

Evidence submitted by The Family Law Bar Association

1. It is now well over 2½ years since Wall J (as he then was), the Chairman of the Children Act Sub-Committee of the Lord Chancellor's Advisory Group on Family Law, produced a report called "Making Contact Work". The report received a warm welcome from practitioners, the judiciary and, notably, parents deprived of contact with their children for no good reason.

2. The Government, through the then Minister with responsibility for family law, Rosie Winterton MP, promised that the recommendations, few of which attracted any real controversy, would be "carefully considered". The Government was, she said, committed to increasing contact between children and non-resident parents where it was safe to do so. From April 2003 we were told that this was to be a "strategic objective" of the Lord Chancellor's Department.

3. Not until 21 July 2004 did the Government finally publish the Green Paper "Parental Separation: Children's Needs and Parents' Responsibilities" (Cm 6273). It is no secret that in the intervening period some members of the Children Act Sub-Committee were disappointed, if not inwardly seething, that the urgent need for change identified in the report had, seemingly, been over-looked.

4. The members of this Association welcome the proposals for change outlined in the Green Paper. We have said so in a written response to the Government and we have conveyed those views orally to the Minister, Baroness Ashton, on several occasions.

5. WHERE THINGS HAVE GONE WRONG

Court orders for contact are made in the expectation that they will be obeyed. All members of this Association who practise in this field can call to mind cases where the parent with care (invariably the mother) determines that he/she knows best and treats the order with impunity (or lip service, which is equally bad), seemingly secure in the knowledge that there is perhaps little that the court can do about it.

The reluctance on the part of the other parent (invariably the father) to pursue applications for penal notices or for committal for contempt is entirely understandable, given the fear that the child may be told "you will not believe what your father is trying to do to us now". An application for a change of residence is no solution for a father who cannot provide full-time care for the child and wants no more than that the contact order be obeyed: a perfectly respectable position.

It is remarkable that, as the law presently stands, the court should possess so many weapons to enforce residence orders, and yet so few when it comes to the enforcement of contact orders. Both, after all, regulate the amount of time that the child is to spend with each of his parents.

6. SECTION 14 OF THE CHILDREN ACT 1989 IS IN THESE TERMS

1. Where:

(a) a residence order is in force with respect to a child in favour of any person; and

(b) any other person . . . is in breach of the arrangements settled by that order, the person

mentioned in paragraph (a) may, as soon as the requirement in subsection (2) is complied with, enforce the order under Section 63(3) of the Magistrates' Courts Act 1980 as if it were an order requiring the other person to produce the child to him.

2. The requirement is that a copy of the residence order has been served on the other person.

3. Subsection (1) is without prejudice to any other remedy open to the person in whose favour the residence order is in force.

The penalty here facing the father who wrongfully retains the child at the conclusion of a period of contact is a finding of contempt, coupled with a fine of up to £5,000 or committal to prison for a period of up to two months.

Relevant parts of Section 34 of the Family Law Act 1986 (applicable to proceedings in courts at all levels) are as follows:

1. Where:

(a) a person is required by a Part I order, or an order for the enforcement of a Part I order, to give up a child to another person ("the person concerned"), and

(b) the court which made the order imposing the requirement is satisfied that the child has not been given up in accordance with the order:

the court may make an order authorising an officer of the court or a constable to take charge of the child and deliver him to the person concerned.

2. The authority conferred by subsection (1) above includes authority:

(a) to enter and search any premises where the person acting in pursuance of the order has reason to believe the child may be found, and

(b) to use such force as may be necessary to give effect to the purpose of the order.

Whilst this legislation is apt to enforce the recovery of a child who is wrongfully retained at the conclusion of a period of contact, in terms of the enforcement of a contact order the moment will almost invariably have been missed. The court will need to be satisfied that the child has not been given up in accordance with the order. All too often the court only learns of the default after the event where, for example, weekend staying contact has not taken place. It may be more apposite to enforce a longer period of holiday contact, provided, that is, that it is possible to obtain fresh travel documents and, if needs be, fresh accommodation.

Sections 29 and 50 of the Children Act 1989 provide a composite code for the speedy recovery of children in care and for the prosecution of those who, for example, retain them at the conclusion of a period of contact. That kind of behaviour is not tolerated.

7. SO WHAT IS THE PARENT TO DO?

As Bracewell J said in the case of V-v-V [2004] EWHC 1215 (Fam) at para 10:

Currently, there are only four options available to the court and each is unsatisfactory: one, send the parent who refuses or frustrates contact to prison or make a suspended order of imprisonment. This option may well not achieve the object of re-instating contact. The child may blame the parent who applied to commit the carer to prison. The child's life may be disrupted if there is no one capable of or willing to care for the child when the parent is in prison. It cannot be anything other than emotionally damaging for a child to be suddenly removed into foster care by social services from a parent, usually a mother, who in all respects except contact is a good parent. Two, impose a fine on the parent. This option is rarely possible because it is not consistent with the welfare of a child to deprive a parent on a limited budget. Three, transfer residence. This option is not necessarily available to the court, because the other parent may not have the facilities or capacity to care for the child full-time, and may not even know the child. The current case is one in which this is a real option. Four, give up. Make either an order for indirect contact or no order at all. This is the worst option of all and sometimes the only one available. This is the option that gives rise to the public blaming the judges for refusing to deal with recalcitrant parents. This option results in a perception fostered by the press that family courts are failing in private law cases and that family judges are anti-father. The truth, however, is that without the weapons to use against what is in essence a small group of obdurate mothers, the ability of judges to do better for fathers is strictly limited. It is not commonly recognised by the public that, in order to have enforcement procedures which are effective, legislation by Parliament is necessary. [Emphasis supplied]

Bracewell J spelled out very clearly in her judgment the perceived need for legislative reform in three areas:

MEDIATION

Judges and magistrates should have the power to refer parties to mediation at any stage of the proceedings.

THE FAMILY ASSISTANCE ORDER

Orders should henceforth be directed to CAFCASS and not to local authorities. The time limit of six months should be removed. The requirement for the circumstance of the case to be "exceptional" should go and the parties should not have the option of refusing to be named in such an order. There must, she said, be a commitment on the part of the Government to proper funding.

ADDITIONAL ENFORCEMENT POWERS

She identified the need for a clear commitment to legislate to provide the court with the following additional powers:

- the referral of a defaulting parent to information meetings, meetings with a counsellor, parenting programmes and classes designed to deal with contact disputed;
- the referral of a parent to a psychiatrist or a psychologist;
- the referral of a "non-resident" parent who is violent or in breach of an order to an education for perpetrators programme;
- a probation order with a condition of treatment or attendance at a given class or

programme;

— a community service order with programmes specially designed to address the default in contact; and

— financial compensation, for example where the cost of a holiday has been lost.

These proposals have, in large measure, been taken up by the Government in the Green Paper. They receive the full support of members of this Association.

8. DELAY

Delay has been described as the scourge of the family justice system. It is inimical to the welfare of children and should be avoided in almost all the cases that come before the courts. Planned and purposeful delay is a different matter altogether.

Munby J in the case of *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam) identified five areas of concern, common hallmarks of intractable opposition cases, and all features of a system that was failing parents and children alike:

— the appalling delays of the court system, exacerbated by the absence of any meaningful judicial continuity, seemingly endless directions hearing, the lack of an overall timetable, and the failure of the court to adhere to such timetable as has been set;

— the court's failure to get to grips with the mother's (groundless) allegations;

— the court's failure to get to grips with the mother's defiance of its orders and the court's failure to enforce its own orders;

— the all too frequent response to any significant problem with contact: list the matter for further directions; reduce contact in the meantime; obtain experts reports; direct the filing of further evidence—all of which produces only further delay which, in turn, exacerbates the difficulties and leads eventually to a situation which may be irretrievable; and

— the fact that too often in such cases we only wake up to the fact that the case is intractable when it is too late for any effective intervention.

As he observed at paragraph 36 of his judgment:

. . . the two great vices of our present system are:

(i) that the system is, for all practical purposes, still almost exclusively court based; and

(ii) that the court's procedures are not working, and not working as speedily and efficiently as they could be and, therefore, as they should be.

In terms of improving the present system he advocated the adoption of a protocol (not dissimilar to the existing protocol in public law children cases) to address the key principles of judicial continuity, case management and, crucially, time-tabling. Bracewell J in the case of *V-v-V* (above) associated herself with these observations in terms of improving the system. On the importance of judicial continuity she had this to say (paragraph 8):

Judicial continuity is essential. For a succession of judges to have to read a case for the first time, often consisting of many bundles, is not only wasteful of judicial time, but risks inconsistency of approach and adds to delay and dissatisfaction of the parties.

There are undoubtedly difficulties in achieving continuity, particularly in the county courts and the family proceedings courts. In the former jurisdiction full-time judges have other duties in criminal and civil courts which may remove them from family work for months at a time; and part-time recorders, by definition, sit for limited periods in the year. In the family proceedings courts it is by no means easy to convene the same bench of magistrates at short notice. However, these problems are capable of solution and must be addressed by the Court Service.

The President's new Framework for the conduct of private law disputes before the courts should go a considerable way towards overcoming avoidable delay in terms of active case management and timetabling. The members of this Association support this important new initiative.

It is no exaggeration to say that the current system is currently creaking under the burden of cases waiting to take their turn to be heard in lists which are jammed to capacity. We do not have sufficient judges allocated to hear these cases nor are sufficient courtrooms made available to enable them to be heard. This is frustrating for all and detrimental to the children who are the subject matter of these disputes.

Part of the solution must lie in deflecting as many cases away from the courtroom to other means of dispute resolution. That said, family courts are still seriously under-manned and this, too, needs to be addressed.

The members of this Association support the initiatives contained in the Green Paper. We look forward to their speedy implementation and hope that sufficient by way of resources will be made available for them to achieve their stated aims. We have long advocated the speedy resolution of all family disputes by means other than a lengthy, fully-contested hearing. Members of this Association were the architects of a "pilot scheme" for the swift determination of cases involving the division of assets on divorce or separation. That scheme (which was to become law under the Family Proceedings Rules 1991) has been in operation nationwide for many years now. Members were likewise the principal architects of the public law protocol in children cases, designed to reduce delay by a greater concentration of the issues in the case and active case management. We were likewise consulted with regard to the President's new Framework in private law cases and we will continue to offer her every assistance as structures are gradually put in place.

We hope that these outline submissions will assist members of the Committee.

The Family Law Bar Council

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