-retained
- Wishes and perceptions of child
 - How communicated to court?
 - Not determinative

Domestic Violence & Contact

- “Proved domestic violence” is an important factor in suspension of contact, but not an absolute bar.
 - risk to mother or child, willingness of abuser to change & wishes of child
 - *Re L (Contact: Domestic Violence)*, [2002] 2 FLR 334, Dame Butler- Sloss P.
 - Sturge & Glacer, “Contact and Domestic Violence,” [2000] Fam L 615
- Supervised contact is possible, especially if d.v. concerns & lengthy delay in resolution: *S.S. v K.S.*, [2009] EWHC 1575 (Fam)
- Historic domestic violence does not preclude contact
 - *Re C (Children)*, [2009] EWCA Civ 994: no need for fact finding hearing to allow father to have contact with children as 3 years since last assault on mother. Thorpe LJ: “the family justice system... is stretched to the breaking point...an unnecessary hearing is wasteful of judicial resources”
- “unscrupulous parents could effectively derail contact by making false or exaggerated allegations of domestic violence”:
 - *S.S. v K.S.*, [2009] EWHC 1575 (Fam), per Headly J.
- 14/30 UK cases of alienation claimed (47%), Mom alleged abuse by Dad -> Court found significant validity in 6/14 (43%).

Justified Rejection by Child

- *Re C*, [2010] EWCA Civ 89
 - 9 ½ year old boy had been sexually abused by father at very young age
 - Some short supervised visits with father, but at age 8 ½ child told about abuse and refused further visits with father or paternal grandparents
 - Trial judge ordered staying contact with paternal grandparents (weekend visit)
 - No evidence of any “significant degree of obstructiveness or non-co-operation by mother”
 - Evidence from GP, psychotherapist, school etc. that boy “despairing and suicidal” at prospect of contact with grandparents or father
 - Appeal court concluded trial judge “misguided and plainly wrong” to order contact, though noted some prospect for future meetings with boy and father, provided therapist present

Alienation & Contact Issues: Experts

- Court-ordered assessment by expert (CAFCASS)
 - Court-appointed very influential (followed 95% of cases)
- But assessments
 - Take time to complete
 - Some assessors do not understand alienation
 - Intrusiveness
 - Potential expense

Importance of Experts in Both Countries

Canada

Role of Experts

- Court-appointed expert in 184/232 (79%) and ordered in 3 more
- Court-appointed very influential - followed over 90% of cases if clear & unanimous

UK

Role of Experts

- Court-appointed expert in 21/30 (70%) and ordered in 3 more (10%)
- Court-appointed very influential - followed in 20/21 cases (95%)

Two Responses to High Conflict & Alienation

- Ultimate objective is to change attitude & behaviour of alienating parent and alienated child
- **Conflict reduction & resolution vs.**
- **Coercive legal responses**

- Determining the most appropriate combination or sequence responses depends on:
 - Nature of relationship dynamics
 - Previous interventions attempted
 - Community & individual resources

Conflict Reduction & Parental Education

- Address underlying relationship issues & facilitate contact
 - Post-separation parenting education
 - Mediation, counseling
- Usually best for children
- But requires some willingness by parties to participate
- Attitude of solicitors often influence parents
 - Supportive of counseling or skeptical
 - Least impact on severely alienating parents
- Threat of legal response may encourage parental engagement, but sometimes not enough
 - Especially with personality disordered parents
- Education/counseling not effective in more severe cases

Judicial Exhortations & Shared Residence

- Judicial Comments & Orders
 - Order and adjournments may include “exhortations” for better behaviour and even orders for “better behaviour”
 - e.g. no derogatory comments against other to the children
 - Enforcement is a problem
- Change to Shared Residence
 - Sole to shared residence
 - More time to establish relationship
 - Message to alienating parent, that there may be full reversal of residence

Court Ordered Therapy, Counseling or Education

- Order may apply to both child and parents
 - Study 23% of UK cases (includes both with PA finding & without)
- Court ordered therapy can be effective if judge can persuade parents involved of its value and importance of ensuring that the children have positive relationships with both parents
 - For less severe alienation, a judicial “push” towards therapy may have positive effects
- Most effective if those receiving “reunification” counselling or therapy do so willingly and voluntarily
 - 6mo max until review; likely 12 mo max
- Remedy for violation is not contempt, but change in parenting/residence
- In severe alienation cases, likelihood of positive outcome for therapy is low (especially if only the child is in therapy), unless change in residence

Contempt – Rarely Used

- Purpose is to secure compliance, not punish
 - Contempt is a “blunt instrument” for promoting better parenting, but can be effective
- Sentences:
 - “real restraint” as sentence may harm the child
 - Consider interests of child in sentencing
 - *Re M (Contact Order: Committal)*, [1999] 1 FLR 810 (CA)
 - Suspend sentencing to see if compliance
 - Behavioural conditions rather than fine or jail
 - If flagrant & persistent breach, jail is possible
 - Alienating parent may becoming a martyr-like to the children

Concerns about delay in UK

"Delays are causing children to be left for a considerable proportion of their early lives in atmospheres of violence, high emotion and parental dispute which, if prolonged, is bound to interfere with their long-term development and give rise to problems in adolescence and later life."

Sir Mark Potter, June 6, 2010

Change of Residence

“The stark dilemma” (Preston J. BCSC, 2004)

- Most extreme judicial remedy, but usually only way to affect most severe alienation
 - Some children change very quickly with residence change
 - Some children traumatized by change and reversal needed
- Is change in residence in child’s best interests
 - Compare parenting capacities
 - Will rejected parent support relationship to other parent?
 - Is alienating parent personality disordered?
- Increasing judicial willingness to consider (UK & elsewhere):
“In recent cases where irrational implacable hostility has been demonstrated, judges have been increasingly willing, where it is in the child’s interest, to move the child from one parent to the other....”
Re M(A child), [2004] EWCA Civ 1262, per Wall LJ

UK Courts Less Likely to Respond to Finding of Alienation by Change in Parenting

Canada

Responses where alienation found

- Counseling ordered in 29% of cases (67/232), both where alienation found & rejected
- Reversal of custody in 63/137 (46%) change custody to alienated parent (14 with no access)
- 23/137 (17%) change from sole to joint custody

UK

Responses where alienation found

- Counseling ordered in 23% of cases (7/30), both where alienation found & rejected
- Reversal of residence in 4/21 (19%) (only 1 with no contact) (statistically significant difference)
- 1/21 (5%) change to shared residence

Child Welfare Involvement – Local Authority

- Local Authorities more involved in high conflict cases
 - Physical & sexual abuse allegations
 - Higher rates of unfounded sexual abuse allegations in context of parental separation (Bala et al, 2007)
 - Also founded allegations of abuse in this context
 - Alienating parent may have mental health issues
 - Alienating conduct may be emotional abuse
- Local Authority can be asked by court to investigate & provide services
- Provide foster care to facilitate transfer of care
 - *Re S*, [2010] EWCA Civ 325 (CA)

Variation of Residence – How to Effect

- How to inform child?
- Tipstaff or police may enforce
- Often rapid change is best
- Role for Local Authority to provide transitional foster care
 - *Re S*, [2010] EWCA Civ 325 (CA)
- Suspension of contact & communication by alienating parent?
 - May be necessary in severe cases as alienating parent may continue to undermine relationship
 - Very rare in UK
 - *Re S*, [2010] EWCA Civ 325 (CA): only 5 minute phone calls & admonition to be ‘supportive ...any negativity, either express or implied, would call for the immediate cessation of this limited opportunity for her to communicate.’
 - Almost impossible to prevent communication with a teenager

Non-enforcement of Contact

- In some cases of severe alienation, not enforcing contact may be the least detrimental alternative for child
- Query whether some UK decisions may be too quick to give up enforcement or too optimistic about value of continued judicial exhortation to alienating parent
 - See e.g. *Re S (Children)*, [2009] EWCA Civ 334 (CA):
 - Children 8 & 10 years – “profound difficulties and effectively alienated from continuing direct contact with their father.”
 - “children had enough of the litigious dispute... and their best interests would be served by giving them a respite.” [Fair enough]
 - “father has to demonstrate to the world and in particular to the judge who hears the case that he is capable of moving at the children’s pace and in a sensitive way”
 - [Query whether this is unfair and unrealistic]
- Supervised “final” visit or independently vetted letter?
- Hope that relationship may be re-established in late adolescence or adulthood (Darnall & Steinberg, 2009)

Limits of Legal Response

- Limited remedies & limited control over parents
 - Can't change personality disturbed parents
- Limited control over older adolescents
 - *Re B*, [2009] EWCA Civ 1438 no enforcement of contact to 14 year old girl; only letters & gifts. Wall L.J. *"The mother had no concept of her duty to promote contact and persuade [her daughter... to have contact....This case demonstrates the difficulties of contested contact proceedings, and it demonstrates all too clearly the limitations on the court's ability to bring about the result that it would like to achieve. "*
 - Despite alienation by mother, no order for direct contact only indirect contact for alienated father - gifts & letters.

Court & Mental Health Collaboration Edmonton, Alberta (Trussler, 2008)

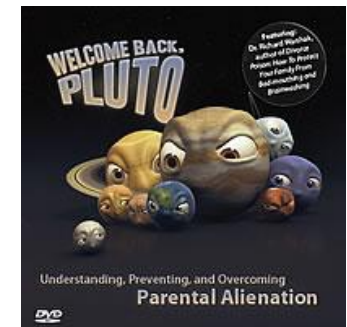
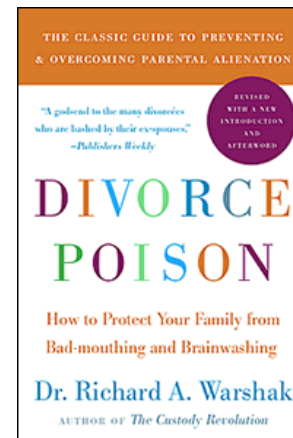
- Court affiliated mental health professionals
 - Court orders entire family to see mental health professionals
 - May be one professional or team who consult with each other
 - Short adjournments to hear about progress
- Reporting to judge by mental health professionals
 - No confidentiality between team & court
- Detailed “multidirectional” orders
 - Schools, therapists etc.
- Some success – lack of systemic research

Intensive Transitional Assistance: USA

(Warshak, 2010)

- **Family Bridges**

- New custodial parent (rejected) takes child to 4-5 days “psycho-educational program” at resort setting (expensive)
 - Usually with court order or approval, but some voluntary cases
- Small initial study by Warshak indicated that his program often is effectively to change children’s attitudes
 - 22/23 changed by end of week
 - 18/22 maintained strong relationship to gains at 2- 4 years
- Not always successful, but “failure” is return to alienating parent
- No contact with alienating during stay; later attempts to engage the alienating parent (if they are willing)
- www.warshak.com
- *Divorce Poison: How to Protect Your Family from Bad-mouthing and Brainwashing*
- *Welcome Back, Pluto* a DVD for children, teens, and parents



Short Intensive Program for Entire Family (USA: Sullivan, Ward & Deutsch et al, 2010)

- **Overcoming Barriers Camp (5 families at a time)**
 - **Court order or agreement for both parents and child(ren) to attend 5 day camp program (children may be resistant)**
 - Initial focus on separate groups and working towards engagement in games, art etc. and then reconciliation in
 - Helps both parents and child(ren)
 - Requires both parents to have degree of willingness to attend plus no violence concerns
 - Encouraging research initial research
 - 9/10 families had positive gains at followup
 - Expensive – developing less expensive weekend(2 day) program

How Can We Better Respond to High Conflict Cases & Contact Disputes?

Complexity & Challenge of Contact Cases

- Conflicting versions of events
 - Parent-child interaction very difficult for court to assess
- Partial responsibility of both parents
 - “mixed cases”
- Personality disordered and high-energy litigants
 - Manipulation of court orders
 - Often self-represented
 - Appeals & complaints to professional bodies
- Lack of resources
 - More access to education & skills training for parents
 - Better education and awareness for professionals
- More and better research
 - Nature & understanding of cases (instruments to reliably & validly identify)
 - Intervention strategies
- Need a “change in culture” – greater recognition by society, professionals and courts of harm to children from high conflict, value of less adversarial dispute resolution., and importance of role of both parents in lives of their children. In a minority of cases, the most severe and intractable, early effective judicial intervention is critical

Best Practices for Family Courts

- Continued litigation is harmful
 - Delay in resolution is a major problem: “decade of litigation” about 12 year old child before change in parenting in *Re S*, [2010] EWCA Civ 325 (CA)
- Delay is a major concern: need more responsive system
- Need for effective judicial control
 - Early identification & expert assessment
 - Triage cases
 - Early response before attitudes of child set
- Better collaboration with courts & mental health professionals (or agency)
 - Court ordered involvement
 - Report to court
 - Monitoring of progress on contact by the court

Best Practices for Family Courts (2)

- Case management – judicial continuity
 - short adjournments & review orders
 - Judge to gain knowledge of dynamics of the case
 - gain credibility & respect of parties
 - Judge to set clear limits & ensure consequences
 - Parental accountability
 - especially important for personality disordered parents
- Remaining seized after trial for review
 - Review orders
- Judicial role in education, exhortation & setting limits
 - Sanction breach or courts lose credibility
 - Earlier change of residence
 - Role for Local Authority
 - Judicial duty to report emotional abuse or engage Local Authority
 - Resources for investigation, support, foster care



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