



What to do When Children Refuse

Evelyn Young, Partner, March 2023.

Children resisting contact with one parent post separation is not uncommon, however it can be an extraordinarily difficult situation to manage. Often the refusal gives rise to allegations of parental alienation having taken place, and it can be difficult to get to the bottom of the matter.

This session aims to provide insight and practical guidance for family lawyers, when faced with a parenting matter that involves elements or allegations of child refusal and parental alienation.

Why children refusing time with one parent can be so troublesome

For the purposes of this paper, what is not being discussed is the perfectly normal scenario where a child expresses a preference for one parent over the other, having regard to that child's age, stage of development and history of attachments. What is being investigated is the difficult situation where a child is exhibiting persistent and seemingly disproportionate negative feelings and attitudes toward one parent, which inevitably gives rise to the allegation by the refused parent that the other parent is engaging in a pattern of parental alienation.

Parental alienation colloquially refers to the phenomenon of a parent engaging in conduct and influence over a child, with the effect of undermining the other parent's relationship with the child.

A child who is alienated is defined as:

*...one who persistently expresses strong, negative feelings (such as anger, hatred, contempt, and fear) and beliefs that appear to be irrational, distorted, or exaggerated and significantly disproportionate to the child's actual experience with a target parent. Entrenched alienated children respond in a phobic-like manner and express unremitting, strident rejection of a parent with no apparent guilt or ambivalence. Early precursors of alienation include complaints and expressions of discomfort along with resistance and lack of pleasure in visiting the target parent, together with role reversal and separation anxieties from the preferred parent.*¹

While parental alienation is a term thrown around extraordinarily regularly and with impunity in litigated parenting disputes, the true prevalence of it as well as the underlying reasons for a child rejecting a parent is deeply contested.² Family violence advocates view the majority of claims of parental alienation as little more than a tactic by abusers, to discredit victims of abuse who are

¹ Johnston, Roseby and Kuehnle, 'In the name of the child' (2nd edition, 2009, Springer Publishing Company) chapter 13 Parental Alignments and Alienation: Differential Assessment and Therapeutic Intervention, p 364.

² Proudman, Charlotte, "The discredited legal tactic that's putting abused UK children in danger", theguardian.com, 21 July 2021.



simply trying to protect their children from unsafe contact. Other organisations have been specifically set up to raise awareness to the plight of alienated parents and children, which they say is an underreported but real and extremely damaging phenomenon.³

It is well beyond the scope of this paper to draw conclusions as to the true instance of parental alienation in the family court system, nor whether these cases are being recognised adequately by the Courts or are being misdiagnosed. This paper does however attempt to provide some insights for family law practitioners when a case involving accusations or elements of parental alienation, lands on their desk.

The vexed nature of Parental Alienation

For something with a seemingly simplistic definition, allegations of parental alienation cause disproportionate havoc within litigated parenting matters.

Specifically, parental alienation runs as an anathema to the overarching principles of Part VII of the *Family Law Act*, as set out in section 60B, with a subsequent cascade of associated legal issues and overlaying considerations. This is best articulated by Federal Magistrate (as he then was) Altobelli, who notes of parental alienation:

It challenges the object in s 60B(1)(a) that children should have the benefit of both of their parents having a meaningful involvement in their lives. It strikes at the heart of the principles of shared parenting in s 60B(2). Depending on the nature and extent of rejection or resistance, it may strike at the root of the child's meaningful relationship with one parent: s 60CC(2)(a). In some cases the cause of the rejection may give rise to the need to protect the child from harm: s 60CC(2)(b). In many cases where a child rejects a parent or resists contact that child will be expressing views, and the issue will arise as to what weight to put on those views: s60CC(3)(a). The fact of rejection or resistance undermines the nature of the child's relationship with one parent, and the cause or causes of this may give rise to concerns about the child's relationship with the favoured parent: s 60CC(3)(b). The rejected parent will almost always assert that the child's rejection or resistance is attributable to the favoured parent's lack of willingness and capacity to facilitate and encourage a close and continuous relationship between the child and the other parent: s 60CC(3)(c). In many cases rejection of a parent or resistance to contact appears to occur suddenly and brings about a significant change in a child's circumstances, and an often dramatic separation not just from one parent, but from that parent's wider family: s 60CC(3)(d). Rejection of one parent is sometimes associated with the favoured parent wishing to move away or relocate, thus giving rise to issues of practical difficulty and expense associated with contact and communication: s 60CC(3)(e). All too often in rejection or resistance cases both parents attack the other's capacity to provide for the child's needs: s 60CC(3)(f). Rejection or resistance may be associated with post-separation changes in lifestyle: s 60CC(3)(g). When a child rejects a parent there are almost always issues of parental attitudes and responsibilities: s 60CC(3)(i). The dark shadow of family violence is sometimes a factor in

³ See for example, Eeny Meenie Miny Moe Foundation.



*these cases: ss 60CC(3)(j) and (k). The risk of re-litigation seems disproportionately present in these cases: s 60CC(3)(l). Finally, issues of reasonable practicality often permeate these cases: s 65DAA(5). **Indeed it is hard to think of a single category of parenting case that potentially throws up as many legal considerations as cases where a child rejects a parent or resists contact.**⁴*

In addition to the plethora of legal considerations, the stakes are often so much higher in matters involving parental alienation. These matters are often sensitive, volatile, and with catastrophic consequences that flow from mismanagement by the legal system. Time is often of the essence, as a child may descend into an extreme state of alienation fairly quickly. Conversely, the process required to restore the relationship between a parent and a child is often slow.

From a child's perspective, it is well established that true alienation is hugely psychologically damaging to a child's wellbeing, particularly in circumstances where a child is led by a parent to believe or make unfounded allegations against the other parent. A child who disproportionately, unreasonably or pathologically reject a parent is at risk of undesirable long-term outcomes, such as personality disorders, relationship problems and mental health problems.

Similarly, the long-term psychological consequences of a child being forced to spend time with a parent who they have rejected for good reason, and to have their wishes downplayed in the legal process on the basis that they have been, in effect, brainwashed can be equally if not more damaging.

The Legislative Pathway

The legislative pathway for parenting matters is set out as follows:

1. Section 60B sets out the Objects and Principles of Part VII of the Act:

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

⁴ Dr Tom Altobelli, *Parental Alienation: the facts and the fiction*, 15th National Family Law Conference 2012.



(2) *The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):*

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

2. Section 60CA provides the Court must regard the best interests of the child as the paramount consideration when making parenting orders.
3. The primary considerations when determining the best interests of a child are set out in section 60CC(2). These provide as follows:
 - a. Section 60CC(2)(a) – the benefit to the child of having a meaningful relationship with both of their parents; and
 - b. Section 60CC(2)(b) - the need to protect the child from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence.
 - c. Where in conflict, the Court is to give greater weight to the consideration in (2)(b).
4. The additional considerations are then contained in Section 60CC(3)

Do have regard for the *Family Law Amendment Bill 2023*. If passed, this Bill will introduce significant changes to the pathway, including:

1. A slimmed down Section 60B.
2. A significantly shortened section 60CC, with the removal of the primary and additional considerations.
3. Removal of Section 61DA and 61DB. This change removes the presumption of equal shared parental responsibility being in a child's best interests.



4. Removal of Section 61DAA.

In matters where a child is refusing contact, the priority has to be getting to the bottom of why this is occurring. This is a difficult task, particularly in matters involving allegations of alienation. In these matters it is common for one or both parents to assert the relevance of s60CC(2)(b). The so-called alienating parent usually will allege that the alienated parent has engaged in conduct falling within the realm of section 60CC(2)(b), justifying both their opposition to the child spending time with the alienated parent as well as the child's attitude toward the alienated parent.

Conversely, the alienated parent will deny the allegations made against them, and claim instead that the other parent is engaged in a pattern of alienation against them. In doing so, they will point to the well-documented poor outcomes for alienated children, and argue that the act of causing a child to become unreasonably estranged from a parent in of itself constitutes family violence, in that they are emotionally abusive and coercive behaviours.

In some cases, this can result in a fairly clear dichotomy for the court to determine on the facts, namely whether the child's rejection of a parent constitutes either:

1. "Realistic estrangement". This refers to the situation where a child has become estranged from a parent as a result of being subjected to or observing domestic violence or other extreme parental deficiencies on the part of the estranged parent.
2. "Pathological alienation".

In other cases, the boundary is not so clear, and there may be present elements of both a degree of alienation as well as a degree of lack of insight and sensitivity on the rejected parent's part. These hybrid cases are often more problematic to address, and require a more nuanced approach to the appropriate interventions.

Making a determination as to the factors underlying a child's rejection of a parent is, of course, only half the exercise. In the event that the Court determines that there is an element of alienation, the Court must then consider what response or intervention is warranted. In extreme cases, this will involve a change of residence. In less extreme cases, this may involve therapeutic counselling for the parties and the children. Irrespective of the severity of the issue, it is essential to engage suitably qualified experts to assist the court. I discuss further, below, the range of possible interventions and Orders that may be appropriate in matters involving alienation allegations.

Running the Case

Acting in a matter with an element or allegation of parental alienation can be extremely challenging. Set out below are practical guidance tips for lawyers acting for parties on both ends of the alienation spectrum.

[Acting for the alienated parent](#)



1. When confronted with a parent who claims to be alienated, the first thing a lawyer ought to be doing is reality testing the claim. Is there evidence of alienation, or is the child presenting with normal affinities or preferences for the other parent, having regard to their age and development? If there is a rejection of the client by the child, is the client blaming alienation as a means of absolving responsibility for the state of their relationship with the child? If there is an element of previous wrongdoing or parental ineptitude on the part of the alienated parent, encourage the client to acknowledge the impact of their actions, and take steps to address their behaviour.
2. Noting that these matters do not typically have a speedy resolution (and nor would that be appropriate given that time and care needs to be taken in first assessing the underlying considerations and secondly to allow any interventions to take effect), it is nonetheless important to operate promptly early on. The longer the alienation continues, the scope of negative outcomes for the children expands, and the likelihood of success of any interventions decreases. Get the matter into court early, and get appropriate interventions in place early.
3. It is also important to counsel the alienated parent of the need to operate with sensitivity. There is little point in scoring a win in court, only for it to turn out to be a pyrrhic victory. By way of example, issuing a subpoena to a child's trusted counsellor may yield helpful evidence, however it is equally possible that the if the child learns of their trust being breached, this may serve to further alienate them from the parent.
4. Connect your client with a mental health practitioner, preferably one with experience in family law matters, who can provide them support in navigating the relationship with the child as well as to cope with the rejection from the child.
5. Counsel your client about what is realistic and likely in the circumstances. This will involve an assessment as to the severity of the disconnection between the child and parent, what is developmentally appropriate for the child, as well as the attitude of the other parent. It will reflect poorly on a litigant if they seek a change of residence order in circumstances where this is not warranted and/or without demonstrating any insight as to the effect of such an intervention on the child.

In terms of the weaponry available to the Court in matters involving parental alienation, there are a range of interventions that can be deployed, often concurrently, depending on the nature and severity of the problem. The most common of these are listed as follows:

1. The appointment of a psychologist to engage in therapeutic counselling with the parties and the children. This is one of the first interventions a party ought to seek, with the aim of starting it as soon as possible. It should be noted that the goal of this counselling is broader than just re-establishing contact between the child and alienated parent. It is important to



also address the underlying attitudes the child has toward the parent, and restoring appropriate parenting roles in the family.

2. Evidence gathering – subpoenas to the Police, DFFH, the child’s school, etc.
3. Parental education and therapy.
4. Psychiatric assessments of both parties, and for the preparation of a family report, preferably after the therapeutic counselling process has had time to yield results.
5. The implementation of developmentally appropriate parenting arrangements.
6. The appointment of an Independent Children’s Lawyer.
7. Consider whether restraints on the alienating parenting are appropriate. For example, in cases where there is concern that a child is being coached into making false allegations or being exposed to too many medical practitioners.
8. The involvement of the child’s school. This can be an incredibly fine line to walk however, as it runs the risk of threatening the relationship of trust between the child and their caregivers.
9. A change of residence for the child, and a moratorium period on the child communicating with the alienating parent. This is obviously an extreme intervention, and the threshold for making the Order is high. Specifically, it requires a determination that remaining in the alienating parent’s care would be more detrimental to the child than the inevitable stress and trauma associated with a sudden change of residence. It also requires a consideration of the likely success of the relocation.

Acting for the alleged alienating parent

When representing a client who is accused of engaging in a pattern of parental alienation, the role of the lawyer is to assess the evidence and advise and strategize accordingly. This is easier to do in matters where it is fairly obvious one way or the other. It is the matters that straddle the fence that can be quite difficult to manage, and your advice may change as the matter progresses. Some tips or managing these cases are as follows:

1. Avoid becoming enmeshed with your client’s case, or being little more than their mouthpiece. Reality test their claims regularly, with the introduction of each new piece of evidence, and give objective advice.
2. Organise counselling for your client, with the caveat that the records may be subpoenaed at some stage.



3. Of particular difficulty are cases where your client has made allegations of abuse and genuinely believes the other parent poses a risk to the child but which is not borne out on the evidence. Whilst this is an uncomfortable conversation to have with a client, you are doing them no favours in the long run by sparing them the details of the deficiencies in their case.
4. It is common for clients in this situation to have a distorted view of reality as well as a distorted risk assessment ability. It is also common for them to believe without question statements or allegations a child has made about the other parent, regardless of how outlandish or physically impossible the allegation. In these circumstances, it can be helpful to take the client through the objective likelihood of whether the alleged incident could have occurred, and also whether there could be a more innocent or benign explanation. Once they have identified whether there is a more benign explanation, walk them through an assessment as to which scenario objectively is more likely.
5. Relevant for all parenting matters, but of particular assistance when acting for a suspected alienating parent, section 60D of the *Family Law Act* sets out the matters a legal practitioner must advise their client about in relation to the best interests of a child. Referring the client to these regularly can assist to refocus their attention.
6. For junior lawyers, enlist the help of a senior practitioner.

Case examples

Guerra & Guerra [2021] FedCFamC1F 73

These proceedings related to a 10 year old child. The parties separated when the child was 5, and since that time he lived with the mother and only spent limited and sporadic time with the father, and was actively resisting doing so.

It was the father's case that the mother had engaged in a continuing course of conduct to undermine the child's relationship with him, by insinuating a variety of contexts that the child may have been the victim of sexual abuse perpetrated by the father.

The mother initially ran an "unacceptable risk" case against the father, but ultimately abandoned this and sought that the child live with her and spend time with the father on alternate weekends and half school holidays. She argued that the various concerns she had expressed in the past were not unreasonable, in circumstances where she was supported by the State child protection authorities, along with the father's failure to engage with the child's complex health situation.

The Court found that the mother's concerns about the father were without substance, and that the mother had waged a sustained campaign of denigration against the father which inflicted serious emotional and psychological harm on the child. The Court found that the mother would continue to



harm the child by failing to support his relationship with his father and failing to disabuse him of the notion that he has been sexually abused in some way by his father, if the child was not removed from her care.

The Court weighed the two options:

1. Leave the child in the care of the mother in the knowledge that this course will likely ensure that the child's relationship with his father continues to be undermined and that the mother's narrative of sexual abuse will be perpetuated. In this scenario, the court found, the child would likely grow up falsely believing that his father had sexually abused him, with the concomitant risk of ongoing harm to his mental health and psychosocial functioning for the rest of his life.
2. Remove the child from the care of the mother, recognising that this change will be dislocating at best and perhaps traumatic in the short term and even beyond, but giving the child an opportunity to develop a meaningful relationship with his father and come to understand that he has not been sexually abused by him. And with the appropriate interventions to enable the child, in time, to resume his relationship with the mother.

Balancing those two risks the Court made an order for the child to live with the father, and for there to be a three month moratorium on time with the mother. Following which, supervised time with the mother commence for 6 months, graduating to unsupervised time.

Somers & Somers [2017] FamCA 713 (14 September 2017)

The proceedings related to the parties' daughter aged 8. Both parties sought sole parental responsibility and residence of the child. Justice Bennett ordered that the child live with the father and that he have sole parental responsibility.

The mother alleged that the father had perpetrated family violence against her, including sexual, emotional and verbal abuse. DHHS received several notifications concerning the child's exposure to family violence and allegations about the father sexually assaulting the mother.

The child's time with the father was initially supervised. A s11F report was prepared and a psychiatric assessment of the parents was ordered. The expert's opinion was that the mother appeared actively engaged in an alienating process which had significant impact on the child who appeared fully aligned with the mother in regard to her attitude to and depiction of the father as being dangerous.

At trial, her Honour found the mother to be an unreliable witness. The mother's allegations of family violence were not accepted and it was concluded that the father was not a perpetrator of family violence. In contrast, her Honour found that *"to the very significant degree to which the child has been required to adopt the wife's allegations as being true, and the child's relationship with the*



husband has been dislocated, the wife has acted abusively and wholly contrary to the interests of the child” [123].

Her Honour was satisfied that if the child were to remain living with the mother, there would be no realistic possibility of the child having a meaningful relationship with the father.

Mallory & Mallory [2018] FCCA 2335

The proceedings related to four children aged 5, 8, 10 and 12 years old. Judge Williams ordered a reversal of primary residence, for the children to live with the mother instead of the father. Orders were made for the children to spend significant and substantial time with the father, but only after a moratorium of six months for the two older children, and at least eight weeks for the younger children.

The mother commenced proceedings shortly after separation as the children were only spending one hour a week with her supervised by the father, or a person nominated by the father. At the time of the hearing, the younger children were spending unsupervised time with the mother. The eldest child was spending supervised time with the mother and the second eldest child’s time with the mother would recommence when recommended by the child’s therapist.

At trial, the mother argued that the father had deliberately alienated the children from her and, if they remained in the father’s care, the children would lose their relationship with her, thereby causing emotional harm. The father asserted that the children were at risk of physical and emotional harm in the mother’s care.

Her Honour did not find it probable that the children would be at risk of harm in the mother’s care and concluded that the children should live with the mother because meaningful relationships between her and all the children were “absolutely essential for their future emotional and psychological welfare” [377]. Her Honour found that the father had no capacity or willingness to facilitate relationships between the children and the mother. The father appealed the decision asserting that her Honour had erred by finding that the mother did not pose risk to the children. The father’s appeal was subsequently dismissed by the Full Court of the Family Court of Australia.

Irish & Michelle [2009] FamCA 66

These proceedings concerned two children, aged 9 and 8. The father sought that the children live with him in Victoria and the mother sought that the children live with her in Tasmania. The mother had been the children’s primary carer during the relationship and post-separation. The children both expressed strong views to remain in her primary care. After separation, the father relocated to Melbourne to live with his new partner.

His Honour ordered equal shared parental responsibility, but that the child live with the father and spend holiday time with the mother, as the parties lived in Tasmania and Victoria respectively.

There was poor communication between the parties and high conflict which adversely impacted the 9 year old child. The impact of this was that the child was becoming estranged from her father and either suffered or was at risk of suffering serious psychological damage. The father argued that the



only way to protect the child was to change the children's residence. His Honour found that the child's relationship with the father was damaged due to a number of reasons, including the impact by the mother and/or her family, although it was unclear whether it was intentional or unintentional. His Honour found that in its most benign, it lacked insight.

During the hearing, questions were raised as to whether the Court should make an interim order or final order. The advantage of an interim order was that if things went wrong there would not be a need for a further application to the Court. However, his Honour decided to make final orders noting the emotional and financial cost of the proceedings.

Wang & Dennison (No. 2) [2009] FamCA 1251

The proceedings concerned two children, aged 11 and 9. Justice Bennett ordered that the children live with the wife and spend no time with the father.

The children were completely estranged by the father, not having spent time with him since the children were 7 and 5 years old respectively. The mother had made false allegations of physical and sexual violence and purposefully conditioned the children to believe that they were also abused by the father, when they had not.

The mother submitted that the children were at serious risk of committing self-harm if placed in the father's care, which was supported by the evidence of the family report writer. The father submitted that the children were at risk of psychological abuse and exposure to violence by the mother. His Honour found that there was no risk of physical abuse, however, the mother's false allegations against the father, and her involvement of the children in those allegations, constituted emotional and psychological abuse of the children.

However, his Honour formed the view that requiring the children to spend time with the father and requiring them to attend therapy directed at re-unification would place them at an unacceptable level of emotional and physical risk. The risk of the children suffering emotional abuse by the mother diminished if the children did not spend time with the father.

Lankester & Cribb [2018] FamCAFC 60

Here, the mother alleged that the father had sexually abused the parties' 9 year old child. The child lived primarily with the mother following separation.

The credibility of the allegations was left wanting, in circumstances where medical examinations and assessments from the Department concluded there was no evidence of sexual assault. This was coupled with the mother's frequent interrogations on the child.

The Family Consultant who met with the family expressed the opinion that left unchecked, the mother's conduct would expose the child to "*continuing distress and confusion about her relationship with the Father whilst she lives with the Mother*".

The Trial Judge ultimately found that the mother had imprinted on the child her belief that the father had sexually abused the child, notwithstanding that the belief lacked evidentiary support. She



made orders changing the child's primary residence to the father, and ordering a 6 month moratorium on the time the child spent with the mother. Following the conclusion of the 6 month period, the child was to spend supervised time with the mother each alternate weekend.

The mother appealed this decision, specifically the requirement for supervised time at the conclusion of the 6 month moratorium period. She was unsuccessful on appeal.

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