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INTRACTABLE CONTACT DISPUTES: THE OLDER CHILD

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How can you deal with intractable contact when the child refusing to comply holds all the power: either the child goes, reluctantly and under sufferance, or does not go and sees the residential parent punished?

The short answer:

- a. The child does not go: there is no contact.
- b. The child attends and does not enjoy it: it is counter-productive.
- c. The child attends and does enjoy it: it is productive.

INTRACTABLE CONTACT DISPUTES

Intractable contact

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- Parental conflict
- The adolescent child: a third view
- Conflicting legal principles

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CONFLICTING LEGAL PRINCIPLES:

1. Presumption of contact

Children Act 1989 (as amended by CFA14):

- CAO – s.8
- Welfare – s.1(1)
- Presumption of involvement – s.1(2A)
- Attenuated nature of presumption – s.1(2B)

CONFLICTING LEGAL PRINCIPLES:

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1. Presumption of contact

Gnahoré v France (Application No 0031/98) (2002) 34 EHRR 38

‘The mutual enjoyment by parent and child of each other’s company constitutes a fundamental aspect of family life.’

CONFLICTING LEGAL PRINCIPLES:

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1. Presumption of contact

Glaser v UK (Case No 32346/96) (2001) 33 EHRR 1, [2001] 1 FLR 153

‘The authorities [must] [...] take all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case ’

CONFLICTING LEGAL PRINCIPLES:

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2. The Child's Voice

Children Act 1989, s.1(3)(a) – wishes and feelings

UNCRC, Art. 12 – views of the child

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3. Parental responsibility

Munby P, *Re H-B*:

‘... [a parent cannot] shirk their responsibility by sheltering behind the assertion that the child will not do something [...] whatever the age of the child.’

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4. Adolescent autonomy

Re Agar-Ellis (1883) 24 Ch.D. 317:

‘... control over the person, education and conduct of HIS children until they are 21 years of age.’

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4. Adolescent autonomy

Hewer v Bryant [1970] 1 QB 357:

‘... a dwindling right ... starts with a right of control and ends with little more than advice.’

WHERE TO FIND THE SOLUTION:

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Re S (Contact: Promoting Relationship with Absent Parent) [2004] EWCA Civ 18, [2004] 1 FLR 1279

Re L-W (Enforcement and Committal: Contact) [2010] EWCA Civ 1253, [2011] 1 FLR 1095

Re E [2011] EWHC 3521 (Fam)

Re W (Direct Contact) [2012] EWCA Civ 999, [2013] 1 FLR 494

Re A (Intractable Contact Dispute: Human Rights Violations) [2013] EWCA Civ 1104, [2014] 1 FLR 1185

Re H-B (Contact) [2015] EWCA Civ 389

Re H (Children) [2015] EWCA Civ 1216

1. Pre-empt the problem

Hedley J, *Re E*:

‘... spot at an early stage those cases which have the hallmarks of difficulty, let alone intractability about them ...’

1. Pre-empt the problem

Hedley J, *Re E*:

Give parties ‘at a relatively early stage the opportunity to give [welfare] evidence’

2. Identify the problem

Even if (a), is it:

- a. a genuine and justified grievance,
- b. a genuinely held but inaccurate gripe, or
- c. whether (b) or otherwise, due to malign influence from the residential parent?

ADVICE

2. Identify the problem

FACT-FINDING

ADVICE

3. Nip it in the bud

4. Effective case management

McFarlane LJ, Re A:

- Judicial strategy
- Consistency of judicial approach

4. Effective case management

Judicial continuity (and so early venue decision)

4. Effective case management

Venue:

- Munby LJ in *Re L-W* (paras 112 et seq.)
- Hedley J in *Re E*, paras 13-14

4. Effective case management

Early reinstatement of contact

4. Effective case management

Early instruction of expert

5. Emphasis of the parental role

McFarlane LJ, *Re W*:

‘... a very big ask ...’

5. Emphasis of the parental role

Munby P, *Re H-B*:

A parent should do their level best to ensure compliance, by:

... argument, persuasion, cajolement ...

... blandishments, inducements, sanctions ...

... or threats falling short of brute force ...

... or by a combination of them.

5. Emphasis of the parental role

Limitations:

- Munby P, *Re H-B*
‘... headstrong or strong-willed teenagers, etc.’
- Sanction or enforcement requires proof of culpable non-compliance

6. Positive involvement of the child

- a. Guardian
- b. Separate representation
- c. Expert instruction
- d. ADR

7. Effective enforcement

Appropriate wording of the order
- see Munby LJ in *Re L-W*

7. Effective enforcement

McFarlane LJ, *Re A*:

Judge should give serious consideration to enforcement before even making the order

7. Effective enforcement

Committal, 2 views:

- a. a *'self-defeating sanction'*, Butler-Sloss P in *Re S*
- b. A *'willingness to grasp the nettle early on'*, Munby LJ in *Re L-W*

8. The role of the lawyer

Controlling the temperature of the dispute

ADVICE

1. Pre-empt the problem
2. Identify the problem
3. Nip it in the bud
4. Effective case management
5. Emphasis of the parental role
6. Positive involvement of the child
7. Effective enforcement
8. The role of the lawyer

Questions and Comments

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