

Clan Childlaw 10th Anniversary Essay Competition: What is the biggest children's rights issue in Scotland and how can the law be used to resolve it?

Essay by Ruari Peoples, Runner-up

Children's Right to their Parents and the Enforcement of Contact Orders

Contact: a Children's Rights Issue

Few would dispute the English judge Wall J's assertion that 'the children of separated parents are entitled to know and have the love and society of both their parents'.¹ In Scotland, this entitlement takes the form a legal right. Under s 1(1)(c) of the Children (Scotland) Act 1995, all parents have a statutory responsibility to maintain personal relations and direct contact with their children. It follows from a classic Hohfeldian analysis that where parents have such a duty, children have a corresponding right to that parental contact.

Where separated parents cannot reach an agreement regarding contact with the parent with whom the children no longer reside, it falls to the courts to make a contact order under s 11(2)(d) of the 1995 Act. In determining whether to make an order – and its terms – the court's paramount consideration is the child's welfare (per s 11(7)(a)): contact will only be ordered if it is in the child's best interests.

Once made, most contact orders are obtempered by the parent with whom the child resides. Sometimes, however, things go wrong: the resident parent refuses to permit, or otherwise sabotages, contact. This can result in contact not taking place for long periods: in *M v S*², by date of judgment, contact had not taken place as ordered for a year and a half; in *G v B*³, for almost 4 years.

¹ *Re O (A Child)* [2003] EWHC 3031 (Fam), [23].

² 2011 SLT 918.

³ 2011 SLT 1253.

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A contact order reflects the arrangements the court has determined are required to maximally secure the child's welfare. Therefore, when orders are defied it is not only the non-resident parent's right to contact that is undermined, but also the child's welfare. Put another way, non-compliance with contact orders – recently called a 'recurring and vexed area' by the Sheriff Appeal Court⁴ – constitutes a violation of children's legal right to contact with both parents, a violation which can have serious negative consequences for their emotional wellbeing and intellectual development.

Faced with non-compliance, it is therefore imperative courts enforce their orders and ensure that children's right to parental contact is upheld. However, determining what form enforcement should take confronts the courts with what Professor Kenneth Norrie has called '[o]ne of the most intractable problems in modern family law'.⁵

Enforcing Contact Orders?

Failure to obtemper a contact order constitutes contempt of court, punishable by imprisonment, and the courts have in the past been willing to impose custodial sentences on resident parents for wilful and sustained non-compliance.

In *M v S*, where the resident parent had 'contumaciously... defied the [court's] orders'⁶ for a period of almost two years, the Inner House upheld the sheriff's imposition of a three-month custodial sentence. In *G v B* the resident parent was 'unapologetic and unrepentant'⁷ in wilfully and consistently refusing to allow contact: the sheriff imposed a sentence of two months imprisonment, upheld by the Inner House.

⁴ *TJ v SB* [2018] SAC (Civ) 15, [26].

⁵ K Norrie, 'Whose View Prevails?' (Journal Online 13 July 2009) <<http://www.journalonline.co.uk/Magazine/54-7/1006772.aspx>>accessed 8 August 2018.

⁶ *M* (n 2), [41].

⁷ *G* (n 3), [22].

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However, more recently the Inner House has turned against the imposition of custodial sentences for non-compliance with contact orders, even where that non-compliance is egregious. In *SM v CM*, the Inner House quashed the sheriff's imposition of a sentence of imprisonment, holding that '[a] custodial sentence... should only be imposed with reluctance and as a last resort'.⁸ In *TJ v SB* the Sheriff Appeal Court found the resident parent's non-compliance to be deliberate and sustained, with 'flagrant disregard for the authority of the court'⁹, but nevertheless upheld the sheriff's decision to impose no sanction.

This restrained approach stems from concern about the impact on the child of imprisoning a resident parent. Gillian Black argues that since 'any contact order has been determined to be in the [child's] best interests', it follows 'that it is in the best interests of the child to reside with the other parent for the rest of the time'.¹⁰ By 'imprisoning the resident parent, the court is therefore specifically acting against the previous determination as to what is in the best interests of the child'.¹¹ Thus, in *TJ v SB*, the court held that 'the effect of the separation of the [resident parent and child] which imprisonment would bring about' justified 'the sheriff's decision to make no order'.¹²

Yet, in *SM v CM* the Inner House maintained that, while a custodial sentence should only be imposed 'as a last resort', '[u]ltimately, the court must enforce its orders'.¹³ However, if this 'last resort' threshold was not met in *TJ v SB* – where the resident parent's non-compliance was wilful, pursued over a prolonged time-period, and with 'flagrant

⁸ 2017 SC 235, [62].

⁹ *TJ* (n 4), [17].

¹⁰ G Black, 'Contact Hearings and Contempt of Court: *SM v CM*' (2017) 21(2) *Edin LR* 275, 280.

¹¹ *ibid.*

¹² *TJ* (n 4), [26].

¹³ *SM* (n 8), [62]).

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disregard for the authority of the court' – it is difficult to envisage circumstances where the courts would ever resort to imprisonment.

Thus, although it was asserted in *TJ v SB* that 'the court is entitled to use... the threat of [imprisonment]... to enforce compliance with its order'¹⁴, such a coercive effect is likely to be nugatory under the current approach. For a threatened sanction to have any deterrent effect there must be some prospect of it actually being implemented: a sanction which is *never* imposed loses all deterrent force. Consequently, with no realistic prospect of a sanction for non-compliance, contact orders are in danger of becoming unenforceable, with the courts in effect acquiescing in 'attempt[s] by... custodial parent[s] to sever the bond between the other parent and their child ... by protracted defiance'.¹⁵

Perhaps the issue lies in the limited nature of the current enforcement options available to courts: in practice, imprisonment or no sanction whatsoever. If less draconian sanctions were available which courts might actually use, could compliance be more effectively achieved?

The courts currently also have the option of imposing a fine for contempt. However, this sanction (according to the reported cases) is seldom, if ever, used because a fine would in effect also penalise the child: as Bracewell J observed in the English case of *V v V*, 'it is not consistent with the welfare of a child to deprive a parent on a limited budget'.¹⁶ Conversely, where a parent is of extensive means, a fine is unlikely to have any tangible deterrent effect at all.

¹⁴ *TJ* (n 4), [28].

¹⁵ *G* (n 3), [47].

¹⁶ [2004] EWHC 1215 (Fam), [10].

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In England, courts can also impose a requirement for unpaid work under s 11J(2) of the Children Act 1989. Again, however, '[t]his... sanction has been rarely used'.¹⁷ The UK government also proposed further potential sanctions: curfew orders and the withholding of passports and/or driving licences.¹⁸ However, it ultimately declined to introduce these measures, on the familiar basis that the 'impact of these sanctions on a parent could have the effect of disrupting the child's life too'.¹⁹

What is required, then, is a sanction producing a sufficiently adverse impact on the parent to operate as an effective deterrent, while at the same time not adversely affecting the child's welfare. If such a sanction was identified, legislation could furnish the courts with the necessary powers. One possible option would be a power to order defaulting parents to attend parenting programmes designed to educate them on the importance of contact for their child(ren).²⁰

However, such an enforcement mechanism faces a fundamental objection, which indeed applies to any prospective alternative sanction: how would such sanctions themselves be enforced? If parents know the threat of the ultimate sanction of imprisonment is hollow, what is to prevent them simply refusing to comply with the alternative sanctions, confident there will, in the end, be no consequences for that non-compliance? With the courts currently opposed to the imposition of custodial sentences in any circumstances, this objection seems insuperable.

¹⁷ L Trinder et al, 'Enforcing Child Contact Orders: Are the Family Courts Getting It Right?' (2013) 43 *Family Law* 1145, 1145.

¹⁸ Ministry of Justice, *Co-operative Parenting Following Family Separation: Proposals on Enforcing Court-ordered Child Arrangements* (TSO 2013) 6.

¹⁹ *ibid* 11.

²⁰ F Wansoff, *Dealing with Child Contact Issues: A Literature Review of Mechanisms in Different Jurisdictions* (Scottish Executive Social Research 2007) 1.

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Therefore, if alternative sanctions were to be introduced, the courts would have to reconsider their opposition to custodial sentences in order to consolidate any new sanction regime. Paradoxically, a willingness to impose custody for breaches of the alternative sanctions might increase the effectiveness of those less draconian alternatives, reducing the number of cases where the ultimate sanction of imprisonment is required.

It is submitted that such an approach – alternative sanctions, backed by the threat of imprisonment for non-compliance – might more effectively enforce contact orders than the current approach, in turn helping to ensure that children's legal right to parental contact is upheld in Scotland.