

White Paper Conference

Amanda Masson - 27 September 2018

In intractable contact cases how do you balance the voice of the child with that of resident parents doing their level best (1) to ensure compliance or (2) discourage it ?

We are all used to explaining to clients that contact is generally a good thing and that contact is likely to be ordered in some shape or form if the non resident parent asks the Court to make a contact order, unless there is a legitimate child welfare-based reason that would disturb that presumption. This is a matter of degree. Often solutions can be found which are helpful in addressing any safety concerns, and in looking at how any risk could be alleviated. As we all know however that does not necessarily mean that the non resident parent will comply.

So when does a dispute become intractable?

In considering my own experience of such cases, I came up with three broad scenarios:

- The possibility of a 'parental alienation' – the subject of a whole other talk!
- Parental refusal to facilitate – direct or indirect
- Refusal on the part of a child

This talk will focus mainly on the scenario where a child indicates that they no longer wish to see the non-resident parent, looking at the legal remedies available, the more recent legal landscape, and possible alternative approaches.

The story of M

I recently met an 11-year-old girl, whose parents had been engaged in a long-running fairly acrimonious litigation about whether and how often contact should take place between M and her father. Our aim was to ascertain her views. The defender, the child's mother, had enrolled a motion to reduce contact to nil on the basis that the child had stated that she did not want to go for contact for a few hours on a Sunday afternoon. I met with a very business-like child armed with a notebook containing a list of reasons why she did not want to see her dad. After the usual preliminary chat about things not related to the case, M told me that she wanted to talk me through what she had written down the night before. She volunteered that her mum had told her that she was old enough to be listened to and that she should tell me exactly how she felt and what had been going on and that that would be the end of matters.

Some of the reasons listed were pretty persuasive; for example, "my dad prefers football to me", "my dad never spends time with me on my own anymore now that he has a new girlfriend", and, perhaps less persuasively, "I had a sore tummy when I came home last time and my mum thinks that my dad's frying pans are probably dirty".

After some further discussion, M told me that she loved her dad. She did not want her dad to think that she did not. She told me that she knew that her dad loved her. She said that she wished that her mum and dad would stop fighting. She told me that she would quite like to see her dad but was worried about saying that. She had a suggested solution, however – she wanted to suggest that a "family meeting" be held. She had spent quite a lot of time thinking about this. She was going to bring along her notebook and talk her dad through her list of reasons. She also had a list of possible solutions to the problems that she had identified. Her example, contact would not be organised on days during the football season. She and her dad could maybe go to the park to feed the ducks, rather than going to his girlfriend's new house. The problem about the frying pan was slightly more complicated but she thought that she and her Dad could get around that by eating out.

What this case highlighted to me and it is something that is highlighted again and again and again is that often a child's reluctance to go for contact stems from an awareness of how the non-resident parent interacts with the resident parent. Whether conscious or deliberate or not, it is not uncommon for the views or anxieties of the resident parent to transfer to a child. A confusing and anxious situation for all concerned.

What remedies does the Law offer?

The legal remedy of course is to find the resident parent in contempt of court for failure to obtemper an order. Having spoken to child psychologists about this scenario, it is clear that views differ as to whether or not that is a good idea, or not. One psychologist intimated to me recently that, in his view, if the courts were more willing to impose fines or sentence a resident parent to a period of imprisonment for non-compliance of the contact order they may quickly find that such difficulties arose less often. The alternative view of course is that that will only likely create further hostilities between parents and that it cannot be in the best interests of a child for their main carer to be imprisoned. Sometimes of course a resident parent will let a child know that their other parent is trying to as they say in Glasgow 'get them the jail'.

I would like to look at a few cases which demonstrate the approaches taken by the court to the issue of an intractable contact dispute, between 2014 to date.

Intractable contact appears to be a particular problem in Dumfries. In the case of *CEF v MLH 2014 SCDUM30* Sheriff Jamieson drew a distinction between an application for a Section 11 Order, where the paramount consideration is the welfare of the child, and proceedings for contempt of court for not obeying such an order, for the court, having been satisfied that it is in the best interests of the child for a contact order to have been made, is then faced with a wilful refusal to obtemper that order.

The Judgement states in terms that the paramount consideration in a contempt of court scenario is that the Rule of Law be upheld.

The essential elements of the contempt action are:

- 1 The alleged contemtor knew of the order he or she is alleged to be breaking;
- 2 He or she has not as a matter of fact complied with the order;
- 3 His or her non-compliance was wilful;
- 4 That wilful non-compliance was without reasonable excuse.

So, proof is necessary if not admitted. The onus lies on the party alleging contempt to prove that contempt occurred, and the standard of proof is 'beyond reasonable doubt'.

In that case, the sheriff made clear that the maximum powers of punishment would be three months imprisonment, a fine of £2,500, or both. The view was expressed that these powers are inadequate.

The circumstances of that particular case were rather unusual. There were issues around allegations of domestic abuse, and non-payment of aliment. Contact had not always been exercised by the non-resident parent and there was a sense that what the defender really wanted was for the pursuer to enter into a shared care parenting plan, which seems rather ironic given that the existing contact order had not been obtempered.

The sheriff pointed out that the proper course for the defender to take would have been to ask the court to review the contact order, not simply refuse to facilitate the contact that had been ordered.

Consideration was given as to whether various incidents which had occurred constituted a 'reasonable excuse'. The court accepted that this was not the same type of situation as, for example, a parent turning up to exercise contact under the influence of alcohol or drugs. The sheriff said that

the defender had a standing in society, which many people in her position did not. Her contempt of the order was described as "serious and outrageous".

The thought process was that a spell in prison might impress upon the defender the gravity of the situation; altering her attitude towards obedience to the court order; giving her time to reflect upon her position in relation to contact.

Such penalty would not remove the obligation to obtemper the order going forward.

Any further committal for contempt would probably be of greater duration, possibly after obtaining a child impact report from the social work department.

The defender was given a 'cooling off period' by the sheriff, who made an order suspending the warrant for committal for an initial period of three weeks to see whether contact would take place. The suspension of the warrant for committal was entirely conditional upon the defender permitting contact. I do remember that that decision attracted a lot of attention when it was published.

In July 2014 Sheriff Jamieson appears again, in the case of *JDE v SDW 2014 SCDUM32*. The defender mother's defence to the contempt action was that she had tried to persuade and encourage the child to go for contact. The mother also said that she had tried, unsuccessfully, to get the child's voice heard. This is a case where a child's view was cited very strongly as the reason why the existing contact order was not operational.

The sheriff pointed out that the court is not obliged to have regard to the child's views in an action of contempt.

The three issues identified were (1) whether the defender had complied with her duty to persuade and encourage; (2) whether she is entitled to act on the advice of a social worker, who had indicated that it was within her gift to determine whether contact take place or not; (3) whether she was entitled to persist in her efforts to have the child's voice heard in the context of the contempt action.

Sheriff Jamieson discusses in his Judgement the duties of the resident parent.

Reference is made to the cases of *Blance v Blance* 1978 SLT 74; *Brannigan v Brannigan* 1979 SLT (Notes) 73; *Cosh v Cosh* 1979 SLT (Notes) 72.

The defender's duty is held to be to tell the child if necessarily firmly, to go, to create a climate of opinion in which the child views her father in a reasonable and well-disposed light, not to leave it to the child to make the decision without positive guidance and genuine encouragement.

The Judgement considers what might constitute a reasonable excuse, and again reference is made to the non-resident parent being unable to care for the child during contact, or in a case where international child abduction is a real threat, or if the contact may lead to the child being subjected to an illegal procure or if the child falls ill.

This particular decision is quite helpful in that it contains relatively lengthy discussion about the role of the views of the child.

The sheriff stresses that an application for contempt is a common law remedy not an application for an order in terms of Section 11 of the Children (Scotland) Act 1995.

While the child's view is a factual matter which may be relevant to determination of the matter of reasonable excuse, it is not for the child to determine the issue of whether or not his or her mother should be obtempering an order for contact that has already been made.

There can often be other reasons for possible distress, on the part of the child, such as the resident parent joining him or her in inappropriate discussions and not creating a positive environment in which contact could be encouraged; which appears to have been the case here.

The sheriff made it quite clear that having the child's voice heard is the responsibility of the court if appropriate that be done, not the resident parent. The sheriff has discretion on the issue of taking a child's view and how much weight to give that view at the point of determining the application for a contact order in terms of Section 11.

Again, we see warrant for imprisonment being granted but suspended on condition that contact be restored.

In March 2016 we had the case of *C v F* (2016 SC BAN 23). The pursuer in that case suffered from a significant mental illness which required ongoing treatment. He was on medication. The sheriff ultimately held that the pursuer knew when to seek help and in fact did seek help when his health deteriorated.

The defender felt that there was no benefit to the child in contact taking place, that it would upset and unsettle him, and that the pursuer posed a risk to the child's safety because of his poor mental health.

The court held that the opposition to contact was ill-founded and unreasonable; and that it was conducive to the child's welfare to come to know his father; and it would not be conducive to the welfare of the child for either party to make derogatory remarks about the other or permit or encourage others to do so in the presence of the child. The court felt that it was necessary to guard against this possibility by interdicting the parties from doing or saying anything to or in the presence of the child calculated to give the child a negative view of the other.

This case is also interesting in that the 'abuse provisions' of Section 11(7A) to 11(7B) were considered. The sheriff stated that, even if the defender had suffered abuse at the hands of the pursuer, that that was in the past and the child had no knowledge of it nor any need to have any knowledge of it. There had been no evidence that the pursuer had abused the child. Sheriff Mann said:

"In my view it would be an abuse of the child if either party were to seek to undermine the contact order that I have made. I consider that the interdicts I have pronounced are necessary to protect the child from the risk of such abuse and to guard against the parties deliberately or otherwise destroying the opportunity to start off on the right foot".

So far, the attempts on the part of the court to resolve potentially intractable contact disputes have involved the making of punitive orders.

A more recent decision of the court on this subject comes in the case of *AH v CH*, [2016] CSOH 152 . This case involved a very long contact dispute. There were several reports by a child psychologist. The defender had been worried about possible removal of the child from a contact centre, by the respondent. The respondent said that visits were missed because the child had refused to go. There was evidence to the effect that the child was very distressed before, during and after contact. The respondent's opposition to contact was twofold. First of all she felt that the father was not taking contact particularly seriously and secondly there was a risk of abduction.

A report was prepared by a social worker who was supporting contact at the contact centre. In view of the social worker, the respondent had very negative feelings towards the child's father, which she was not hiding. She would not engage in a discussion about the possible benefits that contact would convey and nor could she find it in her to encourage or promote contact.

The child psychologist involved in the case gave evidence to the effect that

"the child's views were genuine but not independently formed".

The psychologist's evidence was that the making of an order in difficult and entrenched cases often does not work because of adverse emotional or behavioural responses by children in conflictual cases, the context becoming unmanageable. The child psychologist had suggested that a 'routine order' as he calls it was unlikely to work. He recommended contact with a "strong compulsator" being contained within or attached to the order, this carrying a possible risk greater than the ultimate risk of contact not taking place, with the potential benefits of contact being lost. He said that the likely

breakdown in contact would be associated in the child's mind with negative associations and experiences. There was some discussion about whether any attempt to influence the child's views against his father was deliberate, and whether any influence that did exist and was taking place was at a subconscious level. Whatever view is taken on that, the effect was that the child genuinely had no desire to see his father. Direct contact would cause stress. Contact would be unlikely to work at a practical level. Having regard to those considerations, indirect contact was considered "the least worst option".

Lord Brailsford said that he found no attraction or merit in the creation of a "strong compulsitor" that being that the transfer of primary residence occur, the child being removed from the parent failing to comply with the order, with the previously non-resident parent having residence. It is abundantly clear that the court is very reluctant to sanction such measures. Direct contact was ultimately ordered, with the respondent being encouraged to put her fears aside.

A similar approach is taken by the Inner House in the case of *SM v CM* [2017] CSIH 1. This judgement came out in January 2017. Various procedural issues are raised which in themselves are interesting.

The contempt proceedings should not have been dealt with alongside the substantive action to which the alleged contempt was ancillary. That served to prolong proceedings. It delayed resolutions for dispute about contact. It was liable to cause confusion and uncertainty because of the differences in the two processes being heard together.

Concern was raised about the amount of time that had taken for the litigation to be progressed in the Sheriff Court. The subject of expeditious case management is discussed. The court indicates that

"a custodial sentence particularly on a mother with whom the children live, should only be imposed as a last resort".

Comment is made that the longer a dispute about contact goes on the more difficult it is likely to become, the more the child's life will become overshadowed by the dispute, which is likely to have irredeemable consequences for the child's parent relationship.

The problems in that case do appear to have been aggravated by the fact that there is an equally long-running dispute about contempt of court, with the risk of one parent being found to be in contempt and sentenced to a period of imprisonment then having a direct bearing on the dynamics between the parents and child such that contact was adversely affected.

The cases which have emerged on this subject over the past few years indicate the different views which decision makers have about whether or not more draconian consequences in the event of non-compliance of a contact order are appropriate. Do they make the situation worse? Do they actually avoid contact disputes becoming intractable, by providing a motivation albeit a negative one for the non-resident parent to comply?

Matters are not always as they seem. To return to the case of M, her view was clearly affected by her mother's attitude towards her father. I do not know what will happen in that case. I would hope though that her view would not be considered determinative and that a more proactive, co-operative approach could be taken to finding a solution to that particular problem.

Sometimes court is not the best place to resolve disputes relating to the arrangements for the care of children. It may be that alternate dispute resolution processes such as mediation or even collaborative practice could be used more creatively in cases where arrangements for contact have been broken down. I noticed in the recent decision of Sheriff Anwar from Glasgow Sheriff Court (*Patrick v Patrick* [2017] SC GLA 46) that a number of agencies had been involved to try to make things better for the child involved, including providers of Triple P parenting classes, Relationships Scotland, and a family therapist. It may be worth bearing other possible solutions in mind when faced with a seemingly intractable contact dispute.