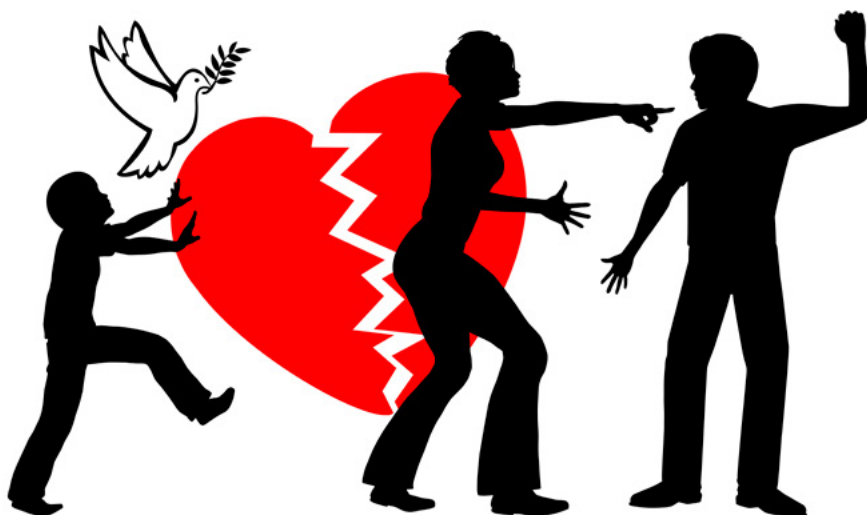


# THE TENSION BETWEEN DOMESTIC ABUSE AND PARENTAL ALIENATION AND HOW THE PASSING OF THE

## DOMESTIC ABUSE ACT 2021

# MIGHT IMPACT UPON SUCH ISSUES IN FAMILY PROCEEDINGS



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The starting point in assessing any dispute over the arrangements for children in the family courts is that there is a presumption that there should be equal time with both parents.

But what happens in a polarised family where there is implacable hostility between the parents resulting from allegations of domestic abuse coupled with the accused alleging the other parent of manipulating the children and causing parental alienation, rendering a shared care arrangement as virtually impossible? It is necessary to grapple with the family court's approach to such tensions, and assess how the passing of the new Act might further impact upon that analysis.

### Parental Alienation and reported case examples

Parental alienation is widely recognised in the family courts, having emanated from the U.S.A. by a psychologist, Richard Gardner. Such views were widely controversial and the term was not recognised as a mental health condition by the American Psychological Association, the American Medical Association nor by the World Health Organisation.

***CAFCASS, the Children, Court and Family Advisory Service, define parental alienation as “when a child’s resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent”.***

The U.K. has had a plethora of case law where judges have dealt robustly following a finding of parental alienation – even where there are counter-allegations of some form of abuse - and ordered a transfer of ‘residence’ of the child in favour of the alienated parent, which has been considered as a last resort and the only option available in preventing ongoing harm from the accused parent and in re-establishing the relationship between that minor and the estranged parent.

A recent example of the distinction between allegations of harm factored against an allegation of alienation, is when Lord Justice Peter Jackson in *S (Parental Alienation: Cult: Transfer of Primary Care)* (2020) EWHC 1940 (Fam) stated that the mother’s alliance with the cult ‘Universal Medicine’ was a “pervasive source of ongoing harm to [the girl], emotionally and psychologically, and may make her vulnerable to eating disorders” which ultimately led to a transfer of residence. In that case, the founder of Universal Medicine was idolised by the daughter to the extent she was virtually unable to be in her father’s presence, who opposed the cult. Examples of some of its philosophies were that all gluten be banned, and the daughter avowed that she would end up with a hole in



her stomach if she did consume gluten, and that of the teachings that actions were taken in an anti-clockwise manner, whether walking in a shop or stirring something amongst other wildly unusual idealisations. Earlier in the case, the mother insisted that the father was attempting to exert coercive control in insisting on her giving of undertakings, and alleging that her influence over the child in endorsing the cult had created the alienation. As can be seen by the outcome, the alleged abuse was given little weight in such circumstances.

There is now a set of four recently reported cases concerning one family in A and B (Parental Alienation: No.1, No.2, No.3 and No.4) [2020] EWHC 3366 (Fam) demonstrating a continuation of the draconian action the family courts will adopt when faced with alienation cases. In that case, Karen Woodall and Janine Braier, known well by now to most family law practitioners as experts in their fields on alienation, were involved with a family whereby the mother was accused and found to have not been able to separate her views of the father from the children. The experts did not believe the mother's cooperation with their program was disguised compliance or that she was deliberately alienating the children. Mr Justice Keehan stated that this presented the worst case scenario:

***“Rather, she did not know that either her actions, behaviour or her emotional state was having an adverse impact upon the children and their relationship with their father, and/or she had re-ordered matters in her mind to conform with her view of the world and avoid her coming to that conclusion that she had been causing harm to the children”. The judge went on to say “if the mother does not and/or cannot, because of her psychological profile be aware of the serious harm she is causing her children now and for potentially for the whole of their lives, how is she to change?”***

The judge did not adopt any of the possible outcomes recommended by the experts of a full transfer, 80/20, 70/30, 65/35 or 50/50 and instead ordered the children live with their father, with no contact with their mother for the first month, other than if the mother accepted the decision, to enable a phone call in the days after the judgment and a telephone call supervised over Christmas (the judgment was handed down on 25 November 2020), and if that went well, after the first month with their father, for the mother to have supervised contact for up to 4 hours every 3 weeks for 3 months, and staying contact every 3 weeks from Friday to Sunday with staying contact for 1 week during Easter and Christmas holidays and two separate 2 week periods during summer holidays.

The judge saw the children to tell them of the decision and they were said to have “not taken the news well”, fleeing from their father's care the following day, necessitating police involvement. The children once again sought to leave their father's home and the police became involved “with the use of some force” on that second occasion to get them to return to their father. The mother was ordered to pay part of the costs but not all, as the father had sought. Ultimately, the final and fourth judgment in this case described how the mother had “not moved one jot” since the November 2020 judgment and so Mr Justice Keehan adopted the roadmap recommended by Karen Woodall reducing the time she spend with the children. It would appear the mother only has supervised direct and indirect contact. Unfortunately, the judge stated in the final judgment that “the mother has not moved on” and that his decision was “not only necessary but it is proportionate to the risks the mother presents to both children”.

But in which household should the child end up where allegations of domestic violence are raised in tandem with an allegation of parental alienation and both are apparent, and both are warranted, serious concerns? Practice Direction 12J of the Family Procedure Rules 2010 had attempted to fill this lacuna by ensuring that fact finds are listed early in proceedings on real issues of significance. If a fact find is listed, and the parent who is alleging domestic abuse is on the balance of probabilities found to be telling the truth, then is the parental alienation justifiable and thereby cancelled out by that harm? Can the domestic abuse justify the parental alienation to the extent whereby it is impossible for the child to spend time with the abuser? Conversely, following a fact find hearing resulting in no findings of domestic violence but an allegation of parental alienation is subsequently raised, would it be fair to automatically rise to an application for a single joint expert alienation psychologist to become involved? In other words, are the two forms of abuse usually mutually inclusive? It would be impossible to tell without some form of data specifying whether the two competing allegations were present themes in a family law case.

***Every case is fact specific.  
The family courts apply  
a holistic approach in  
private children disputes  
but always come back to  
upholding the paramountcy  
principle and whether that  
behaviour would impact  
upon the accused's  
ability to properly care  
for the child.***



## The treatment of domestic abuse in fact find hearings

The first detailed judgment on coercive control within the family court arena came to fruition on the handing down by Mr Justice Hayden in *F v M* [2021] EWFC 4. That case emanated from an extremely difficult procedural history. The judge stated that the formulaic approach in ordering Scott Schedules to list specific episodes of domestic violence was archaic and unfit for purpose if having to determine allegations of coercive control, as was the issue in that particular case. More focused training was needed by various professionals in the judge's opinion, to grapple with what were insidious and underlying acts of control which were impossible to pin down to specific episodes.

Following that decision was the Court of Appeal decision of *Re H-N and Others (Children)* (domestic abuse: finding of fact hearings) [2021] EWCA which amalgamated 4 cases. The case of *Re T* was an appeal against Her Honour Judge Evans-Gordan whose analysis in distinguishing intention from the affect of the abuse which she found of a father coming up from behind a mother, who was at the time holding their baby, and placing a plastic bag over her head, saying "this is how you will die" was not the right approach. The very act itself was sufficiently serious and intention was irrelevant.



## Section 68 of the Domestic Abuse Act 2021 – Coercive control

The legislative recognition of coercive control pursuant to the Domestic Abuse Act 2021 is likely to bring about an increase in allegations because it amends and widens the scope of persons being 'personally connected' in Section 76 of the Serious Crime Act 2015 from being:

- (a) in an intimate relationship or
- (b) living together or
- (c) having lived together; to include
- (d) relatives,
- (e) married couples,
- (f) civil partners or
- (g) those who have agreed to either marry or enter a civil partnership whether or not such an agreement has been terminated.

This is likely to bring about a greater number of fact find hearings which could give rise to retaliating claims of parental alienation.

From the above, it would seem there might be a shift from the recent alienation decisions on transfers of residence if there are serious allegations of abuse, particularly in light of the new legislative recognition for coercive control. This will require a fine balancing exercise, but despite the very 'fact' of an abusive incident being inconclusive to severing a child's ties with its parent, we have yet to see a reciprocated approach where parental alienation is concerned.

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