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**The ECtHR's Interpretation of 'Democratic Necessity'  
When Assessing Domestic Court Interventions in  
Cases of Parental Alienation and Contact Denial**

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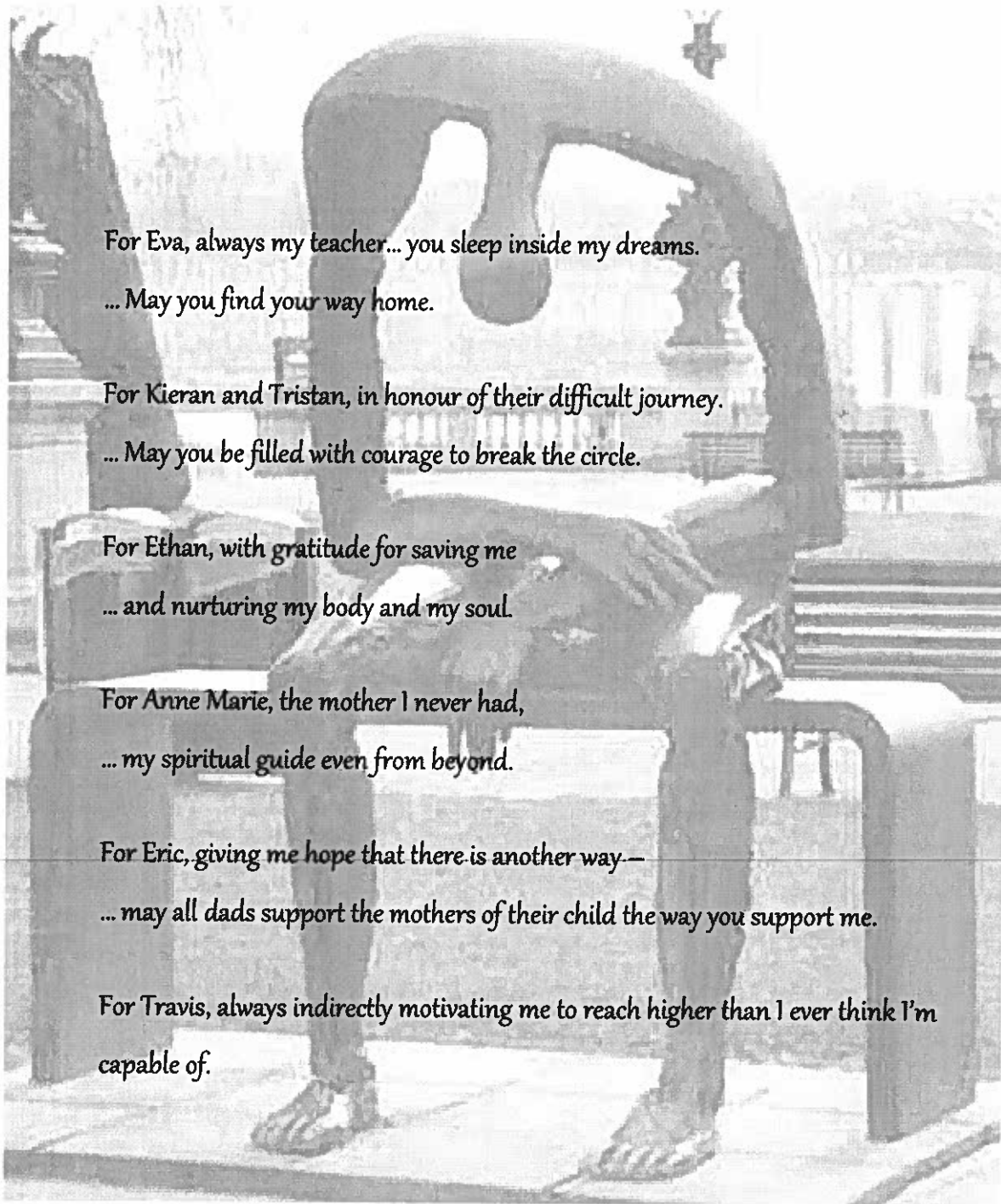
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## ABSTRACT

When cases of parental alienation and contact denial reach the European Court of Human Rights seeking a remedy for a violation of the applicants' rights as protected by Art 8 of the European Convention of Human Rights, namely the right to respect for family life, the domestic authorities frequently attempt to justify their interference with this right by invoking the democratic necessity of the impugned measure. This study analyses the principles applied by the European Court of Human Rights in these cases, in its interpretation of 'necessary in a democratic society'. The margin of appreciation accorded to national authorities in cases where a child and parent are being denied the right to mutual enjoyment of each other's company – which constitutes a fundamental element of family life – is narrow, and decisions taken by the authorities in these cases are subject to a higher intensity of review. Particular diligence should be applied by national authorities when interpreting an alienated child's expressed wishes, as these could be a reflection of the alienating parent's voice. Cases of parental alienation and contact denial should be dealt with swiftly by courts if damage to the parent-child bond is to be mitigated, with as little procedural delay as possible and a decisive enforcement of court orders. Transfer of the alienated child's residence to the targeted parent offers the best outcomes in severe cases of parental alienation, and waiting for the situation to resolve spontaneously is never successful. A number of reforms for Malta's Family Court are recommended, which do not require the time-consuming implementation of new laws but rather the better application of existing provisions with minor amendments. The approach proposed incorporates principles of judicial continuity, organised case management and a focused case strategy which, if applied, would contribute to a reduction in unnecessary delays and thus bring Malta in line with its obligations under Art 8.

(Keywords: parental alienation; contact denial; necessary in a democratic society; right to respect for family life; family court reforms)



*For Eva, always my teacher... you sleep inside my dreams.*

*... May you find your way home.*

*For Kieran and Tristan, in honour of their difficult journey.*

*... May you be filled with courage to break the circle.*

*For Ethan, with gratitude for saving me*

*... and nurturing my body and my soul.*

*For Anne Marie, the mother I never had,*

*... my spiritual guide even from beyond.*

*For Eric, giving me hope that there is another way—*

*... may all dads support the mothers of their child the way you support me.*

*For Travis, always indirectly motivating me to reach higher than I ever think I'm capable of.*

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## CHAPTER 4: RECOMMENDED FAMILY COURT REFORMS

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### 4.1 Introduction

The European Court judgments very clearly highlight the areas where domestic authorities fall short when addressing contact denial and PA. Maltese Courts would do well to incorporate policies, procedures and legal provisions within their operations that address these commonly condemned shortcomings. Anything less will result in Malta being found in violation of its obligations to protect the right to respect for family life under Art 8 and the right to a fair trial under Art 6 of the ECHR when parents that have been targets of PA and thus denied contact with their children start taking their grievances to the European Court of Human Rights – and this is a question of *when* rather than *if*.

The overriding focus of the Family Court ought to be that of improving outcomes for children caught in litigation between their parents. However, it is cursed by procedural delays which choke the justice system and present the greatest obstacle to the best interest of the child being served. People’s lives – those of both parents, the children as well as extended families – are suspended in a limbo until cases are resolved. Additionally, the longer the duration of the proceedings the greater the financial, health and emotional burdens incurred by the families – which burdens make the children their greatest victims – and the more the animosity between the parents is allowed to fester as a result of frustrating court sittings that trickle slowly on for years.

Three aspects of Family Court procedures that, if fine-tuned, would contribute to a reduction in unnecessary delays and ensuing damage, include judicial continuity, organised case management and a focused case strategy. These will be discussed in detail in the sections that follow.

### 4.2 Judicial continuity

The longer a case drags on, the more likely that the Judge hearing the case will change, as Judges might retire or be moved to a different section, to be replaced by a new one. Every time the case moves to a new Judge, time is necessarily required for his

replacement to acquaint him/herself with the case, resulting in more delays as sittings are adjourned for this purpose. A new Judge might also have a different mindset and approach towards the issues raised in the case than the previous one, which might take the case in a tangentially new direction. Aiming to reduce delays would remove the obstacle of different Judges hearing the case.

### **4.3 Organised case management**

#### **4.3.1 'Early Intervention Programme'**

An *'Early Intervention Programme'* could be introduced to place cases in different streams depending on seriousness and complexity. This programme would be an out-of-court procedure that includes, but is not limited to, mediation.

Current Maltese legislation obliges parties to appear before a mediator prior to being given Court authorisation to proceed with a suit for separation or divorce<sup>107</sup>. However, mediation is often considered by parties to be a useless but imposed burden that one must endure before proceeding to 'the real case'.

As part of this Early Intervention Programme, mediation is supplemented by a parent education programme. It is the author's belief that quite a number of parents fighting over contact with their child truly want what is best for their child, and it is highly likely that they are unaware of the damage they cause their children when obstructing their contact with the other parent, thinking rather that they are 'saving' them from that parent.

A parent education programme that runs concurrently with mandatory mediation would explain, through leaflets, videos, interviews with adults that were alienated as children, and talks, the damage caused to children by polarisation. Parents would also be introduced to healthy coparenting strategies and assisted in drawing up a parenting and contact plan.

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<sup>107</sup> The Civil Court (Family Section), The First Hall of The Civil Court and The Court Of Magistrates (Gozo) (Superior Jurisdiction) (Family Section) Regulations, S.L.12.20, Art 4(3)

#### **4.3.2 The Fast Stream**

Such a programme, if implemented and managed professionally, will sieve those cases out of Court, where the parents simply need some guidance and support in handling the very strong emotions that accompany a relationship breakdown, particularly where it involves one's children. This sieved group will enter a '*Fast Stream*' in which cases, seeing as mutual agreement on major points of conflict would already have been reached, are closed rapidly, according to a schedule that spans weeks rather than months.

#### **4.3.3 The Focus Stream**

The cases that remain will be those that are more complex and resource intensive. These will enter a '*Focus Stream*' and resolved according to a schedule that spans months rather than years. The increased attention necessitated by these cases will become available as a result of the reduced strain on the Court after the sieving process.

Within five days of receiving an application from a '*Focus Stream*' family, a case management meeting is held, attended also by a 'support person' (who could be a social worker) and aimed towards assisting the Judge to actively manage the case, to identify the predominant issues and to fix a case schedule for ALL sittings including the date of the final sitting when judgment will be handed down.

If PA has been alleged, it is vital for this case management team to include professionals who have familiarity and experience in the very particular dynamics and characteristics of PA, as otherwise the case will be derailed.

#### **4.3.4 Legal framework**

Art 7(2) of S.L.12.20 actually requires the Court to fix time limits within which the parties are to produce all documentary evidence in support of their case and to produce any witnesses whose evidence cannot be produced by affidavit. When the time within which the documents and witnesses that were supposed to be produced

has elapsed, the law obliges the Court to close the pre-trial period<sup>108</sup>, and except for grave and serious reasons, the pre-trial period is not to extend beyond one year<sup>109</sup>. Considering the ECtHR's emphasis on the 'exceptional diligence' expected from domestic authorities as part of the State's positive obligations under Art 8, the Court would do well to be guided by the ECtHR's interpretation of what constitutes grave and serious reasons when these are used as justification for delays. For example, the European Court has frequently iterated that States are responsible for organising their legal systems in such a way as to guarantee the right to obtain a judicial decision within a reasonable time<sup>110</sup>; furthermore, an excessive workload cannot be taken into consideration<sup>111</sup>.

Nowadays there is agreement that PA is a form of domestic violence, being psychological and emotional abuse<sup>112</sup> on both the child and the target parent. The Gender Based Violence and Domestic Violence Act includes all acts or omissions including verbal and psychological violence in its definition of domestic violence<sup>113</sup>. Considering the relationship between the parties involved, the actions also qualify as aggravating circumstances under the Istanbul Convention<sup>114</sup>. Once Courts move away from focusing only on physical and/or sexual abuse when considering domestic violence, towards the encompassing definition in the laws that Malta has ratified, then there is an implied requirement to appoint cases with allegations of PA within four days<sup>115</sup>.

Delays resulting from inaction of the parties, abuse of rights by the parties, or stalling tactics by lawyers should not only be unacceptable to the Family Court, but rather should be admonished and sanctioned, as it is the responsibility of the Judge to

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<sup>108</sup> S.L.12.20 (n 107) Art 7(3)

<sup>109</sup> S.L.12.20 (n 107) Art 7(4)

<sup>110</sup> *Vocaturo v Italy*, 24 May 1991, § 17, Series A no 206-C

<sup>111</sup> *Cappello v Italy*, 27 February 1992, § 17, Series A no 230-F

<sup>112</sup> Wilfrid von Boch-Galhau, 'Parental Alienation (Syndrome) – A serious form of psychological child abuse' (2018) 14 *Ment Health Fam Med* 725; JJ Harman, E Kruk and DA Hines, 'Parental alienating behaviours: An unacknowledged form of family violence' (2018) 144(12) *Psychological Bulletin* 1275

<sup>113</sup> Gender Based Violence and Domestic Violence Act, Chapter 581 of the Laws of Malta, Art 2

<sup>114</sup> Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS 210 (2014) ((Istanbul Convention) Art 46

<sup>115</sup> Civil Code, Chapter 16 of the Laws of Malta, Art 37(2) and Art 37(9)

manage the case and keep it on schedule. In any case, allowing delaying tactics by one of the parties would not absolve the Maltese authorities in front of the ECtHR from their duty to ensure that proceedings are conducted within reasonable time<sup>116</sup>.

After the close of the pre-trial stage, the Judge is to fix a date for the trial, wherein the advocates of the parties and the children's advocate if appointed make their submissions and counter-submissions<sup>117</sup>. The Judge then proceeds to judgment.

Thus, Malta's laws actually oblige the Courts to implement a case management approach and to set reasonable time limits. How far this is actually adhered to would make for interesting future research that could help elucidate problem areas and extrapolate solutions.

#### **4.4 Focused case strategy**

Maltese legislation empowers the Judge assigned to the case to give guidance and directives as they deem fit for the better management of the case<sup>118</sup>, giving paramount consideration to the welfare of the children, and even limiting or denying access once PA is seen by our Courts as what it is, *i.e.*, a form of domestic violence (Section 4.3.4)<sup>119</sup>. Domestic violence is also a 'grave reason' for which the Court may, even of its own motion, declare that the alienating parent is not fit to have custody<sup>120</sup>.

##### **4.4.1 Expert involvement**

The involvement of experts such as Appoġġ should be expanded. Children who are being alienated from a parent will require a social worker to follow them long enough to form a long-term and trusting relationship. One must also keep in mind that the alienating parent will also very likely be indoctrinating the children to mistrust 'the system', including any social workers, psychologists or child advocates assigned to the case. The intervention of a skilled social worker familiar with PA behaviours and responses is vital for both the children and parents, and may also be used to facilitate

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<sup>116</sup> *Mincheva* (n 97) 68

<sup>117</sup> S.L.12.20 (n 107) Art 7(6)

<sup>118</sup> S.L.12.20 (n 107) Art 13

<sup>119</sup> Civil Code (n 115) Art 47

<sup>120</sup> *ibid* Art 56A

contact by preparing the child and the alienating parent for contact, and being present during transfer time to ensure no obstacles at hand-over.

#### **4.4.2 Dealing with false allegations**

One of the hallmarks of PA is the false allegations made by the alienator, directly or indirectly through the child, about the target parent. The more common allegations made in PA cases revolve around sexual or physical abuse, loose or immoral lifestyle, drug or alcohol abuse, unsuitable parenting skills and involvement in pornography. Red flags should be raised when any of these allegations are made with respect to blocking a parent's contact with a child, as otherwise they tend to take on a life of their own. These allegations are highly damaging and destructive, even in the long term, not only for the target parent (who has to live with the humiliation and mental health consequences of being publicly slandered) and to the parent-child bond, but even for the child when, in the future, she will perhaps access the court files and realise how she was weaponised to destroy the other parent.

PA cases usually proceed in exactly the way the alienator is hoping it will – an allegation is made, together with a demand to either stop access, or to allow minimal access under supervision, which demand is frequently accepted pending investigations into the allegation. Such a decision, especially when accompanied by delay tactics, favours the alienator by allowing him/her more time and opportunity to entrench the alienating behaviours, to the detriment of the alienated child and target parent.

Faced with allegations, the Court must grasp the bull by the horns and investigate and resolve them at the earliest, rather than leave them to fester and to remain a weapon in the arsenal of the alienating parent, to be brought up repeatedly at various points in the proceedings. Inaction in this area achieves no purpose other than that of allowing the allegations to remain a continuing source of dispute and friction between the parents. Unless tackled immediately, this is not a problem that will go away if ignored, and therefore the Court must make time for fact-finding without delay.

Allegations that could (or ought to) have been made earlier but only come up during separation proceedings, especially those made without any formal police report, should be viewed with scepticism. It is very easy for one parent to throw mud at the other parent hoping that something would stick, knowing that one will not be held

accountable. This sense of impunity is encouraged by the awareness that Family Court proceedings drag on for years, at which point, after years of denial of contact, the issues are resolved merely by the passage of time, seeing that the child might no longer be a minor and in any case the breakdown of contact would have reached an intractable stage.

#### **4.4.3 Addressing the child's wishes**

There is unanimous agreement that children should be heard in proceedings that involve them. A child's right to be heard, however, is not equivalent to the right of that child to make decisions, and a child's voice must never override her best interests, with which it may be inconsistent.

In everyday parenting situations, a good parent will listen to a child's wishes, and, after giving them due consideration, will ultimately make the decision that is in the child's best interest. If parents adopted the approach of 'child's voice = child's choice', then children would be allowed to eat only junk food, play videogames all day, skip school, never shower, stay up all night, never use a seatbelt, and so on.

Giving children what the ECtHR has termed 'an unconditional veto power' to decide on custody and access proceedings burdens them with a responsibility that they should not be weighed down with. An alienated child has already been given an unrealistic sense of power, and a distorted sense of reality and permission to behave disrespectfully and in Contempt of Court orders. The Courts, by their decisions, should assist children to disengage from such a dynamic of false perceptions. Taking this inappropriate role away from children frees them from guilt and further provides them with an excuse to 'save face' and rebuild their relationship with the target parent. The Court must keep in mind that research shows how alienated children actually love their rejected parent, and the only reason for their vehement rejection is because they are caught up in a loyalty conflict and a situation of coercive control. In other words, they may be vocally denying a relationship with a parent with whom they previously enjoyed a loving relationship, while all the time on the inside they are screaming for someone to notice, dig deeper and set them free<sup>121</sup>. When a Court orders contact and

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<sup>121</sup> Barbara J Fidler and Nicholas Bala, 'Children resisting postseparation contact with a parent: concepts, controversies, and conundrums' (2010) 48(1) Family Court Review 16

actively enforces such an order, the child will feel and be able to say that they cannot be blamed for seeking a relationship with the target parent since this was 'imposed upon them' by the Court. Thus, they have an emotionally safe way out of the conflict.

This emphasises the importance that the Court engages a child psychologist with expertise and background in PA behaviours and dynamics early in the proceedings, in order to identify if PA is indeed taking place. This should inform the Court when making contact and custody decisions.

#### **4.4.4 Intervention measures to dislodge severe parental alienation**

PA cases necessitate a synergistic combination of legal and clinical management<sup>122</sup> if families are to be aided to function in a healthy manner. The level and type of judicial intervention depends upon the severity of the alienation<sup>123</sup>. Some of the interventions commonly availed of by courts include<sup>124</sup>:

- a) Leaving the child with the alienating parent while the parents undergo individual and/or family therapy;
- b) Putting strict visitation schedules in place, while imposing court sanctions to force the alienating parent to comply with court orders;
- c) Ordering that the victim child reside with the target parent; or
- d) Taking no action, expecting that the alienation will be resolved in time by itself.

The initial measure implemented by Courts when addressing contact issues is usually the imposition of traditional therapy. While this may have some success in cases where the PA is still at the early stages and hence its manifestations are mild, therapy alone is unlikely to resolve severe PA and has been shown to be ineffective and may actually result in further damage<sup>125</sup>.

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<sup>122</sup> Matthew J Sullivan and Joan B Kelly, 'Alienated Children in Divorce: Legal and Psychological Management of Cases With an Alienated Child' (2001) 39 Family Court Review 299

<sup>123</sup> Douglas Darnall, 'The Psychosocial Treatment of Parental Alienation' (2011) 20(3) Child and Adolescent Psychiatric Clinics of North America 479

<sup>124</sup> Sylvana Brannon, 'A review of legal interventions in severe parental alienation cases' (2020) 7 ELSA Malta Law Review 129

<sup>125</sup> Kathleen M Reay, 'Family Reflections: A Promising Therapeutic Program Designed to Treat Severely Alienated Children and Their Family System' (2015) 43(2) The American Journal of Family Therapy 197; Richard A Warshak, 'Family Bridges: using insights from social science to reconnect parents and

The only effective way to restore a broken parent-child bond and to overcome the damage caused by alienation is to move the child away from the alienator to live with the target parent. The risks inherent in a forced transfer far outweigh the risks involved in keeping the child in a situation of emotional abuse and distorted reality, and the long-term gains are greater.

The change in residence must be accompanied by a minimum 30-day *protective separation phase*, during which contact with the alienating parent is suspended. This is because the child's healing, like that of disentangled cult members, will only be possible following isolation from the source of influence<sup>126</sup>.

90% of PA cases in one study of 400 cases where an increase in parent-child contact was ordered by the Court in spite of an objection by the child showed an improvement in the relationship between the child and the alienated parent<sup>127</sup> without additional interference from the alienating parent. A review of the commonly recommended responses to severe PA concludes that a change in residency in favour of the target parent can reduce and even eliminate PA<sup>128</sup> and that, rather than harm the children, removing them from the alienating parent protects them from further emotional abuse in spite of the transient distress experienced.

Not one study endorses the position of waiting for PA to resolve spontaneously, or allowing the child to decide on custody or residency<sup>129</sup>. To the contrary, this 'intervention' (or rather, lack of one) aggravates PA by enabling the abuse to continue and even get further entrenched<sup>130</sup>.

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alienated children' (2010) 48(1) Family Court Review 48; Janet R Johnston and Judith Roth Goldman, 'Outcomes of family counseling interventions with children who resist visitation: an addendum to Friedlander and Walters (2010)' (2010) 48(1) Family Court Review 112

<sup>126</sup> Amy JL Baker, 'The cult of parenthood: a qualitative study of parental alienation' (2005) 4(1) Cultic Studies Review

<sup>127</sup> SS Clawar and BV Rivlin, *Children held hostage: Dealing with programmed and brainwashed children* (Chicago, IL: American Bar Association 1991)

<sup>128</sup> Brannon (n 124)

<sup>129</sup> Douglas Darnall and BF Steinberg, 'Motivational methods for spontaneous reunification with the alienated child' (2008) 36 American Journal of Family Therapy 107

<sup>130</sup> Deirdre Rand, Randy Rand and Leona Kopetski 'The spectrum of parental alienation syndrome part III: the Kopetski follow-up study' (2005) 23(1) American Journal of Forensic Psychology 15

#### **4.4.5 Enforcement of measures**

If the alienating parent obstructs or denies contact in spite of a contact order, the appropriate judicial response should be to apply a clear and definite approach that does not budge from the schedule. Maltese law addresses contact denial as a contravention under Art 338(II) of the Criminal Code<sup>131</sup>. This Article, however, should be reworded so that it is not simply the 'refusing' to give access that is punishable, but also its obstruction and non-enforcement by the parent with the obligation to provide it. This is because most cases that go to Court over contact denial will use the excuse that not only did they not refuse access, but they actually encouraged the child to go with the other parent and it was the child who refused to go, whom they couldn't force.

A parallel can be drawn between a parent's duty to ensure regular school attendance<sup>132</sup>, failure of which would constitute a criminal offence<sup>133</sup>, and a parent's duty to ensure that a child respects a contact schedule. In most cases, a parent would not allow a child to skip school just because she refuses to go, so why should that parent allow a child to refuse to not go with the other parent just because she says so?

This should be seen as a breach of parental responsibility. The law places on parents the responsibility to 'look after, maintain, instruct and educate' their children<sup>134</sup>. Furthermore, a spouse is expected to provide moral support to the other in any obligation that the other spouse has towards their children<sup>135</sup>; one should note that, in cases of separation, it is only the obligation of cohabitation of the spouses that ceases<sup>136</sup>. Thus, a parent who is not actively supporting the other parent's access to their child, ought to be found in breach of his/her obligations.

Once the Courts start seeing PA as the act of domestic violence that is as, as discussed under Section 4.3.4, then the Court may also, even on its own motion, issue a protection or treatment order<sup>137</sup>.

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<sup>131</sup> Criminal Code, Chapter 9 of the Laws of Malta, Art 338(II)

<sup>132</sup> Education Act, Chapter 327 of the Laws of Malta, Art 5

<sup>133</sup> *ibid* Art 139

<sup>134</sup> Civil Code (n 115) Art 7(1)

<sup>135</sup> *ibid* Art 9

<sup>136</sup> *ibid* Art 35

<sup>137</sup> *ibid* Art 39

Appropriate and proportional sanctions when a Court order is not adhered to constitute a basic pillar of the Rule of Law. In PA, the alienator will be looking for loopholes out of any Court orders. For example, an order that states that 'the child will be with the mother between 5 and 7pm' does not specify who does the pickup, the dropoff, from where and to where, and so on. Thus, Court orders need to be very detailed, specific and inclusive of what sanctions will be applied in case of non-adherence. The Court should stay away from 'threatening' with sanctions that it will not then be prepared to apply once the transgression occurs, as it most certainly will.

Possible sanctions at early stages could be the imposition of fines, community work and financial compensation to the target parent. For example, when the target parent has to take time off work and pay the lawyer to attend a sitting that is then adjourned as a result of inaction or delay tactics by the alienating parent, then the alienator could be made to compensate for such financial losses.

Imprisonment must only be the remedy of last resort as it will only serve to increase the hostility between the parties, and is counter-productive to the aim of the proceedings to restore the child-parent bond, since the alienated child will side with the alienator and blame the target parent for putting the 'preferred' parent in prison. However, detention could still form part of the case strategy if a very short sentence is imposed, for example of one to three days, in extreme cases, as this could act as a deterrent and encourage compliance, particularly in the early stages of the proceedings.

In order to maintain judicial continuity and decrease delays, criminal sanctions for contact denial should fall under the jurisdiction of the Family Court so that they will be heard and decided by the same Judge hearing the case.