Parental Alienation: What is the Judicial Approach to A Transfer of Residence?

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Dedication

For my sister, hopefully one day you will understand why I have written this.

Also, I want to thank my academic supervisor Kaye Howells who has provided invaluable support throughout this research given our shared enthusiasm for the subject matter.

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Introduction

This paper will undertake doctrinal legal research and critically analyse the several expressions for and legality of parental alienation including implacable hostility. In light of both socio-legal opinion and the statutory powers of judiciary, the transfer of a child's residence will be discussed by outlining persuasive common law precedent. The judicial balance of rights will also be explored in light of the Children Act 1989 and the Human Rights Act 1998 which will inform an evaluation of what the future might look like for parental alienation. Given the justifiable hostility between litigants and necessary case complexity, the transfer of residence is just one judicial power afforded to the court. In *Re H*[1] Mr. Justice Keehan noted regarding a transfer of residence that "this order is a necessary and proportionate response to the harmful and damaging situation"[2] which indicates a comprehensive and reasoned judgment as to child arrangements.

Family law proceedings are divided between private and public law, the former concerns applications brought by individuals where the decision "is between care by one parent and care by another parent"[3] and the latter relates to "local authority's concerns."[4] This research will analyse parental alienation within private law. Noticeably, the court in *Re H*[5] saw the "sixth set of private law proceedings"[6] which clarifies the common law understanding of legal disputes between private individuals and the equally extensive nature of them.

Nationally, the trajectory of parental alienation is broadly progressive but in order to forecast practices moving forward initial thinking should be hinted. "American child psychiatrist Richard Gardner in 1985"[7] explored a preliminary rationale, though in relation to parental alienation as a syndrome. For this research the writer seeks to focus on the United Kingdom jurisdiction and to depart from both the psychological underpinning and aforementioned cross-cultural regard.

[1] [2019] EWHC 2723 (Fam)
[2] ibid. [34] (Mr. Justice Keehan)
[3] Re L (A Child) [2019] EWHC 867 (Fam) [59] (Sir Andrew McFarlane)
[4] B (A Child) [2013] UKSC 33 [42] (Lord Wilson)
[5] (n 1)
[6] (n 1) [6] (Mr. Justice Keehan)
[7] Re D (A Child: Parental Alienation) [2018] EWFC B64 [167] (HHJ Clifford Bellamy)

This research will highlight the controversial nature of parental alienation given the absence of statutory or judicial direction. Although "whilst Westminster remains silent on the issue, parents and children suffer"[8] so the current thinking is essential. Family law professionals notice that "it is time for the courts and practitioners to catch up"[9] however, in the meantime The Child and Family Court Advisory Support Service (Cafcass) have utilised their impartiality in this area to promote uniformity for children and their families within proceedings.

Cafcass are a national organisation who provide welfare recommendations to the court on behalf of children. S.11 Criminal Justice and Court Services Act 2000 established this service and s.12 of the same statutory provision outlines their principle functions including to safeguard children by advising the court in relation to any application made in family law proceedings. In private law matters, Cafcass may receive judicial direction to produce a welfare report under s.7 Children Act 1989 in relation to a child and document their analysis. Given their impartial nature, Cafcass provides a foundation to private family law by enabling the views of children to be adequately represented to the court, in proportion to their parents. A local authority may also be directed in private law proceedings to produce a s.7 Children Act 1989 report, with the view that the local authority is independent and not a party to proceedings. This is perhaps with the caveat that a local authority may not be deemed to be equally as independent as Cafcass. This is because, where a local authority is directed to produce a welfare report in private law proceedings, as opposed to a direction to Cafcass, it is ordinarily as a result of local authority having prior involvement with the family in relation to preceding child protection concerns. In public family law, the independence of Cafcass is arguably elevated because the local authority are the applicants in the matter.

Due to the additional complexity with parental alienation, a Cafcass guardian can be appointed which ensures that the child is in fact party to the proceedings. In *Re L*[10] the child was "represented by a professional Cafcass guardian"[11] and submissions on behalf of the for child's welfare were "certainly "heard" within the proceedings"[12]. This refocused proceedings

[8] HC Deb 15 March 2017, vol 623, col 496W
[9] Anarkali Musgrave, '*Lessons to be learned from Re: L [2019] EWHC 867 (Fam)*' (Family Law Week, 2019) <https://www.familylawweek.co.uk/site.aspx?i=ed201173> accessed March 15 2020
[10] [2019] EWHC 867 (Fam)
[11] (n 3) [62] (Sir Andrew McFarlane)
[12] ibid.

to the child because the court "readily accepted the Guardian's description."[13] This appointment was made in line with rule 16.4 Family Procedure Rules 2010 and the duties of the guardian for this are outlined in Practice Direction 16A at paragraph 7.6. Amongst other things, all steps taken by the guardian must be in accordance with the welfare best interests of the child.

Given their undoubtedly influential platform, Cafcass define of 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"[14].*

The lack of statutory guidance as to parental alienation highlights the infancy stage at which related practices currently sit and explains why this definition may assist. Although, Cafcass do recognise that "there is no single definition" and "its surrounding terminology and its scale remain under debate"[15]. Moreover, Lord Justice Peter Jackson noted "for working purposes, the Cafcass definition of alienation is sufficient"[16] and in addition to this approval, the court elaborated that "manipulation of the child by the other parent need not be malicious or even deliberate. It is the process that matters, not the motive."[17] This removes any questions of why such behaviour is demonstrated and to focusses on the apparent conduct.

Regardless of the label, social opinion could create confusion and as such, hinder the effective administration of justice. Ford noted that "whether that be intractable contact or hostility to contact… parental alienation is the current and perhaps most apt description"[18]. This provides a practical suggestion as to the description but, Ford even indicates a degree of uncertainty using 'perhaps'. Moreover, this research will explore the difficulties that professionals may face not least in relation to the term used but equally when analysing a child's behaviour, certainly if there is an overlap. Thus, parental alienation may be one of a number of

[13] (n 3) [21] (Sir Andrew McFarlane)
[14] CAFCASS 'Parental Alienation' (2017)< https://www.cafcass.gov.uk/grown-ups/parents-and-carers/divorce-and-separation/parental-alienation/> accessed 14 April 2020
[15] ibid.
[16] Re S (A Child) [2020] EWCA Civ 567 [8] (Lord Justice Peter Jackson)
[17] ibid.
[18] Rebecca Giraud and Bob Greig, '*101 Questions Answered About Separating with Children'* (Bath Publishing, 2019) 245

controversial matters raised within proceedings. For example, resisting behaviours might also be present following exposure to domestic abuse.

This research will also emphasise that professionals should undertake a merit-based analysis of each case and draw a reasoned line beneath socio-legal opinion. Necessarily, this will fundamentally promote the welfare of the child. As Chief Executive of Cafcass, Anthony Douglas worried "that public debates can easily over-simplify a complex issue."[19] Here, if socio-legal opinion creates an imbalance for achieving family justice, it could divert the focus of proceedings away from its highly regarded child centredness as highlighted within the s.1 Children Act 1989. This indicates the paramount importance and how judiciary should avoid diverting from it.

Though analysis of the current judicial outlook, Brissenden's view is that:

> "if a child's views are so deeply held, and so ignored, the potential for harm is obvious. There is unfortunately no straightforward answer to any of this, every case is fact-specific, and every judge will do just that, judge the case on the facts."[20]

This interpretation clarifies the emotive and life-changing reality of family law proceedings regarding the unique facts of each case and potential subjectivity of any assessment in relation to whether the child's ascertainable wishes and feelings are in fact rational and justified. Also, there is a statutory obligation placed upon the court to consider the ascertainable wishes and feelings of every child subject to proceedings as this research will detail. Brissenden's words are informative nevertheless because every child and their views deserve to be properly reflected throughout subsequent judgements. But the writer appreciates that they are just one perspective that must be considered. As this research will explain, it is essential that the child's views are elicited accurately because without this, they will be wholly redundant. It is evidently a complex task to distinguish between parental alienation from a legal perspective and a social construct so, appreciation for the difficulties

[19] Anthony Douglas, 'Alienation Rarely Exists in isolation' (CAFCASS, 27 November 2017) <https://www.cafcass.gov.uk/2017/11/27/alienation-rarely-exists-isolation/?platform=hootsuite> accessed 12 November 2020

[20] Claire Brissenden, 'Changing Residence – A Judgement of Solomon' (Family Law Week)<https://www.familylawweek.co.uk/site.aspx?i=ed57393> accessed 10 February 2020

facing professionals in the sector cannot be undermined and caution ought to be shown in overgeneralising the term.

Chapter 1

Throughout family justice, s.1(1) Children Act 1989 outlines that the child's welfare shall be the courts paramount consideration when determining any questions with respect to the upbringing of a child. S.105 Children Act 1989 confirms that a child means a person under the age of eighteen. Justice Keehan commented in *Re H*[21] "that the welfare best interests… are the court's paramount consideration"[22]. Further, Sir Andrew McFarlane in *Re L*[23] explored how "it is well established that the court cannot put a gloss on to the paramountcy principle."[24] This appreciation as to the vulnerability of children reinforces, especially given its overriding placement within the Act, that children deserve to have their welfare best interests objectively represented. Each judge considering this section should therefore not do so reluctantly and the writer proposes that Parliament intended to highlight a child centeredness when drafting this legislation to ensure that the state upholds the rights of children, where otherwise they may be easily overlooked.

The Human Rights Act 1998 ensures that fundamental rights are afforded to everybody from having their autonomy unduly interfered with by the state. Specifically, Article 8 outlines the "right to respect for a private and family life" which ensures that the court is bound to consider the rights of each party including the parents, in the interests of justice. Case law persuasion notes that "there is no suggestion that the 1989 Act… inconsistent with the Convention."[25] Therefore, "the court will need to bear Article 8 of ECHR in mind"[26] and this imperative wording is crucial for the judiciary when balancing these competing rights. Article 8 was also discussed in *Yousef v Netherlands*[27] because "where the rights under Article 8 of parents and the child are at stake… If any balancing of interests is necessary, the interests of

[21] (n 1)
[22] ibid. [4] (Justice Keehan)
[23] (n 10)
[24] ibid. [59] (Sir Andrew McFarlane)
[25] Re Y (Children) [2014] EWCA Civ 1287 [42] (Lord Justice Ryder)
[26] W-P (Children) [2019] EWCA Civ 1120 [49] (Lord Justice Peter Jackson)
[27] [2003] 1 FLR 210

the child must prevail."[28] So, the judiciary must have the welfare of the child as a dominant provision in light of the need to balance the rights of each party.

The alternative perspective has been explored by Tolson QC that:

> "… the welfare test… is so broad in the discretion it creates and so dominant in its position within domestic proceedings that, I suggest, it does not permit a rights-based examination of the case."[29]

Referring to this welfare consideration as a 'test' is indicative of an obligation and can be distinguished from a merit-based case analysis. Too much weight is highlighted as being afforded to the child here and this promotes an imbalance between the human rights of the parents and the welfare paramountcy principle, favouring the child. Notwithstanding that the child is equally afforded their corresponding human rights. So, the Children Act 1989 promotes the child's welfare as paramount and not their fundamental human rights and a distinction can be drawn between the two. It is essential to consider the child's rights initially in isolation, not least because the judiciary have statutory duty to do so in light of age and understanding within s.1(3) Children Act 1989 as this research will detail. Thus, this perhaps places the judiciary in a difficult position given the potentially completing nature of the two pieces of legislation and subsequent statutory interpretation.

Alternatively, considering s.1(1) Children Act 1989 as 'paramount' or 'overriding' is unsatisfactory because "the two approaches are not compatible… it is no use expecting them to interact"[30]. Here, the alternative might be that the judiciary examine the two as mutually exclusive considerations because some cases facts might lend themselves to a legislative interaction and others not so much. However, given that this would create a judicial inconsistency they should assess the legal merit of each case. Therefore, it is merely the procedure taken to achieve the proportionate conclusion that can be distinguished, not the conclusion itself.

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[28] Youself v Netherlands [2003] 1 FLR 210 [73] (Mr. Jean-Paul COSTA, President of the European Court of Human Rights)

[29] Robin Tolson QC 'The Welfare Test and Human Rights – Where's the Beef in the Scared Cow?' (Family Law Week) <https://www.familylawweek.co.uk/site.aspx?i=ed307> accessed January 3 2020

[30] ibid.

Moreover, the court will undoubtably require "the assistance of the welfare checklist"[31]. The court should have regard for s.1(3) Children Act 1989 including:

(a) the ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding);
(b) his physical, emotional and education needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.

This checklist guarantees that "all the relevant factors are weighed in the balance with the objective of determining which of the available options best meets the child's welfare."[32] It also minimises any subjectivity in order to thoroughly consider the needs of each individual child. Although the weight to be attached to each of the factors will no doubt fluctuate, each case must be decided upon its individual circumstances and situational facts.

In *W (A Child)*[33] Lady Justice King reflected upon commentary from earlier in the proceedings that "I have, where appropriate, considered and applied the relevant parts of the welfare checklist."[34] Therefore, the judiciary should reflect upon the relative facts before them and undertake a systematic assessment. Other judgements have approached the checklist methodologically such as "in any difficult or finely balanced case… it is a great help to address each of the factors in the list"[35]. Although not in specific relation to parental alienation, this judicial approach could help future cases to ensure that each factor receives individual consideration. This would depart from a broad examination and guarantee that no single factor is disregarded. In light of the aforementioned Cafcass definition, the judiciary might attach more weight to how capable each of his parents are of meeting his needs as was

[31]Re R (Child) [2016] EWCA Civ 1016 [11] (Judge Heaton)
[32]ibid.
[33] [2019] EWCA Civ 1966
[34] W (A Child) [2019] EWCA Civ 1966 [46] (Lady Justice King)
[35] Re G [2006] UKHL 43 [40] (Baroness Hale of Richmond)

prevalent in *Re L*[36] because "maintaining the placement with his mother and grandmother would not meet L's emotional needs"[37]. Factually, within this welfare assessment it was decided that moving L was a "harm which is worth incurring"[38] which equally balanced the likely effect on him of any change in circumstances.

As per s.1(2) Children Act 1989 any procedural delay is likely to prejudice the welfare of the child. Here, Lord Justice McFarlane noted that "I apologise to the parties and to the children for this unwelcome delay"[39] which presents an appreciation as to the impending detriment for the child, given the relevant disturbance. Similarly, Lord Justice Peter Jackson considered that "it would not be right for leave to be given. I would not wish there to be further delay."[40] Evidently, there is a thorough consideration of the judicial formalities with implications as to welfare when evaluating whether to grant leave to appeal or not. Further, paragraph 2b of Rule 1.1 within the Family Procedure Rules 2010 clearly sets out that any delay should be proportionate to the nature, importance and complexity of the issues when undertaking case management justly and so far as practical. This is crucial because timescales in a child's life are exceptionally meaningful and the judiciary must consider any welfare implications of a procedural delay whilst balancing the Article 8 right of all parties.

Within public law proceedings s.14 Children and Families Act 2014 ensures that any application is disposed of within the twenty-six-week statutory time limit. The writer proposes that this provision should equally apply to private family law as this would retain the child focussed outlook under the Children Act 1989, given Article 8 too. Although placing such restrictions on proceedings could shift the focus to an overwhelmingly procedural one, ancillary to the welfare of the child. Further, these key statutory provisions emphasise the fundamental role of collaborative multi-agency work to have due regard for the paramount child's welfare. For example, s.91(14) Children Act 1989 permits to the judiciary to direct that no future application may be made with respect to the child concerned. This ensures that the court maintains autonomy over proceedings within their jurisdiction as "the father required leave of the court to make an application"[41] and this obligation was "not on the court or

[36] (n 10)
[37] (n 3) [30] (Sir Andrew McFarlane)
[38] ibid.
[39] J (Children) [2018] EWCA Civ 115 [38] (Lord Justice McFarlane)
[40] W (A Child) [2020] EWCA Civ 16 [28] (Lord Justice Peter Jackson)
[41] Re R (A Child – Appeal – Termination of Contact) [2019] EWHC 132 (Fam) [87] (Mr. Justice Williams)

anybody else."[42] This statutory interpretation equally upholds the aforementioned Children Act 1989 provisions.

Likewise, the court must not make an order unless it considers that doing so would be better for the child than making no order at all as per s.1(5) Children Act 1989. This "material feature"[43] ensures that the court favours the least interventionist approach whilst considering if "the welfare objective can be achieved with less disruption"[44]. In *Re C*[45], the court suggested that:

> "the 'no order' principle goes even further and requires the court to justify making any order at all, regardless of whether it is in support of the child's wishes or in opposition to them."[46]

This judicial understanding from the Court of Appeal again upholds s.1(1) Children Act 1989 because it affords children with the invaluable opportunity to understand judicial decisions in their future.

Chapter 2

To arrive at a just and reasonable resolution for parental alienation, the current practices should be explored such as how the case is prepared for the relevant hearing and how the child's wishes, and feelings are ascertained in light of Cafcass' policies and procedures. Again, to increase accuracy these internal protocols are set to work collaboratively alongside their aforementioned definition. In 2018 the Child Impact Assessment Framework (CIAF) was developed to reform the previously named 'High Conflict Practice Pathway' and support "practitioners in assessing the harmful impact of a range of complex case factors"[47] within private family law. Judges have given their positive judicial treatment but have equally highlighted areas for improvement in relation to collaborative practice. One category of the CIAF is refusal or resistance to contact with a parent. Although this could be for a variety of

[42] ibid.
[43] (n 25)
[44] ibid.
[45] (Older Children – Relocation) [2015] EWCA Civ 1298
[46] Re C (Older Children – Relocation) [2015] EWCA Civ 1298 [2] (Mr. Justice Peter Jackson)
[47] CAFCASS 'CAFCASS Publishes New Assessment Framework for Private Law Cases' (October 2018) <https://www.cafcass.gov.uk/2018/10/11/cafcass-publishes-new-assessment-framework-for-private-law-cases/> accessed 2 October 2019

reasons, it might be "an indicator of the harm caused when a child has been alienated by one parent against the other for no good reason."[48] Albeit, this category of the CIAF is subdivided into typical alienating behaviours, drafting recommendations and understanding wishes and feelings.

In *Re S*[49] "the relatively small number of cases of alienation inevitably means that not every childcare professional will have experience of dealing with a case involving an alienated child."[50] Whilst the CIAF is fundamental within private law, the writer questions whether the justifications for this limited prevalence are accurate or whether there is a socio-legal and common law confusion. For this reason, "it is essential that the court has the benefit of professional evidence from an expert who has personal experience of working with alienated children."[51] This recognises that perhaps parental alienation extends beyond the expertise of social work and the legal profession. In *Re S*[52] HHJ Bellamy specified the work of an instructed expert, Dr. Weir who suggested that "the proposed term 'Alienation' applies only to the cluster of psychological responses in the child with no need to presume a deliberate campaign of denigration by one parent."[53] This reinforces that it might therefore be more effective to understand the behavioural conduct presented through parental alienation, rather than focussing merely on the expression used as a description.

Nonetheless, Part 25 Family Procedure Rules 2010 outlines the legal formalities for instructing an expert within proceedings to support the court on matters within their expertise. S.13 Children and Families Act 2014 explains that an appointment must be necessary to assist the court to resolve the proceedings justly. This reflects the aforementioned Children Act 1989 provision regarding both delay formalities and the least interventionist approach. It also presents an additional hurdle to cross before the final hearing for parental alienation cases.

Typical behaviours exhibited where alienation may be a factor is the first sub-division within the CIAF to assist impact analysis. Recently, HHJ Bellamy in *Re D*[54] referred to the "new Cafcass

[48] CAFCASS 'Child Impact Assessment Framework (CIAF) Overview' (2018) <https://www.cafcass.gov.uk/grown-ups/professionals/ciaf/> accessed 2 October 2019
[49] (A Child – Transfer of Residence) [2010] 1 FLR 1785
[50] Re S (A Child – Transfer of Residence) [2010] 1 FLR 1785 [59] (HHJ Clifford Bellamy)
[51] Ibid.
[52] (n 49)
[53] (n 49) [43] (HHJ Clifford Bellamy)
[54] (n 7)

assessment framework for private law cases"[55]. Evidently, the CIAF has received practical judicial recognition and the writer expects that such approval from this retired family judge will promote further debate and the importance of recognising parental alienation for minimising future harm. HHJ Bellamy also cited behaviours from the CIAF such as "the child's opinion of a parent is unjustifiably one sided… idealises one parent and devalues the other."[56] The consistent theme is irrationality and can be distinguished from resisting behaviours in cases of domestic abuse because an explanation can be provided. Whilst these typical behaviours may not comprise an exhaustive list there could equally be 'non-typical' alienation given the relative complexity. Although, *Re D*[57] affirmed that the "list of 'typical behaviours' clearly resonates with the facts of this case."[58] Since these typical behaviours were outlined by Cafcass in accordance with their definition, their effectiveness remains to be recorded within this niche area of law. However, recognition has in fact begun.

This approach has not always been consistent though, because in 2010 HHJ Bellamy handed down judgement in *Re S*[59] commenting that "what is less clear is the approach that should be taken in dealing with a case involved an alienated child. That has been the key issue in the case."[60] He clearly departed from this thinking more recently however, evidentially in 2010 there was a judicial uncertainty. Nevertheless, given that every case should be individually examined, this judgement is helpful to understand the trajectory and to project future practice and case management for parental alienation.

Drafting welfare recommendations for the court is the second sub-division which indicates how 'typical' behaviours may not always lead to a conclusion of parental alienation. This means that there is a degree to which "the polarised nature of the debate about matters as fundamental as its definition and identification… allegations tend to increase in an adversarial court system."[61] This emphasises the inevitable harm which may stem from professionals misdirecting their focus, or that this is a factor that contributes to it.

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[55] (n 7) [256] (HHJ Clifford Bellamy)
[56] ibid. [170] (HHJ Clifford Bellamy)
[57] (n 7)
[58] (n 55)
[59] (n 48)
[60] Re S (A Child – Transfer of Residence) [2010] 1 FLR 1785 [47] (HHJ Clifford Bellamy)
[61] CAFCASS 'Resources for Assessing Child Refusal/Resistance' <https://www.cafcass.gov.uk/grown-ups/professionals/ciaf/resources-for-assessing-child-refusal-resistance/> accessed 14 April 2020

In *Re B-S*[62] the court affirmed the importance of reasonable and proportionate recommendations in that must conduct a "multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives"[63] of each option available. Only following this will they be "fully reasoned recommendations"[64] as to welfare considerations. Notwithstanding this case was a public law dispute, analogies can be made to advance thinking in this area.

Likewise, McFarlane LJ in *H (Children)*[65] expressed a preferred approach. He noted that "I regard parental manipulation of children, of which I distressingly see an enormous amount, as exceptionally harmful."[66] The judicial frustrations are evident here and disappointment was expressed because "professionals in this case are unable truly to understand this message."[67] Again the "untold damage"[68] on the children that result from parents who "obstruct a relationship with the other parent"[69] must be recognised. Although, the latter frustrations were case specific they provide uncertainty as to how case law is interpreted because McFarlane LJ initially commented on the high quantity of cases but then criticised case specific practices.

So, the Court of Appeal set precedent in 2014 regarding how parental alienation and insufficient practice can impact a child within hostile and emotive proceedings. Interestingly though, the use of 'manipulation' rather than 'alienation' in the context of emotional denigration presents that a variance from the socio-legal opinion was encouraged. Although, in 2010 HHJ Bellamy described an "alienated child"[70] there has observably been an element of judicial confusion. What remains unclear is a justification for whether there is simply a discouragement from the use of specific language or a broader misinterpretation about truly understanding parental alienation and therefore using the appropriate expressions. This is perhaps not surprising given the aforementioned lack of judicial or statutory direction alike in relation to a standardised definition. Further, the alarming upset and impact for a child of

[62] (Children) [2013] EWCA Civ 1146
[63] Re B-S (Children) [2013] EWCA Civ 1146 [44] (Sir James Munby President of the Family Division)
[64] ibid. [36] (Sir James Munby President of the Family Division)
[65] [2014] Civ 733
[66] H (Children) [2014] Civ 733 [44] (McFarlane LJ)
[67] ibid.
[68] ibid.
[69] ibid.
[70] (n 60) [28] (HHJ Clifford Bellamy)

parental alienation is not disputed, neither is the quantity of application appearing before the court, but the uncertainty regards the lack of guidance in this area. The judiciary are therefore left to inform practice both in law and social work whilst battling with this linguistic confusion. However, the discussion about scope for using the term and distinctions between legal practice and social opinion is very much apparent because recently Lord Justice Peter Jackson commented that "as to alienation, we do not intend to add to the debate about labels."[71] Whilst this judicial comment does provide assistance, it also indicates a reluctance to observe or approve the much needed legal developments in this area. Perhaps the judiciary are hesitant to move practices forward given the heavy related socio-legal opinion.

The ascertainable wishes and feelings within s.1(3) Children Act 1989 relates to the third division of the CIAF. In *Re D*[72] the judiciary distinguished between decisions that are in the child's best interests, and what the child simply wants. The court also considered the value of hearing the child's views and detailed that "as any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants."[73] This comparison explains that if a preference as to residency is ascertained, it does not necessarily coincide with the objective and professional conclusion as to welfare best interests. Although, "it is the child, more than anyone else, who will have to live with what the court decides"[74] and whilst this may be factually correct, it disregards the child who expresses their false wish due to parental alienation. It is therefore crucial that welfare recommendations are precise and a depart from the CIAF guidance has the propensity to escalate parental alienation. This case provides a professional reflection.

Ascertaining accurate wishes and feelings can evidentially prove difficult, not least given the additional concern for parental alienation. The court in *Re D*[75] was cautious to note that when ascertaining wishes and feelings professionals should bare "in mind the misapprehensions which children can entertain and the limited extent of such a child's insight into his own best interests."[76] Here Toulson QC commented that they are "never more than a factor to be taken

[71] (n 17)
[72] [2006] UKHL 51
[73] Re D (A Child) [2006] UKHL 51 [57] (Baroness Hale of Richmond)
[74] ibid.
[75] (n 71)
[76] (n 72) [75] (Lord Carswell)

into account"[77] but whether a child displays typical behaviours or not, precision should be had in translating their account into welfare recommendations. Irrespective, as *H(Children)*[78] reiterates "the word used in the Children Act about wishes and feelings is "ascertainable" and not "expressed"."[79] So, given the insufficient guidance generally, achieving this heightened degree of accuracy when trying to understand behaviours is a step too far without instructing an expert. Though, the importance of Part 25 is illustrated.

The emphasis placed upon ascertainable, and not expressed wishes and feelings is supported reflected within the CIAF to assist the progression of understanding for parental alienation within private family law. Although the effectiveness remains undetermined, the CIAF reduces the chance of parental alienation going unnoticed due to a lack of education or expertise. This being said it is primarily guidance which provides scope for professional departure, save in exceptional circumstances. In summary Wiley QC commented that "the court is being invited to carefully consider the environment and context that a child inhabits when expressing their wishes and feelings"[80] in addition to mere language use.

Equally, *Re E*[81] clarified the judicial direction for cases of this nature. The court explained that:

> *"it is important for me to recognise in cases such as this that one must take seriously the fact that child expresses firm opposition to contact, but one must ask seriously: why is that the case?"*[82]

The recognition of parental alienation is essential to reduce the scope for a misunderstanding. Whilst this may not be the accurate explanation for every child's wishes and feelings, it enables those working with children to recognise parental alienation and appropriately draft welfare recommendations to reduce the child impact. However, due to this early stage there might be a danger for professionals to disproportionately favour a parental alienation inference which could see an overgeneralisation and escalate the current overlap of socio-

[77] (n 29)
[78] (n 65)
[79] (n 66) [43] (McFarlane LJ)
[80] Francesca Wiley QC, 'Parental Alienation: Where Are We Now?' (*Francesca Wiley QC*) <https://francescawileyqc.com/parental-alienation-where-are-we-now-2/> accessed 15 April 2020
[81](A Child) [2011] EWHC 3521 (Fam)
[82]Re E (A Child) [2011] EWHC 3521 (Fam) [31] (Mr. Justice Hedley)

legal and common law thinking in this area. In relation to this, the effectiveness of the CIAF in light of their proposed objective definition remains unanswered.

Moreover, *Re G*[83] suggested that each consideration of s.1(3) Children Act 1989 should be addressed individually in parental alienation cases and:

> *"this is perhaps particularly important in any case where the real concern is that the children's primary carer is reluctant or unwilling to acknowledge the importance of another parent in the children's lives."*[84]

This judicial observation directly corresponds with the Cafcass definition regarding hostility between two parents in that unjustified animosity indicates parental alienation. Nevertheless, the importance of methodologically addressing each factor remains crucial.

Chapter 3

This chapter will explore parental alienation in the context of s.8 Children Act 1989 proceedings within private law. Although parental alienation could be equally prevalent within public law proceedings with evidence of significant harm as per s.31(2) Children Act 1989, the difficulties in proving such harm are alike. S.8(1) Children Act 1989 outlines that a child arrangement order considers who a child should live with or spend time with, as just one judicial power for parental alienation. For example, Mr. Justice Keehan commented that "I shall make a Child Arrangements Order that H shall live with his father[85]. Nevertheless, the starting point is s.11(2) Children and Families Act 2014. The court is to presume that involvement of a parent in the life of the child will further their welfare although the court is obliged to consider rebuttals to reflect Article 8 and s.1 Children Act 1989.

S.12 Children and Families Act 2014 amended s.8(1) Children Act 1989 to replace the 'contact order' and 'residence order' albeit the function remained the same. The legislature therefore shifted their focus to favour of an order that represents the child's arrangements rather than the parent's and no longer uses bias language that renders the rights of the child subsidiary.

[83][2006] UKHL 43
[84]Re G [2006] UKHL 43 [40] (Baroness Hale of Richmond)
[85] (n 1) [38] (Mr. Justice Keehan)

Though "a decision to change residence from one parent to another can be an extremely difficult balancing act" [86] and the court must:

> "recognise that the more distant the relationship with the unfavoured parent becomes, the more limited its powers become. It must take a medium to long term view and not accord excessive weight to short-term problems".[87]

Which provides further evidence for the practical implications of s.1(3) Children Act 1989 and the likely effect on the child of any change in circumstances that the court determines.

Likewise, Practice Direction 12J[88] imposes a duty on the court to consider the nature of any allocation, admission or evidence of harm raised and the implications for the subsequent child arrangements. This also mirrors the welfare checklist regarding the harm suffered or likely to suffer. It is evident from the CIAF, that raising allegations is a typical behaviour and so this judicial assessment is not limited to harm of a physical nature. But this consideration extends to the trauma of parental alienation for example, "it could cause significant emotional harm for a child to grow up believing that one of their parents does not love them." [89] In relation to this Musgrave suggested that when children allege abuse "either there is truth in the allegations, or the allegations are false" [90] and the difference "lies at the heart of disputes involving parental alienation"[91].

Relative to a transfer of residence in *Re H*[92] the court was satisfied "that the balance falls decisively in H's welfare best interests in ordering that H should now like with his father."[93] The s.1(3) Children Act 1989 checklist was plainly utilised regarding the likely effect of any change in circumstances because Mr. Justice Keehan commented "I do not underestimate the trauma and stress H will ensure… I am however entirely satisfied and find that… likely to be of short duration only"[94]. Evidentially the judiciary recognise the immense consequences of

[86] (n 18)
[87] (n 17) [11] (Lord Justice Peter Jackson)
[88] Family Procedure Rules, Practice Direction 12J, para 5
[89] (n 40) [49] (Lord Justice McFarlane)
[90] (n 9)
[91] ibid.
[92] (n 1)
[93] ibid. [33] (Mr. Justice Keehan)
[94] ibid. [32] (Mr. Justice Keehan)

their decisions which also, assist to understand their deliberations and route through case management.

In *Re L*[95] the child expressed false allegations of harm and this judgement was set to inform future practice not least regarding the approach to take when ascertaining wishes and feelings. Sir Andrew McFarlane as President of the Family Law Division outlined the judicial approach to cases that fall "short of attracting the labels of "intractable hostility" or "parental alienation.""[96] This indicates amongst other things that the two labels can be used interchangeably. Further, the "use of such expressions frequently gives rise to criticism, profound scepticism and doubt"[97] which will in turn, distract from s.1 Children Act 1989.

Alternatively, the court concluded in *Re H*[98] that the mother had plainly alienated H against his father."[99] But, this specifies a judicial inconsistency for cases of this nature regarding such language use because they were both heard in 2019 which raises a concern because "parental alienation is very harmful to a child."[100] Consequently, the judiciary should apply the label with caution given the influential socio-legal underpinning or refocus discussion from linguistics to behavioural. But, given the complexity of parental alienation further questions arise as to 'typical' behaviour particulars. As such, ambiguity remains because the value of the CIAF is yet to be ascertained and this evident inconsistence is perhaps unsurprising in relation to the distinctiveness of every family and their dynamics.

In *Re A*[101] Lord Justice Thorpe proposed that "the transfer of residence… is a judicial weapon of last resort."[102] Mr. Justice Coleridge approved this stance that it "needs to be deployed with great care and any apparent change of heart, it seems to me, fully tested." [103] This judgement verified that a transfer of residence can be instrumental for case management, although the language use has since received wide critique.

[95](n 3)
[96](n 3) [1] (Sir Andrew McFarlane)
[97](n 7) [166] (HHJ Bellamy)
[98] (n 1)
[99] (n 1) [29] (Mr. Justice Keehan)
[100] (n 1) [13] (Mr. Justice Keehan)
[101] (Children) [2009] EWCA Civ 1141
[102] A (Children) [2009] EWCA Civ 1141 [18] (Mr. Justice Thorpe)
[103] ibid. [21] (Mr. Justice Coleridge)

In his 2019 judgement, Sir Andrew McFarlane departed from this interpretation because "whilst having the greatest respect for the two judges who gave judgement in *Re: A*, I would wish to distance myself from the language used"[104]. Sir Andrew McFarlane noticed a problematic redirection for exercising this judicial power as it "risks moving the focus of the decision-making away from the welfare of the child which must be the court's paramount consideration." [105] For parental alienation, this modified approach is promising in relation to any alternative justifications for a child's wishes and feelings in order to promote an objective foundation.

In *Re L*[106] the Cafcass representative circumvented attempts to understand the child's view because "it was not possible to ascertain L's wishes and feelings on the central issue without causing him emotional harm."[107] Considering the aforementioned statutory distinction between 'ascertainable' and 'expressed' Cafcass upheld the child's welfare best interests in varying their method of assessment whilst having regard for future welfare too. For this reason, "it would not be possible to ascertain the child's genuine view."[108] Albeit, to draft recommendations taking the child's views "at face value"[109] would be unwarranted "no matter how consistently or firmly those wishes are expressed."[110] The reason for this practice direction is because:

> "the impact of alienation upon the reliability of those wishes and feelings… may not in fact reflect his true feelings, are matters to be taken into account when assessing the weight to be attached to them." [111]

This is indicative of the professional decision making undertaken by Cafcass given the wholly irrelevant false wishes and feelings if that is what they in fact are and further, it would be inappropriate to recommend theses to court. However, the court would benefit from an explanation for such practice. So, it is evident that a transfer of residence is just one power

[104] (n 3) [54] (Sir Andrew McFarlane)
[105] ibid.
[106] (n 3)
[107] (n 3) [66] (Sir Andrew McFarlane)
[108] ibid.
[109] Re S (A Child) [2010] EWCA Civ 219 [27] (Lord Justice Thorpe)
[110] Re A (A Child) [2013] EWCA Civ 1104 [68] (McFarlane LJ)
[111] (n 107)

available to the court for parental alienation and whilst the "transfer of residence is being considered more regularly by judges" [112], inconsistency remains.

Conclusion

The Children Act 1989 is a fundamental statutory provision for family law proceedings but it is essential that the court adequately balance this domestic law with the Article 8 rights of all parties involved. As this research has demonstrated, this balance can sometimes pose a challenge for the judiciary when applying this law to the matter before them. Necessarily, this will inform practice for parental alienation given the complex nature and socio-legal overlap. Also, in relation to Cafcass and their highly regarded position for advising the family court, the effectiveness of their proposed definition and practical guidance are yet to be seen.

Understanding this niche area of law and the emotive reality of everyday decisions that the court is being asked to reach, it is encouraging that there has been more recent judicial regard for alienation. But the evident apprehension is plausible. This confusion is justified in relation to which label alienating behaviours should attract, noting that this should not be a primary judicial focus.

Moving forward, to more efficiently work with children and reduce the harm of parental alienation, the twenty-six statutory time limit should equally be applied to private law proceedings. This will support the no delay principle and will ensure that hostility between litigants does not render the welfare of the child redundant. It is well-defined that the rights of the child are paramount and whilst the Children Act 1989 maintains this thinking, the reality is that nobody else "is dealing with their emotions, their lives and they are not packaging to be moved around. They are people entitled to be treated with respect."[113]

[112] (n 20)
[113] Re S (Minors) (Access: Religious Upbringing) [1992] 2 FLR 313 (Bulter-Sloss LJ)

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