

6 Enforcement

Problems in enforcing court orders

104. It is pointless for the courts to make orders if those orders are not then enforced. There is a legitimate public interest in ensuring that where an order is made by the court it is subsequently obeyed. Failure to enforce contact orders is the basis of some of the claims that the system is 'biased against fathers'. Furthermore, a failure of the State to enforce orders in this sphere has been held by the European Court of Human Rights to amount to a breach of the State's positive obligations under the European Convention on Human Rights.

105. Nonetheless, enforcement of orders has always been fraught with difficulties. There are obvious practical problems with fining or imprisoning recalcitrant parents—especially those who live with the children in the case—since the main impact of doing so will be to injure the children's interests. Witnesses gave various reasons why parties to cases disobey court orders. Some, including Women's Aid, say that some orders are not obeyed because of fears of domestic violence (see section 8 below on Safety).

106. The Government has recognised that groups representing non-resident parents have substantial concerns about the failure to enforce court orders. Families Need Fathers has commented that:

There is much debate, often lacking in detail, about enforcement procedures and vague promises to legislate. Whatever is done, this should be clear—that denying children the contact ordered is not acceptable and will not be permitted. Taking action for enforcement should not be the responsibility of the contact parent. The authorities should take responsibility for ensuring their decisions are complied with.

107. One area of concern is whether the Government has gone far enough in its consultation to address recommendations which have already been made by the judiciary and other child law specialists. In particular, Lord Justice Wall has drawn attention to the fact that powers suggested in the CASC report to allow judges to refer a parent to a psychologist or psychiatrist (publicly funded at the first instance) have been dropped; and that the power to refer a non-resident parent to an education programme or a perpetrator programme have been replaced with the words "a relevant programme". We raised this with ministers in oral evidence. Baroness Ashton responded: You cannot make somebody go to a psychiatrist or a psychologist because that is not the way they work, nor can you have compulsory discussions with a doctor, it does not work like that. I think they would find that unacceptable in terms of clinical practice.

108. Dame Elizabeth Butler-Sloss set out a number of additional powers which she believed would usefully assist the judiciary, indicating that:

What we need is community service, parenting plans, requiring people to go and get information to teach them how to be good parents and why the other parent matters because we want children to have both parents.

109. The need to find alternative methods of enforcement is clear because it is recognised that imprisoning the non-resident parent or taking the child into care because of the failure to observe contact orders would almost always be to the detriment of the child. Even fines could in effect punish the children. It is a key point that the enforcement of court orders

should not conflict with the interests of children. In written evidence NCH indicated that:

For us the problem isn't really that judges lack sufficient powers to enforce orders: as a children's charity we endorse the view that it would be wrong for judges to 'punish' obstructive parents if this resulted in adverse consequences for the children, as it invariably would. The problems that come to court reflect the complexities of people's lives and there are no simple solutions to the conflicts between parents. An order for contact or residence alone cannot remove the animosity between the parents.

Mr John Eekelaar, Reader in Law, Oxford University, summarised the position:

If the only way in which the father's interests here can be protected is by a measure which the court has expressly found, and that is why I want to highlight this, has expressly found, will cause greater harm to the child by making it more real than the present situation of the child, that it will cause greater harm to take those steps, we have just got to make a decision, which person's interests are right, the child's, protection against harm to the child or the father's interest, and you have got a straight choice. I cannot solve that dilemma.

110. On 18 January 2004, the Government indicated that it would be introducing draft legislation this Parliamentary term containing new policies in this area.

The draft Bill will offer the courts new and more flexible powers, including: power to direct parties in a contact case to attend information meetings, meetings with a counsellor, parenting programmes/classes or other activities designed to deal with contact disputes; and power to attach conditions to contact orders which may require attendance at a given class. Where a contact order has been breached, courts will be able to: impose community-based 'enforcement orders' for unpaid work or curfew; or award financial compensation from one party to another (for example where the cost of a holiday has been lost). We welcome the additional flexibility which the Draft Bill proposes to give the courts in dealing with recalcitrant parents.

111. Disobedience of court orders and the flouting of the rule of law is unacceptable. Nevertheless, forcing parents to do things which they do not consider to be in their child's best interests may not work. We believe the emphasis should be placed on overcoming problems through CAFCASS intervention and education programmes, rather than by the traditional means of enforcing court orders through a system of punishments. This will involve CAFCASS monitoring the way in which court orders are carried out and fully engaging in questions of enforcement where necessary. This will require a whole new approach for CAFCASS, which up to now has not had a role in supporting court orders. CAFCASS case workers will need to take a much more proactive role as the first point of appeal where arrangements under the court order have failed.

112. The new role for CAFCASS was a major element in the Government's plans, set out in the Green Paper (see paragraph 30 above). Potentially, this is a revolutionary change. If this major new responsibility for CAFCASS is to be carried out successfully, the Government will need to ensure that sufficient resources are placed at its disposal. CAFCASS will need enough caseworkers with the relevant skills to carry out this ambitious new work. The organisation will need to accept that its former tradition of service will no longer apply, as the nature of its role will be radically different.

113. The range of enforcement methods to be used should not harm the interests of the children involved in the case: for example, imprisonment of a parent would generally harm

the interests of children, whereas the imposition of a community service order might not. We would expect that punishment would only be appropriate in cases of wilful refusal to obey the court and as a last resort in exceptional cases.

114. The power of the court system is not in itself sufficient to resolve all child contact related issues. We note the efforts made by the Government to broaden the enforcement regime and we welcome a more inventive approach to this problem. Courts will only be in a position to enforce orders if they continue to engage with a case when it is obvious that orders which they have made are failing and where they are given adequate support by CAFCASS.