

# Best-laid plans

*Helen Cort outlines the steps that may be taken to enforce child arrangements orders and provides practical tips on the drafting of such orders*



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**'The first task for the judge hearing an application for committal for alleged breaches of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it was that the order required the defendant to do.'**

The breakdown of relationships between married and unmarried couples with children is far from unusual, but, fortunately, many separated parents are able to agree the future arrangements for their children. There is a recognition that the children are likely to benefit from regular time with each parent, with an absence of parental conflict. While the parents' personal relationship may have ended, the family relationship continues, albeit in a different form. A research study, *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth* (Fortin, Hunt and Scanlan, 2012), funded by the Nuffield Foundation, found that children had positive experiences where there was a cocktail of often interlinked factors, including where:

- there was an absence of post-separation parental conflict;
- the resident parent encouraged the relationship between the child and non-resident parent;
- the child felt equally at home in both homes;
- the non-resident parent demonstrated their commitment to the child;
- the child had been consulted over the arrangements;
- the parents were flexible over the arrangements and prepared to accommodate

the child's needs as they grew older; and

- the contact was continuous and unbroken.

Only the most highly conflicted child arrangement disputes end up in court. It is therefore imperative that any subsequent court order very carefully records not only what the arrangements are but also what is expected of each parent. An example of the importance of the need for precise wording in an order was the decision in *Re L-W (children) (enforcement and committal: contact)* [2010].

## **Re L-W**

### **Background**

The parties had two children, a boy M, aged 11, who lived with his father, and a girl, E, aged nine, who lived with her mother. There were protracted proceedings in relation to contact (now a child arrangements order), particularly in relation to M's contact with his mother. The mother applied for an enforcement order, and a compensation order for financial loss including her petrol costs for attending contact, alleging that M had not been made available for contact on certain dates contrary to an earlier contact order. The Children and Family Court Advisory and Support Service (CAFCASS) reports stated that M did not wish to visit his mother. The judge held that the father was obliged to exercise effective parental control over M, and that it was not a reasonable excuse for the father to maintain that M did

not want to go with his mother and that he would not make him do so. The judge made a suspended enforcement order and a compensation order. In further hearings the judge reiterated that the father had failed to make M available to his mother and made further enforcement orders, with penal notices attached,

- the first task for the judge hearing an application for committal for alleged breaches of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it was that the order required the defendant to do – that is a

judge must first be sure that the defendant has not done what they were required to do before considering whether the requirements were within the power of the defendant to do so; and

- if the judge finds the defendant guilty, they must set out plainly and clearly in their judgment their finding of what it was that the defendant had failed to do and the finding that the defendant had the ability to do it.

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and compensation orders. The failure of M to visit his mother ultimately resulted in the judge making a committal order in respect of the father.

The father sought permission to appeal certain parts of the orders made under ss11J and 11O, Children Act 1989 (ChA 1989) and appealed the committal order.

**Appeal**

The father’s appeal was allowed in part and it was held that:

question of construction and, thus, a question of law;

- the next task for the judge is to determine, as a matter of fact, whether the defendant had done what they are required to do and if they have not, whether it was within their power to do so;
- the standard of proof is the criminal standard (ie, beyond all reasonable doubt) and the

In *Re L-W* the judge had overstated what the contact orders required the father to do and had wrongly rejected the impossibility of performance as being a defence. The father’s obligations under each of the contact orders were to ‘allow’ contact and ‘make M available’ for contact. To ‘allow’ was to concede or to permit and to ‘make available’ was to put at one’s disposal or within one’s reach. These were the father’s obligations, nothing greater. However, that was not how the judge had treated the orders. Throughout his judgments the judge had assumed that the father’s obligations were to ‘make sure’ or ‘ensure’ that M went with his mother and that contact took place. While the father may have been under a parental or moral obligation to do those things, on the wording of the relevant orders he was not under any legal obligation to do them. Nor was the father under any legal obligation to take such steps in the exercise of his parental discipline, guidance and encouragement as were reasonable in all the circumstances to ensure that contact took place. He could not therefore be in breach of the order.

**Comment**

As practitioners, our initial reaction may be that we do not agree with this decision. We have all been involved in cases where all the evidence points to the resident parent doing everything they can to frustrate contact, whether by constantly making negative comments about the other parent or by failing to give the child emotional permission to enjoy spending time with that parent. But against this backdrop we must remember that successful committal proceedings

**Practical tips**

Practitioners often pay painstaking attention to the drafting of financial orders – for example, when drafting a financial order each word may be analysed, with mechanisms to cover for different eventualities and an eye on potential future enforcement proceedings – but the same care and attention is less commonly applied to the drafting of child arrangements orders.

Following the decision in *Re L-W*, rather than simply drafting the order to provide that, eg a parent ‘shall make the child available on the following dates and times’, words such as ‘encourage’ or ‘must make available’ can be considered, together with a schedule/contract of expressions that clearly sets out what is expected of both parties. For example an order could include wording that a parent will:

- be positive and promote the idea of contact between the child and the other parent;
- talk about contact positively, preparing the child for contact so that they know about it in good time, and refer to the other parent as ‘daddy’ or ‘mummy’;
- not talk in a derogatory or an undermining manner about the other parent in the presence or hearing of the child; or
- continue to ensure the child has their familiar toys with them.

These simple provisions have the potential to make the handovers and contact time with the other parent a much more positive experience for the child.

lead to a deprivation of liberty and it is therefore no wonder that the legal requirements that must be met for a committal application to be successful are so stringent. Furthermore, there would be a huge impact on the child, whose main carer would be taken away from them. Often this is not actually what the applicant parent is seeking. They simply wish to secure compliance with the terms of an existing contact order. A committal application should not be used unless it is a proportionate response to the problem, or a less drastic remedy would not provide an adequate solution. Practitioners must therefore carefully consider what alternative enforcement measures and steps they could take to encourage compliance with the court order.

Where conduct is insufficient for a committal application to be made, it is still likely to constitute a welfare issue that the court should take into account in any decisions made regarding the child.

#### Alternative enforcement measures

ChA 1989 (as amended by the Adoption and Children Act 2002) also makes provision for alternative enforcement orders under s11J (unpaid work requirement) and s11O (financial compensation orders). The court can make an enforcement order if it is satisfied that a person has failed to comply with a child arrangements order. The burden of proof is on the civil balance of probabilities, which is lower than the criminal standard for committal, and on the parent who claims to have had a reasonable excuse. Sometimes the threat of these measures is as effective as the execution. A warning notice (since April 2014) is now attached when the court makes or varies a child arrangements order, warning of the consequences of failure to comply with the terms of the order. Prior to April 2014 such a warning was only attached to residence orders, and in appropriate circumstances, consideration may be made to making an application for a warning notice to be attached to older contact orders. Practice Direction 12B, Family Procedure Rules 2010 sets out the matters that will be considered by the court on an application for enforcement together with the procedure to be adopted.

The residence of a child may be transferred where contact has been frustrated or sabotaged, but this is a judicial weapon of last resort. In *Re A (children) (residence order)* [2009] the Court of Appeal held that the judge was wrong to make an order transferring residence of three children to their father following the mother's refusal to allow contact as

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no clear contact order had been made by the court. In contrast, in *Re C (a child) (residence order)* [2007] the court transferred residence from the mother to the father as a result of the mother's implacable hostility to contact. The full practicalities and implications of such an order must be given careful consideration. The non-resident parent may not be in a position to care for a child full time and a transfer of residence could involve a move to a new area, with the associated upheaval of a change of schools and friends. The courts must hold these factors in the balance, together with the risk of emotional harm to the child if the resident parent is further alienated. As a warning measure, where a parent persists in disobeying a contact order the court may order the transfer of residence of the children, but suspend the operation of the transfer upon the obdurate parent complying with the order; see for example *Re D (children)* [2010].

Rather than looking to enforcement sanctions, professional involvement may sometimes be the best way forward. The right guardian or CAFCASS officer can be invaluable in facilitating contact handovers and overcoming that initial hurdle or the distress of a child on separating from the parent they live with. Of particular relevance in intractable cases is the use of a family assistance order, per s16, ChA 1989. This enables a court to make an order requiring a CAFCASS officer, or an officer from a local authority, to advise, assist (and where appropriate) befriend

any person named in the order.

If a family assistance order is made alongside a contact order a CAFCASS officer may also be directed to advise and assist on establishing, improving and maintaining contact. However, it is crucial to be aware that a family assistance order is a voluntary order, in that the court may not make the order without the consent of everyone

(other than any child) named in the order.

#### Conclusion

The ideal approach is to try to prevent problems from arising in the first instance. Education as to the effect each parent's behaviour is having on the child can be sufficient to enable one or both parents to make changes for the better. The court's approach of ordering parents to attend a parenting information programme in suitable cases can be vital in preventing protracted court proceedings. Unfortunately, this will not always be enough on its own, and in these cases, it is crucial that careful consideration is given to the precise wording of any order, and the further obligations required of each parent. In the event that breaches of an order do occur, practitioners must carefully consider with their client the burden of proving the breaches and the consequences of the enforcement action they may embark upon, and it is always important to remind ourselves and our clients that what matters the most is what is best for the children, not the adults. ■

*Re A (children) (residence order)*  
[2009] EWCA Civ 1141  
*Re C (a child) (residence order)*  
[2007] EWCA Civ 866  
*Re D (children)*  
[2010] EWCA Civ 496  
*Re L-W (children) (enforcement and committal: contact)*  
[2010] EWCA Civ 1253