

Draft Guidance on Responding to allegations of alienating behaviour

Resolution's response to the Family Justice Council

Resolution's 6,500 members are family lawyers, mediators, collaborative practitioners, arbitrators and other family justice professionals, committed to a non-adversarial approach to family law and the resolution of family disputes. Resolution members abide by a [Code of Practice](#) which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family and the best interests of any children in particular.

Resolution members seek to solve problems outside of court, where possible, through solicitor negotiation, mediation, collaborative practice, arbitration, roundtable discussions, private FDRs/ early neutral evaluation and other processes.

Resolution is committed to developing and promoting best standards in the practice of family law amongst both its members and amongst family lawyers in general.

We also campaign for better laws and better support for families and children undergoing family change.

This response has been prepared by Resolution's Children and Domestic Abuse Committees.

References to Cafcass also relate to Cafcass Cymru.

General comments

1. Many of our members have cases where allegations of alienating behaviours are appearing. We understand that allegations of alienating behaviour are less frequently raised in cases proceeding in the private law Pathfinder pilot courts which aim to centre the voice of the child in proceedings and at a much earlier stage. We look forward to hearing more about the findings of the pilot evaluation and roll out of the pilots to further courts.
2. In the meantime, we broadly welcome this draft Guidance and believe it could be useful in some cases. There are of course other and wider problems in the family justice system, not least delay and the time cases take to proceed through the family justice system. The range of solutions available for some families at the end of proceedings are severely limited in the absence of early family intervention and therapy for change. Any opportunities to divert families to such should be taken.
3. Resolution considers that how the voice of the child will be heard should be addressed at safeguarding and again at the first hearing in all child arrangements proceedings. In our members' experience, in particular the voice of the child is heard far too late in cases where

allegations of alienating behaviour are made. There should be some investigation as early as possible around what is going on in the family with the child at the centre. It may not be possible within the scope of this particular Guidance, but we believe that the production of an early child impact report following the pathfinder model would be welcome. Or at least Cafcass should interview the child and produce in an interim wishes and feelings report much earlier (at the safeguarding investigation stage) to find out what the child is really thinking, feeling and saying before parents become even more embedded. Children have their own views, which if heard properly and early in the process with welfare analysis, can mean that any issues around alienating behaviours may fall away, and it may be established that there is justified reluctance to contact due to another reason. It could also assist in identification of concerning behaviours and judicial assessment of whether a fact finding and an evaluation of the evidence is necessary.

4. Resolution is, however, also concerned that the right balance needs to be struck between involving the child directly in the litigation at this early stage, as it may expose them to more conflict between their parents. There will need to be careful consideration of the welfare checklist (age, particular needs etc), and the allegations set out in the C100, C1A to determine what level of involvement would be appropriate for the child in question.
5. We suggest that the provision of guidance recognising alienating behaviours within different ethnic communities would also be really helpful, and offer our future assistance with preparing such if the FJC is able to take an additional Guidance note forward. The prevalence of and how alienating behaviours present can be very different within different communities, and it would assist the courts and practitioners to be more familiar with these differences, so that the approach to each case can be tailored towards the family's specific characteristics.
6. The draft Guidance is also silent on consideration of alienating behaviour in international child abduction cases. We suggest that the existence of alienating behaviour in those cases and the role of Cafcass in those cases be addressed.
7. In terms of consistency of language, we think that the Guidance should consistently refer to alienating behaviours (AB) throughout and not alienation. It is helpful to move away from reference to 'alienation', and to offer a structure for addressing patterns of alienating behaviour. It may be helpful to consider the way that patterns of coercive and controlling behaviour are identified and to deal with patterns of alienating behaviour in a similar way.

Introduction and scope of the Guidance

We wonder if the Guidance should more explicitly here:

- recognise that allegations of AB can be used by perpetrators of domestic abuse to seek to minimise the allegations of domestic abuse made against them.
- state that there is a very clear distinction between AB which, in itself may amount to a form of domestic abuse, and justified rejection from the child. There might be a clearer section on recognising safeguarding flags to identify where AB may be being alleged as a form of domestic abuse.

Mapping the litigation journey where Alienating behaviours are alleged

The mapping of the litigation journey chart is generally helpful. There is reference to a Guidance note to good gatekeeping which is not included in the consultation with the other guidance notes, it would be helpful for us to see that note.

Case Management

The Burden of Proof

We suggest that establishing whether AB has occurred is difficult to assess without the court hearing the voice of the child, and this should be addressed by the court as early as possible at the first steps stage.

Evidence of alienating behaviours

We find this part of the Guidance a bit confusing.

The second paragraph should refer to 'alienating behaviours' rather than 'alienation'.

The third paragraph stating that the 'behaviour of a child is not evidence of the behaviour of an adult, so the behaviour of a child should not be used to evidence adult behaviours' is hard to follow and unhelpful. The behaviour of the child, where allegations of AB are being made, might be the most important evidence (as recognised in the Cafcass AB Thinking Tool). This paragraph also seems to be contradicted later in the draft Guidance, such as on page 6. We would simply delete it.

Robust Case Management

First steps

Resolution's position is that initial case management should be undertaken by a district judge or more senior judge which is most likely to rightly streamline and set the framework for a case, provide confidence that the case is set on track, and also give signals to magistrates around how to most effectively deal with matters. This is particularly important for the types of cases falling within the scope of this Guidance, and we suggest that a triage judge could immediately deal with a first case management hearing where the three elements may be present.

In any event, on an initial scrutiny of the allegations (page 5), how will the legal adviser or judge decide if one or more of the three elements is absent? Will this be on the basis of the C100 and C1A if relevant on gatekeeping and/or the Guidance note to good gatekeeping (which we would welcome sight of)? Will this be possible without a more detailed safeguarding stage involving the child?

We agree that it is important that where a case remains with the magistrates, they should keep allocation under review, and be clear that where the three elements may be present **at any stage** the case must then be transferred to a judge. This could perhaps be made more explicitly clear as who makes the decision to transfer is not spelt out in the third paragraph of the guidance.

On page 6 it is indicated that it is incumbent on the court to robustly avoid AB being raised late in the proceedings. We think that there should be more of a duty on the court to have the issue in

mind and monitor parental behaviour on an ongoing basis. AB may not be evident or even exist at the beginning of proceedings, but behaviours can develop gradually and/or over time where there is a lack of robust case management during lengthy and delayed proceedings where it can take so long, for example, for evidence of domestic abuse to be tested and decisions made. Cases change and parties must be able to raise the issue at any stage.

We are also concerned that the guidance suggests a critical approach towards a parent who raises AB later on in the proceedings. This is contrary to the emphasis within the family justice system on trying to resolve matters amicably, and could prejudice a parent who issues court proceedings as a last resort, where they suspect AB is present, but want to reduce the animosity by keeping allegations to a minimum in their C100, in the hope that the court proceedings may be enough to prevent the parent from continuing with AB.

Case management hearings

In the third paragraph, we suggest that it be made clear that the court should decide whether to direct a schedule of incidents, a narrative statement or both as needed.

Is the first element evidenced?...

We do not wholeheartedly agree with the approach that AB is unlikely to be made out by a NR parent (usually) when there is ongoing contact. That implies that they would have to wait until the AB has actually worked (i.e. stopped contact) before AB can be evidenced. A child might, for example, have to be dragged “kicking and screaming” to contact, have to be coaxed out of the car, resulting in contact still going ahead, or refuse to come out of their room or get off the phone to the RP during contact, but this may still constitute AB. There can be a gradual manipulation of the child to undermine the time they spend in the other parent’s home which is a valid welfare issue to raise. The early calling out of behaviours and exploring of the child’s wishes and feelings can stop escalation.

We are not sure why the paragraph on page 6 beginning ‘The court should be cautious about ordering a stand-alone wishes and feelings report’...’ is included here.

‘The court should look for evidence of children being reportedly unwilling to see ...’ conflicts with what is said on page 5 that the behaviour of a child should not be used to evidence adult behaviours, and further supports why the statement on page 5 should be deleted.

We feel that the sentence beginning ‘It may be appropriate to direct Cafcass/ Social services...’ suggest that Cafcass’s role is to make findings that AB have or have not occurred despite the later statement that Cafcass are not arbiters of fact. It would be appropriate to report that the child is refusing contact as fact, but not the reasons behind that as facts.

Possible directions

Seeing and/or working with the child is often too late after fact finding.

There is no reference to Cafcass needing to identify the child’s wishes and feelings as soon as possible. We think there should be.

Nor is there any reference to the possibility of an early family therapy assessment to understand a parent and/or the child's mental health or whether the child is at risk of going through prolonged proceedings due to their mental health.

Earlier consideration might also be given as to directions for the need for expert involvement/ a whole family psychological assessment if findings of alienating behaviour are made. This would save time in having to make these enquiries after a fact finding and thus delay the final outcome for the child. The parties could set out what work they would require the other party to do (in respect of AB or other abusive behaviour if alleged) prior to any fact finding so that the Judge can make directions immediately after the fact finding in that regard. In our experience, this can be helpful and can also cause the parties to consider whether they are prepared to undergo that work and avoid the need for a fact finding altogether.

On page 7 the need for schedules and/or statements should be considered on a case by case basis.

On page 8 the reference to the factual matrix surrounding a case of alleged 'alienation' should be amended to 'alienating behaviours'.

There is some concern that the relevance of when AB allegations were first made risks leading to AB being raised more frequently – some parents may currently avoid raising allegations, in the hope of keeping the proceedings simple, but may now worry about being criticised if they do not raise AB initially. Please also see our comments above.

On page 9 is the reference to interim orders intended to be an indication that the court should make interim orders if it feels appropriate, or just can make such orders?. It would certainly be welcome if courts were more proactive in this area where there is sufficient evidence that an interim order would be in the child's best interests. Many courts are currently reluctant to hear evidence at this stage or to involve Cafcass in interim hearings.

It would be helpful for both courts and unrepresented parties for information to be available in each court on what interim measures are available in the local area for courts and on funding options.

Welfare decisions where findings of alienating behaviours have been made

Preamble

We suggest that the first line should be amended to read 'A finding that a parent has exhibited alienating behaviour is usually only one part of the factual matrix.'

Guidance

Statements

A parent's level of acceptance and attitude to reparative work can have a huge impact on the child. However, there is some concern that directing of statements in response to the findings of AB is likely to cause further delay. It rather pre-supposes that both parties will be legally represented, and that the party accused of alienating behaviour will have been advised to take time to think about what work they are willing to do if facts are found against them. We are not sure how much statements will add and assist in some cases to progress the case, particularly where there are mental health issues of either parent in play.

Consideration would perhaps be better given earlier to how this and/or the family will be assessed post a finding of fact as mentioned earlier.

Interim measures

It is welcome that it is recognised that the court may want to look at interim measures straight away, but it should be stressed that interim measures need to be safe for both children and the parents.

Parent's attitude to reparative work

We are not sure this is the right sub-heading here. It seems to read as if reparative work or part of that is a transfer of residence or could be.

We suggest that the Guidance should be more explicit that transferring who the child lives with is a highly complex area, but sometimes it may be necessary.

Factors to be weighed in the balance (pages 13 and 14)

We consider that it should be clear that the child's wishes and feelings will still be an important part of the court's consideration at this stage and, and how the voice of the child will be heard should be addressed. The Guidance could address more explicitly how to balance any findings either way with the child's evolving wishes and feelings i.e. to make it clearer that findings either way do not mean that the wishes and feelings of the child should not be explored further or will be ignored. Those wishes and feelings will impact of the viability of reparative work at this stage. It should not be assumed that reparative work will work.

We are not clear exactly what is meant by 'A deterioration in the mental health of either parent' at l) and m) and the effect of that. It is earlier therapeutic work with the family, and before a final decision is made, which may avoid such deterioration and assist the court on the impact of a life changing or ending decision on either parent and their capability to meet the child's needs.

Understanding hostility and psychological manipulation in cases in which alienating behaviours are alleged

What does hostility look like?

We would prefer for the term 'hostility' not to be used in this context. This depicts a child with problematical behaviour making a choice, and a child should not to be labelled and described as hostile.

It would be preferable to discuss negative reactions and what those might look like on a non-exhaustive basis, and to recognise that some behaviours may be protective of the child themselves and/or an abused parent.

Use of experts in cases in which alienating behaviours are alleged

It might be helpful to generally reference addressing the use of experts as early as possible in cases in which AB are alleged to safeguard a child's welfare and mental well-being.

It would be helpful to add reference to consideration of the use where necessary of cultural and community specific experts familiar with community based abuse, and the impact of such on the child's development.

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