



## **Andrew McFarlane QC**

*Contact Enforcement and Facilitation*

# Enforcement of Contact Orders in England and Wales

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## Introduction

A useful starting point for a consideration of the modern law relating to the enforcement of contact within England and Wales is the judgment of Balcombe LJ in *Re S (Minors) (Access)* [1990] 2 FLR 166:

*'Although, like any other order of the court, [a contact order] can be enforced by penal notice and, if necessary in the last resort, prison for contempt of court, it is a rare case – although I would not go so far as to say it can never happen – that the welfare of the child requires that the custodial parent be sent to prison for refusing to give the other parent access. In this case there is a much more effective sanction. If the mother remains obdurate, as she has hitherto, then it seems to me that the court will have to look at this case afresh and decide whether the welfare of the child requires that he be given the opportunity to know properly his brother and father even though that may regrettably mean taking him away from his mother.'*

That decision encouraged courts and advocates to approach contact enforcement on the broad bases:

- (a) that the court was most unlikely to impose a sentence of imprisonment for a failure to comply with a contact order; and
- (b) that, where there are difficulties in enforcing contact, the court would consider varying the arrangements for the child's residence more readily than contemplating committal proceedings for contempt.

Each of these two bases now requires reappraisal in the light of recent Court of Appeal decisions.

## **Background**

The English courts have jurisdiction to punish a breach of any order by way of a fine or committal to prison in contempt proceedings. In the High Court or a county court the rules allow the court to attach a 'penal notice' to a contact order – the effect of the notice is that it explains to the recipient that a failure to obey the order may result in proceedings for contempt of court [Family Proceedings Rules 1991, r 4.21A]. There is no power for the Family Proceedings Court (i.e. magistrates) to attach a penal notice to an order, but that court shares similar powers to the High Court and county courts to fine or imprison a person who is found to be in breach of an order.

Following the accepted practice, as described by Balcombe LJ in *Re S* (above), a number of authorities in the 1970's and 1980's had suggested that contempt proceedings to enforce a contact order were generally inappropriate where the effect would be to send the parent with care of the child to prison:

*Ansah v Ansah* [1977] 2 All ER 638;

*Patterson v Walcott* [1984] FLR 408;

*Thomason v Thomason* [1985] FLR 214.

*R v R (Contempt)* [1988] Fam Law 388;

*I v D (Access Order: Enforcement)* [1988] 2 FLR 286.

During the early part of the 1990's there were some (very few) examples of a court being prepared to use committal orders to enforce contact:

*Re X (A Minor) (Contact: Committal)* [1993] Fam Law 246

*Z v Z (Refusal of Contact: Committal)* [1996] 1 FCR 538,  
[1996] Fam Law 255.

## **Greater acceptance that the use of committal proceedings may be justified**

The 1970's and 80's authorities must now be considered in the light of the Court of Appeal decision of *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533. In that case a mother had consistently flouted orders for contact. The judge imposed a sentence of 6 weeks imprisonment which was suspended for 6 months on condition that the mother complied with the order. The mother again failed to comply with the order and the judge therefore imposed the sentence of imprisonment. The Court of Appeal dismissed the mother's appeal and Ward LJ stated:

*' . . . the question which is before the court is whether there should be a committal for breach of orders of the court and in that inquiry the upbringing of the child is not a paramount consideration. It is obviously a material consideration and every judge who does any family work at all is always alive to the grievous effect the implementation of an order is likely to have on the life of the children whom the mother is unwisely seeking to protect in her own misguided way. I need not express a concluded view because it is, if I am constrained to look at welfare, quite apparent that the judge yesterday made plain that he was dealing with this matter as he had dealt at length with it on the last occasion. On that occasion he was fully mindful of the distressing consequence of imprisonment on the child and indeed the other child of the mother, but he balanced against that the importance of this child knowing her father as she grows up and the long-term damage she will suffer . . . [Counsel] submits, almost as if it is a matter of principle, although I am prepared to treat this as a matter of the exercise of discretion, that a sentence of imprisonment for breach of a contact order cannot or should not be imposed save as a measure of last resort. He submits, therefore, that there were remedies still available through which the court has to plough before giving effect to its contact order . . . I reject that submission.'*

Further:

*'For it to be submitted that the hardship to the child is the result of the court imposing the committal order is wholly to misunderstand the position. This little child suffers because the mother chooses to make her suffer. ... In my judgment it*

*is time that it is realised that against the wisdom of the observations of Ormrod LJ is to be balanced the consideration that orders of the court are made to be obeyed. They are not made for any other reason.'*

And further:

*' . . . it is perhaps appropriate that the message goes out in loud and in clear terms that there does come a limit to the tolerance of the court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault, not the fault of the judge who did no more than his duty to the child which is imposed upon him by Parliament.'*

In *A v N* (above), Ward LJ relied upon an earlier Court of Appeal decision in *F v F (Contact: Committal)* [1998] 2 FLR 237 in which Sir Stephen Brown P had stressed that, where the order of the court is that there should be contact, it must not be disobeyed.

### **Some Recent Cases:**

#### Committal proceedings for breach of contact order

At a review hearing following a tightly drawn contact order, endorsed with a penal notice, the father did not apply for a committal order, but the judge himself initiated a committal hearing. The judge drafted the particulars of breach, directed that there was no need for an application by the father, or an affidavit in support or for service on the mother. The mother appealed. The Court of Appeal allowed her appeal. The judge did have jurisdiction to proceed of his own motion [RSC Ord 52, r 5 + CPR Sch 1]. If one judge initiates the process, a different judge should determine the issue.

In relation to a contact order, committal should be the remedy of very last resort. Where it is thought that committal might be necessary, the judge should pause for reflection, should invite the Official Solicitor to represent the child or to report on the child's

position and could consider transferring the matter to the High Court. The crucial consideration was the interests of justice.

*Re M (Contact Order: Committal)* [1999] 1 FLR 810.

Penal notice inappropriate: if committal would never be in the child's interest,

A child disabled from birth was cared for by his mother. The judge made an order for reasonable contact, but refused to attach a penal notice to it. He reserved the case to himself in order to prevent the father renewing his application for a penal notice before another judge. The Court of Appeal dismissed the father's appeal against this part of the order, but observed that it was unwise for a court to rule out a particular form of abuse for all time. However if a court was to put the enforcement above the risk of harm to the child it must be very clear about the correctness of the orders it was seeking to enforce. In the present case it was foolish to disregard the effect of the child's disabilities and the judge had been right not to add a penal notice.

*Re F (Contact: Enforcement: Representation of Child)* [1998] 1 FLR 691.

Court should not give up too easily in face of mother's unfounded opposition

Where a parent objects to contact, the court should first evaluate whether that opposition was with or without objective foundation. Where it was without objective foundation the court should not give up the prospect of achieving contact at too early a stage. Rather than use its coercive powers, the court should work with local agencies for counselling and mediation to achieve contact.

*Re H (A Child) (Contact: Mother's Opposition)* [2001] 1 FCR 59

## **Commentary**

One clear message from the recent case law is that the court should decide at an early stage whether or not it is appropriate to contemplate the use of contempt proceedings to enforce any contact order. The time for this decision should be before a penal notice is attached to the contact order.

Once the court has embarked upon the route of making directive and specific orders, backed up by the threat of committal, the time must come, in the event of continual breach, when the court will be required to support its orders with the appropriate sanction. Note, however, the decision of the Court of Appeal to stay its own order for the return of children under the Hague Convention following the children's physical opposition to the court's officers attempts to enforce the order [*TB v JB (Abduction: Grave Risk of Harm)* [2001] Fam Law 576].

If, as in the case of the disabled child in *Re F* (above), it is plainly not going to be appropriate to contemplate contempt proceedings, even in the event of blatant disregard of court orders, the court would be unwise to embark upon the path of enforcement by, for example, attaching a penal notice to any order.

## **The procedure:**

### **(1) Contact order must be worded in order to create a positive obligation on the parent.**

An order providing that there should be contact between a child and a named person is not capable of enforcement by committal or other proceedings, unless it is specifically defined – *Re P (Minors) (Custody Order: Penal Notice)* [1990] 2 FLR 223 and *D v D (Access: Contempt: Committal)* [1991] 2 FLR 34.

Examples of orders which are not specifically defined are: '*reasonable contact*' or '*contact every other Saturday between 2.00pm and 5.00pm*'.

An example of a specifically defined order is: '*the mother is to take Janet and John to 41 Beckham Gardens at 2.00pm on Saturday 21<sup>st</sup> September for the purposes of contact with their father. The father is to return the children to their mother's care at 207 Erickson Villas by 5.00pm on the same day.*'

Where a contact order is not defined, it is usual, if there is disagreement or non-compliance, to seek to obtain a defined order. If the order requires a specific act, for example that the child be brought to a certain place at a certain date and time, it is possible to seek to enforce it by attaching a penal notice *Parsons v Nasar* [1990] 2 FLR 103. Breach of such an order may then give rise to committal proceedings.

### **(2) Methods of enforcement**

- provision of a surety or bond which is forfeited on non-compliance with an order of the court [Rules of the Supreme Court, Order 52, r 9 (as applied by Civil Procedure Rules 1998, Sch 1)];
- contempt proceedings:
  - committal to prison
  - suspended order for committal to prison
  - fine
  - hospital or guardianship order under the Mental Health Act 1983, ss 37+38.

**Varying the arrangements for custody/residence in order to ensure contact between the child and absent parent weighed against the importance of the status quo.**

The earlier guidance of Balcombe LJ to the effect that, where there were difficulties with the provision of contact, the court could reconsider the welfare test and contemplate altering the arrangements for the care of the child must now be read in the light of the Court of Appeal decision in *Re B (Residence Order: Status Quo)* [1998] 1 FLR 368.

In *Re B* (above), the father had had the care of the only child following the parties' separation in 1992 (child then aged 3 yrs). A residence order was made in his favour in 1993. Contact arrangements to the mother, who had moved to a different area, gave rise to difficulty throughout. In 1997 the judge granted the mother a residence application, thereby reversing the care and contact arrangements, in the hope that the contact provisions would work more effectively. The Court of Appeal reversed the judge's order holding (per Thorpe LJ) that the overwhelming importance of

securing the child's future was to maintain the status quo. The difficulty in contact simply had to be endured and tackled by whatever means was available – the means selected by the judge (i.e. reversing the residence order) could not possibly have been justified on the evidence.

### **Use of the Family Law Act 1986, s 34 to direct an officer of the court to take the child to contact**

Family Law Act 1986, s 34(1) provides:

*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.*

Although it would be a most unusual order, the provisions of Family Law Act 1986, s 34 are wide enough to allow a court to authorise an officer of the court, or constable, to take charge of a child and deliver him for the purposes of contact.

### **Ensuring that parent enjoying contact adheres to the contact arrangements: some recent cases**

#### Precautions taken on order for contact abroad [1]

Application granted for mother to take her 5-year-old child for a month's holiday in Saudi Arabia. Mother's bona fides and integrity of her family not in question, but court must proceed with caution where the other country has a very different culture and is not a

Hague Convention signatory. Wall J made a detailed order and required the mother to swear an oath on the Koran before the Imam of the Regent's Park Mosque (or similarly highly placed individual) and extracted a formal sworn undertaking from the grandfather as head of the family.

*Re A (Security for Return to Jurisdiction) (Note)* [1999] 2 FLR 1

#### Precautions taken on order for contact abroad [2]

When making an order for staying contact to take place in Egypt, Hughes J extracted detailed undertakings from the father, which would be embodied in a fully notarised agreement and a mirror order should be made in Egypt. [Report contains full details of the order, covering 4 pages].

*Note: Re T (Staying Contact in Non-Convention Country)* [1999] 1 FLR 262

#### English court has jurisdiction to make mirror orders prior to arrival of child

Singer J held that the English court did have jurisdiction to make mirror orders, reflecting orders made in a foreign court, prior to a child's arrival in the UK, notwithstanding the apparent jurisdictional difficulties presented by Family Law Act 1986, s 3(1) [habitually resident, or physically present]. Such orders would be intended to have effect only for the period during which the child was in the jurisdiction, but could be made once to have effect each time the child came to England and Wales. A High Court judge should hear such cases.

*Re P (A Child: Mirror Orders)* [2000] 1 FLR 435