

Contact breakers

by Roger Mackenzie, John Fotheringham

Roger Mackenzie surveys family lawyers' views on how to enforce contact orders; John Fotheringham highlights a provision that may help to win some financial support
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For many family lawyers, the findings of a recent survey suggesting that the incidence of non-compliance with child contact orders dealt with by the courts is low, and that repeated child contact actions are not a significant issue for the courts, may contradict the evidence of their files.

A recently published survey, carried out by the Centre for Research on Families and Relationships on behalf of the Scottish Executive, concluded that the most common reason to return to court in relation to an earlier contact order was to vary that order, rather than seek enforcement due to non-compliance. The Survey of Sheriff Clerks' Perspectives on Child Contact Enforcement in Scottish Sheriff Courts found that enforcement of contact orders for non-compliance forms a negligible proportion of family actions. When they do arise, they may involve repeated appearances by the same families, "but do not seem to present any particular operational difficulties". The survey also reported the valuable role mediation services and contact centres have in assisting in contact disputes.

Setting aside concerns as to how much weight can be apportioned to the findings, given this was a small scale survey offering only the perspectives of sheriff clerks, the survey's conclusions appear to be at odds not only with the experience of family lawyers, but also public perception and concerns expressed by policymakers.

Before the Justice Committee

As Professor Kenneth Norrie noted in October's Journal ("Lesbian Families, Parenthood and Contact", 24), the matter exercised the Scottish Parliament during the passage of the Family Law (Scotland) Act 2006. Indeed the CRFR survey was commissioned because "policymakers wish to improve their understanding of non-compliance with court orders and how this matter is dealt with by the courts".

In the course of the parliamentary process the Justice 1 Committee concluded that "the two sanctions available to the court – fines or imprisonment – are not effective in resolving situations when a breach has occurred".

The committee reported: "courts will encourage, cajole or even threaten resident parents to comply with the terms of the court order but the bottom line is that the court will not actually penalise the resident parent because it would not be in the best interests of the child's welfare to do so".

The committee made reference to the findings of an Australian parliamentary report, which described a similar position, and heard evidence from Family Mediation Scotland who observed that even where a court makes a contact order, "there are

many ways in which a resident parent who wants to resist contact can make difficulties”.

Families Need Fathers pressed for compulsory parenting education and community service orders to be introduced in statute, with the suggestion that the resident parent could undertake the community service when the non-resident parent has contact. StepFamily Scotland expressed the view that early intervention at the time of separation offers the best hope of resolution before the relationship becomes too embedded in conflict.

The committee concluded that only in a very small number of cases, the resident parent wilfully ignores a decision of the court – and that no jurisdiction had yet found a solution to that dilemma.

The way forward, English style

But is it satisfactory to conclude that the problem only affects a small number of cases and is too hard to fix, so we'll do nothing? While situations where there is repeated and wilful failure to adhere to a contact order may be comparatively rare, they loom large in a family lawyer's caseload. As week after week the aggrieved parent calls with information about the latest frustrated contact, the feeling of helplessness of solicitor and client escalates with the knowledge that the remedies available in the final reckoning are almost certainly not going to be utilised.

In contrast, in England there has been considerable discussion of the issue, culminating in provisions contained in the Children and Adoption Act 2006.

Anecdotal evidence suggests the provisions were prompted by the emotive remarks of Mr Justice Mumby in a 2004 case where the judge apologised to a father who left the court in tears after abandoning a five-year battle for contact with his daughter. The mother's implacable hostility led to Mr Justice Mumby complaining: “this case illustrates all too uncomfortably the failings of the system. There is much wrong with the system and the time has come for us to recognise that fact and face up to it honestly. If we do not we risk forfeiting public confidence”.

The Act, which has received royal assent but is not yet in force, enables the court to refer parties to contact activities, which could include programmes, classes and counselling, or guidance sessions. Additionally, the court can appoint a Children and Family Court Advisory and Support Service officer to monitor compliance with a contact order. The court can make an enforcement order imposing an unpaid work requirement on a person who has beyond reasonable doubt breached a contact order. The Act also introduced a compensation element, by allowing the court to require an individual who has caused financial loss to another individual as a result of breaching a contact order to pay compensation up to the amount of the loss; moreover, whenever a court makes or varies a contact order it must attach a notice warning of the consequences of failing to comply. The Act stopped short of introducing an electronic tagging enforcement order, though that was included in the draft bill.

Whether influenced by the campaign waged by Fathers for Justice in their various guises or the court pronouncements of Mr Justice Mumby and others, there has at

least been a creative and proactive response to the issue of enforcement of child contact orders in England.

Where the impact falls

Here, although parliament declined to legislate as part of the Family Law (Scotland) Act 2006, there is a consultation process ongoing into family support services in Scotland. This latest consultation is designed to address issues raised, but not legislated on, during the consultation process which led to the 2006 Act, and could conceivably lead to a recommendation to follow England's lead.

But will research such as the sheriff clerks' perspectives continue to preserve the impression that no action is needed, and would that be a fair assumption? The Scottish Executive likes statistics to back up its policies, and if the figures produced by the CRFR survey hold sway, parliament may find justification for further inaction.

Accredited child law specialist John Fotheringham of Fyfe Ireland said he can appreciate why the CRFR paper makes surprising reading, but notes the people surveyed were sheriff clerks who do not pick up the pieces when contact orders are not obtempered.

“As a matter purely of administration I accept that these cases produce very little extra work for the courts. For the families concerned, the consequences can be very serious indeed. Usually a good sheriff will, by appropriate use of the dignity of the court, persuade a reluctant defender that there really is no choice but to do as she is told.

“The problem comes when a defender sticks her heels in and effectively dares the court to send her to prison. I've seen specialist family law sheriffs threaten Cornton Vale in terms that only the dullest brain could fail to understand, but sometimes the defender knows that it is so obvious that it would be against the best interests of the child that the mother should be sent to prison (even briefly) that the threat is seen to be an empty one. For the mother can say to the child, 'Daddy is asking the judge to send me to prison but you'll just have to be brave and I'll see you when I'm allowed out.' The chances of constructive contact after that are slim.

“We have to remember that the primary criterion is the best interests of the child, not the rights of the father. It may be that the father has done no wrong, yet the turmoil which would be caused by the exercise of contact would be, in net terms, detrimental to the child. This is a very difficult balancing act, but in most cases parents after legal advice are prepared to accept the reality either of contact or of non-contact, applying the paramount criterion of the child's welfare. Sometimes a father has to be like the true mother before Solomon.”

False picture

Noel Ferry, head of family law at Maclay Murray & Spens, suggests that the CRFR survey paints a false picture of the incidence of contact orders not being obtempered.

“If you are representing a client who is not getting contact despite having a court order, you would advise them of the sanctions available to the court but would also advise them realistically of the scarce likelihood that these sanctions will be utilised. With an eye on the cost of raising further proceedings, the best advice might often be

that bringing an action to find the resident parent in contempt is not a worthwhile course of action. The corollary of that is that the solicitor advising the party resisting contact will tell them they could face jail, but that is a remote possibility, and often, in that context, the resident parent will feel inclined to take a chance. Only on one occasion have I seen a sheriff send someone down to the cells to think about their conduct.”

Ayr based family law specialist Elizabeth Welsh, recently appointed vice chair of the Family Law Association (Scotland), said she tended to agree with the view expressed by Professor Norrie in October’s Journal that the courts accept that “residence trumps contact”, and that this allows recalcitrant residence parents to get away with defying court orders on contact.

“Most family law solicitors have experience of cases where the parent with residence has in one way or another simply refused to comply with an order for contact. I remember one sheriff who would warn the mother (as it usually was) that he could take the child away from her and give the father custody (as it then was) if she didn’t start cooperating. I’m not aware that he ever carried out this threat but it certainly had an effect. There is now authority for deciding residence in favour of a parent who would promote contact with the other, where the other parent was inclined to frustrate contact. I find that useful in persuading a client to accept a reasonable contact order in order to guarantee residence.”

Welsh has recent experience of a client being fined, but that did not lead to any change in that parent’s attitude.

“I think sheriffs share the frustration about the lack of an effective sanction. The rare cases which lead to findings of contempt are not usually resolved by meting out such punishment. Recently courts have frowned on motions for findings of contempt and instead have encouraged parties to seek a further child welfare hearing so that the sheriff can address the issue in a child-centred way rather than with the full weight of judicial authority. Sheriffs are using such hearings to challenge the recalcitrant parent to justify his or her actions. A straightforward talking-to from the bench, which lets the parent know quite clearly that an order will be made and the parent will be in trouble if it is not obeyed, is effective in most cases.”

Other tools

For Welsh, while the research produced some useful figures to put this issue in perspective, she thinks the findings are a little misleading.

“The question asked seems to have been ‘How many actions for enforcement are there?’ I suggest that we are using such actions more rarely, but not because the problem is that rare. The tool now is the child welfare hearing, perhaps coupled with a referral to mediation. There is also an enormous reliance by the courts on the work of experienced family lawyers who know the great strides the law has been taking towards promoting the rights of children to have a relationship with both parents after separation. Careful work with a client before going into court can bring good results. For that reason I suggest the Executive should look at the English introduction of classes for parents but avoid the community service order option.”

The reality of the challenge for legislating to provide an effective regime for enforcing contact orders is that even the most draconian sanctions may not persuade an intractable parent to facilitate contact or solve the more subtle problem of children being turned against the non-resident parent and expressing a tarnished view to the court, be it directly or via a reporter or curator. Indeed a wider debate might begin by asking whether courts – even in the form of child welfare hearings – are the right forums to decide how much time a child should spend with his father on a Saturday afternoon. There are no easy solutions, but it is to be hoped that in reaching conclusions, policymakers will have access to the right information. They might start by asking family lawyers.

Roger Mackenzie is a solicitor in the family law unit at Maclay Murray & Spens, Glasgow, and a former deputy editor of the Journal

JOHN FOTHERINGHAM highlights a provision in the Family Law Act which may help separating cohabitantes with children, ahead of any reforms to the child support system

When the Family Law (Scotland) Act 2006 was passed, the press suddenly became interested in Scots family law. This in itself was good. Usually the only things which prick up their ears are either the salacious circumstances of a celebrity marital breakdown or the high, wide and handsome financial claims of a super-rich couple who have fallen out and can't mediate. Unfortunately the press coverage of this important Act was rather thin and ill-informed. The headline in the Scotsman when the 2006 Act was passed was "Scotland gives in to quickie divorces", ignoring the very important features of the legislation which came into force on 4 May.

This was a badly missed opportunity, since it is properly the role of the media nowadays to inform the public about public events and news. The Scottish Executive, to give it its due, has tried but lacks the machinery to tell the average person in the street about the development of new legal institutions and remedies.

Now that the 2006 Act has been in force for half a year, how many members of the public know about the statutory rights for cohabitants? Family lawyers will of course have been telling their clients about their new rights and obligations and will have been advising anent cohabitation agreements and the implications of the new Act for intestate succession. Unfortunately we can only tell those people who have chosen to come into our offices in the first place. How many claims will be time-barred simply because the potential claimant was wholly unaware of the existence of the claim?

A hidden nugget?

One feature of the 2006 Act seems to have escaped much discussion, although it has the potential to be very significant in the protection of the rights of the former cohabitant who has the care of the child of his/her former union.

Readers will be familiar with the provision in s 8 of the Child Support Act 1991 as amended, effectively excluding the jurisdiction of the court in questions of aliment. Since the 2003 changes to the child support system the income and resources of the parent who has the care of the child have been irrelevant, no matter how wealthy or poor she may have been. Only the income and resources of the non-resident parent have been counted. This has worked injustice for fathers, mothers and children, as is well known by family lawyers across the land. Thanks to the 2006 Act there may now be a door in the Great Wall of the Child Support Agency, at least for the parent with care who sees the CSA as a poor protector of the welfare of her children.

A burden to be shared

The key to that door lies, if we're lucky, in s 28(2)(b) of the 2006 Act. That paragraph provides that when a cohabitation ends other than by death, one or other of the cohabitants may make a claim and the court may "make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the parties are the parents".

This has a faint echo of s 9(1)(c) of the Family Law (Scotland) Act 1985, which provides that the economic burden of caring for a child of the marriage shall be shared fairly. The wording is different from that in the 2006 Act and one must ask why this should be. The cynic tells us that it is merely because the politicians could not stomach too close a parallel between cohabitation and marriage, particularly given that cohabitation includes same-sex relationships. This is not a satisfactory answer and neither is it one which could seriously be argued in court. If Parliament made a distinction between the terms of s 9(1)(c) of the 1985 Act and s 28(2)(b) of the 2006 Act, there must surely have been a reason for the distinction.

The new Act was passed in the full knowledge of the existence and the difficulties (to put it no higher) of the child support system. The new Act did not legislate on a matter of aliment – that would probably have been improper in light of the terms of

s 8 of the 1991 Act. Family law is a devolved topic but social security, including child support, is not.

Section 28(2)(b) is not a provision in relation to aliment and cannot fall foul of the 1991 Act. The claim is by one parent against the other for a payment to the applicant – not a payment for the child, nor even for the specific benefit of the child.

Watch your back

Nevertheless if the claim is not for aliment as such, it can be for a periodical sum – the restriction to a capital sum in s 28(2)(a) is not repeated in s 28(2)(b) – and it is likely to feel very like aliment in the pocket of the payee. The party making the claim under s 28 can make a claim under the Child Support Act in addition. There is no provision in the Child Support Regulations allowing the non-resident parent to deduct, from his net earnings for calculation purposes, any sum which he is ordained to pay

under s 28(2)(b) of the 2006 Act, even if the order is for a capital sum, payable by instalments. Can this work injustice for the non-resident parent? Of course it can. But it can also cause difficulty for the family lawyer who fails to take the new provision into account when advising a client about the financial consequences of separation after cohabitation.

The caveat to attach to all this is that the Act does not actually say that a s 28(2)(b) order can be a periodical one. Section 29(2)(a) specifically mentions a capital sum and s 28(2)(b) does not, so applying *expressio unius est exclusio alterius* there is a strong case for a quasi-alimentary order. The first cases on the point are going to be very interesting.

More to come

The terms of s 28(2)(b) are likely to be very much less significant for our clients than the reforms which we can expect in the light of the Henshaw Report on the child support system. Reform of child support was mentioned in the Queen's Speech in November, but at the time of writing the DWP had not yet published its white paper. When it does, we will see just how seriously the government has taken Henshaw's trenchant critique of the Agency. Until then we have a possible route through the monolith of the CSA if we choose to take it.

John M Fotheringham WS, Fyfe Ireland, Edinburgh
<http://www.journalonline.co.uk/article/1003676.aspx>