TRANSFER OF RESIDENCE FROM AN OBDURATE PRIMARY CARER TO A PARENT FRUSTRATED IN PURSUIT OF CONTACT – IS IT STILL A WEAPON OF LAST RESORT?

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CASE LAW: TRANSFER OF RESIDENCE – A chronological overview

Re A (Residence Order) [2009] EWCA Civ 1141 - Leading judgment Thorpe LJ

- Three children aged 8, 7 and 3
- M had alleged domestic violence and an allegation of assault against eldest child
- Judge found M had invented assault on child allegation but that relationship very volatile on both sides
- Judge considered findings not a bar to contact with F
- M opposed contact; then changed her mind pre-hearing so long as she was granted residence
- Judge found could not trust M's position and granted residence to F – M appealed
- **NOTE – no long history of contact orders being flouted**

OUTCOME

- M's appeal allowed; order for contact substituted
- Judge had **failed to carry out an essential balancing of the risks** of moving the children versus leaving them with M
- There had been no existing contact order in relation to which M was in breach
- The risk of "gamesmanship" by the Mother in the face of a detailed residence and contact order would be significantly less
- The judge's order was premature, and its **draconian content too risky**
- **"*The transfer of residence from the obdurate primary carer to the parent frustrated in pursuit of contact is a judicial weapon of last resort"*** (per Thorpe LJ)
- **"*It may indeed be a case of putting a gun to a parent's head to force her or him to rethink…..but that, it seems to me, is a legitimate approach and remedy*"** (per Coleridge J)

POINTS OF INTEREST: This was not an obvious case for transfer of residence given (a) no contact order had been made; and (b) M's position at the hearing was to support contact. Note the colourful judicial language – saloon doors flapping…

Re A [2009] EWHC 1576 (Fam) – Coleridge J

- Two children age 8 and 11
- Findings that F had sexually abused stepchild but **not** his own two children
- Findings rejected by M
- Direct contact had been ordered; M deliberately and repeatedly breached orders
- **Two years** since contact with F; limited contact only with PGPs
- Application for immediate transfer of residence to PGPs and thereby gradual reintroduction to F
- Two experts supported application on basis M causing significant emotional harm to children
- CG supported transfer of residence in principle
- Children indicating they wanted nothing to do with F or PGPs
- Third expert vacillated between suggesting therapy and supporting transfer of residence

OUTCOME:

- **Residence order in favour of the PGPs** but **enforcement suspended** provided M complied with clearly defined terms including a contact order
- Move to PGPs would be emotionally harmful; but less so than the prevailing exposure to M's false beliefs and unremitting hostility to paternal family, undiluted by actual contact
- Coleridge J identified as a "*very clear advantage*" that suspending transfer of residence made the future entirely dependent on M's, **and the children's**, decision and action
- Detailed contact directed for **holiday contact only to PGPs; no direct contact for F**
- Any breach to result in immediate lifting of suspension of the residence order to PGPs
- M warned that if she "***seeks to call the court's bluff she will only have herself to blame for the ensuing distress***"

POINTS OF INTEREST: Not a transfer from parent to parent; F still had no direct contact under the order. Sits somewhat ill with **B (A child) [2012] EWCA Civ 858** where C of A disapproved of transfer from obdurate parent to GP – see below. And C of A has subsequently specifically disapproved of children being given the power to determine whether court orders for contact are complied with: **S (Children) [2010] EWCA Civ 447,** where children's willingness to go was wrongly made a condition of contact. Note again the vivid language – who draws first….?

Re S (Transfer of Residence) [2010] EWHC 192 (Fam) – HHJ Bellamy as Deputy HCJ

- One child, boy, now aged 11
- Proceedings ongoing for almost 10 years
- Last contact was almost 4 years previously
- Both parents had been criticised by the Court but recently M's hostility to contact was focus
- Child was refusing all contact
- M unable or unwilling to support indirect contact
- CG supportive of child's refusal; recommended therapy and an end to proceedings
- Court expert disagreed; described alienation and recommended direct contact but fell short of recommending transfer of residence

OUTCOME:

- **Immediate Residence order in favour of Father**

- **S1(3) required the Court to have regard to S's wishes and feelings BUT these must be considered in light of age and understanding and the impact of alienation upon their reliability should be considered**

- The CG had become overinvolved and lost objectivity in her assessment; the Court preferred the expert opinion where it departed from hers

- Court must balance the risk of future harm; in M's care S risked further psychoemotional harm from a distorted view of F and his family as against a risk of emotional harm of removal from only home S had known, and M to whom he was strongly attached and family and friends

- Balancing relevant factors meant transfer of residence was appropriate and in child's interests; F was more likely to be able to meet full range of needs; the Court was more positive about his ability to make necessary changes as opposed to the Mother's ability.

POINTS TO NOTE: Clear example of immediate transfer; language is more moderate and focusses on balance of potential harms to child. Important point about how to factor in appropriately into account child's (negative) wishes and feelings arising from parental manipulation or hostility

HOWEVER, note the follow up, making quite tragic reading:

Re S (Transfer of Residence) [2011] 1 FLR 1789 – HHJ Bellamy again

- All attempts to enforce the order for residence to F had failed
- S refused to cooperate with contact
- There was Tipstaff involvement which was traumatic
- Parents disagreed as to how to enforce; further litigation ensued
- LA then issued care proceedings and S was placed in foster care, deeply distressed
- Contact then began with F but was a failure, amid concerns about S's mental state
- S returned to live with M under an ICO; continued efforts at contact failed

- Therapeutic input was engaged and S appeared to show limited signs of progress
- Expert recommended F to abandon order for residence
- Dr Weir, court instructed expert disagreed and advocated quick transfer, despite distress shown
- CAMHS input disclosed S to be unhappy, probably depressed and expressing suicidal ideation
- In July, 6 months after the order was made, F abandoned its implementation

POINTS OF INTEREST: Not a good advert for the success of immediate transfer of residence. Perhaps CG was right after all to recommend closure of proceedings and therapy? Powers of enforcement seem mainly crude and enhance child's feelings of distress – quite probably contributing to mental ill health.

Re M (Children) [2012] EWHC 1948 (Fam) - Peter Jackson J

- Two children aged 10 and 8
- Separated in 2007; in 2010 F applied for contact & residence
- Pattern of contact in May 2010 was weekly each Sunday; contact ceased in August 2010
- Limited successful court directed contact in April 2011
- In August 2011 M uprooted children from home and school and moved counties without notice
- M disengaged from Court process entirely
- At committal hearing, 3 periods of contact ordered and proceeded successfully
- Children thereafter negative about F and contact ceased
- Judge rejected M's case that she was trying her best to make the children go to contact; on contrary her real attitude was that the children did not need a relationship with him at all
- No point in ordering another "simple" contact order; it would be ineffective

OUTCOME:

- It was unacceptable in the short, medium and long term that the children be deprived of family relationships essential for their development as balanced young people and adults

- A move to F's care would bring losses that might easily amount to harm if the transition were unsuccessful

- However a move was the only way to restore the children's relationships with F and family; no therapeutic mechanism was available given distance, funding and attitudes

- A move to F's care was on balance more likely to succeed than fail

- "*It is bad for children to be taught that the sort of manipulation that they have been caught up in succeeds. That would be a lesson in injustice*"

- F's application should succeed **BUT** M should be given one final opportunity

- A "**conditional residence order**" was made – this was in fact an **order for holiday staying contact with a provision for an immediate transfer to F's care under a Residence Order if there was default with respect to the first two periods of staying contact ordered.** Thereafter in the event of breach of contact, F had liberty to apply back to Court.

POINT TO NOTE: Peter Jackson J at paragraph 77: "[A] conditional residence order is in my view appropriate where the court can confidently foresee the circumstances in which it might come into effect". By no means a wholesale transfer of residence case – instead, the Court created a short term "sword of Damacles" – quite a surprising outcome given the damning content of the judgment regarding M!

B (A child) [2012] EWCA Civ 858

- One child, aged almost 5
- M alleged serious abuse and DV against F and PGM
- Contact orders were disobeyed by M
- M conceded with respect to her allegations of harm; contact was ordered but she disobeyed
- GM applied for residence and assessments followed, with LA involvement
- LA did not support transfer of residence to GM
- M sought to re-open factual allegations of harm; judge refused and made residence order to GM
- M appealed

OUTCOME:

- Appeal allowed

- This was significantly different from a case of transfer of care between parents.

- "***I would further observe that the transfer …from an obdurate parent to the alternatively available parent is a weapon of last resort which is sometimes used successfully and sometimes used unsuccessfully by trial judges, but that is a transfer between parents.. I know of no case in which such a dire sanction has been exercised against an obdurate parent to transfer the primary care to a grandmother. Manifestly grandparents are not on equal footing with parents.***"

- Given what was at stake, the judge ought to have allowed M to re-open her factual allegations so the judge could make the necessary findings to properly evaluate the options for care of B

POINTS TO NOTE: C of A had no appetite for immediate transfer of residence to GM; note reference to transfer as "***dire sanction"*** as well as ***"weapon of last resort..sometimes used unsuccessfully"*** – thinking of Re S (above)?

Re A [2013] EWCA Civ 1104: Leading judgement McFarlane LJ

- One child M, a girl aged almost 14
- Since 2006 there had been 82 court orders, seven judges and in excess of 10 CAFCASS officers
- Mo had significant longstanding mental and physical health issues
- Parents separated in 2001; litigation had continued throughout last 12 years
- Contact difficulties arose immediately and rumbled on; in 2006 M made allegations of sexual abuse by F
- A judge rejected her allegations after a fact finding hearing
- M lived happily with F between Feb and Nov 2007 while M was ill
- M returned to Mo's care; contact again began to fail and in 2009 became supervised
- M became reluctant to attend and an order was made that she should not be forced to go
- Thereafter orders for unsupervised contact were made and an expert psychiatrist instructed
- At final hearing in Oct 12 M was unable to attend due to illness
- Judge ordered **residence to M and only indirect contact 2 x annually for F**
- S91(14) order made re both parents for 12 months to M's 16th Birthday
- F appealed on grounds judge wrong to refused direct contact; and where Court had admitted that there had been a systemic failure of family justice, the outcome should be a full re-hearing of the case

OUTCOME:

- F was unimpeachable
- M had enjoyed seeing him in contact
- M had "*doggedly refused to allow M to develop and maintain a relationship with her father without any good reason whatsoever for so doing*"
- F's appeal succeeded because in the long course of proceedings there had been a violation of the procedural requirements that are part of the rights enshrined in Article 8, thereby violating the family life rights of M and F to have an effective relationship with each other
- Re-hearing was directed

McFarlane LJ cited with approval Bellamy J's decision in Re S (above) as "*an illustration of an acceptable judicial approach in a case where the outcome chosen by the judge as best meeting the welfare needs of an older child runs directly contrary to his firmly stated wishes and feelings"*

McFarlane LJ endorsed the need for judicial continuity AND a judicially set strategy for each case, to which the judge sticks consistently:

"If as part of that strategy, the court makes an express order requiring the parent with care to comply with contact arrangements and that order is breached then, as part of a consistent strategy, the judge must, in the absence of good reason for any failure, support the order that he or she has made by considering enforcement, either under the enforcement provisions in CA 1989 ss 11J-11N, or by contempt proceedings. To do

otherwise would be to abandon the strategy for the case……; to do otherwise is also inconsistent with the rule of law….

The first time a judge should give serious consideration to whether or not he will, if called upon, be prepared to enforce a contact order should be <u>before</u> the order is made and not only after a breach has occurred….If, on the facts of the case, enforcement is not to be contemplated, then an alternative judicial strategy not involving a directive court order (and which might in an extreme case include a change of residence or, at the other extreme, dismissing the application for contact) must be developed"

POINT OF INTEREST: McFarlane LJ here proposes transfer of residence as an *alternative* to the making of a directive contact order, where a judge considers there may be no realistic prospect of enforcing a contact order *but note he contemplates it as arising only in an "**extreme case**"* – and did not suggest it was the appropriate strategy for this case (albeit it would be open to the next trial judge hearing the case to do so).

RS v SS [2013] EWHC B33(Fam) – HHJ Harris

- Two children, aged 14 and 11
- Parties separated in 2002
- weekend staying contact ordered in 2004; M defaulted but later visiting contact restored
- F consented to children moving abroad with M in Dec 2005; problems ensued re contact and continued after M returned to UK in 2009
- Contact broke down in 2010
- Court restored contact in December 2012 but boys refused to attend and difficulties persisted through to final hearing in Nov 2013

OUTCOME

- Judge found M to be "*very angry and wilful; her hatred for the father is almost pathological*"; she prioritised her own needs over those of her children
- She either lied about her efforts to support contact or was in denial
- She had involved the children and painted a wholly distorted picture of F
- She encouraged the children to show a total lack of respect for F and to other adults
- The judge cited **Re S** and **Re A** (both above) in relation to s1(3) CA 1989
- The older children's expressed wishes and feelings were **not reliable** owing to their manipulation by M, their alignment with her as a measure of self-protection, their distorted view of reality stemming from exposure to M's views
- "**I am satisfied that for her own motives this mother has sought to alienate these children from their father, and that behaviour is a form of emotional abuse"**
- Ordered immediate transfer of residence to F; contact to M with a review to follow

POINTS TO NOTE: **HHJ Harris expressly rejected the notion of a suspended order for residence on condition that it would not be activated if contact is maintained (Peter**

Jackson J's "conditional residence order") because M lacked insight and capacity to change; it would leave a state of suspension and uncertainty, necessitate further court proceedings to determine breach and was in the judge's view **"**wholly untenable".

In a grim postscript the judge added that removal from M's care was traumatic; M refused to comply with handover, the children tried to evade the authorities and collection was enforced via tipstaff and police on Christmas Day. One is left wondering about the long term prospects of harmony and success….

TB v DB [2013] EWHC 2275 (Fam); [2013] Fam Law 1392 – Keehan J

- One child, D, boy aged 5
- Had been subject of a shared residence order; primarily living with M and staying with F
- M made false allegations against F in a "*concerted campaign*" to thwart contact

OUTCOME:

- Judge indicated if a shared residence order could be made to work it would be in D's best interests; changing his living arrangements carried some risk
- However D had a **warm loving relationship with both parents**
- The CG strongly recommended that F be granted sole residence, advising that D would adapt without medium or long term harm
- **Even if it could be said that M had not sought to alienate D from F, and had not breached court orders**, she had made highly damaging allegations which if repeated would cause serious emotional and psychological harm
- No orders could realistically be made to prevent her from making future allegations
- The court had no confidence she would behave differently in future
- Shared residence could not be made to work
- Risks to D of maintaining shared residence outweighed any in making a sole residence order to F, which was undoubtedly in D's interests

POINTS OF INTEREST– An example of a case of **immediate transfer in the absence of breach of existing court orders or active alienation of child** but based on risk of emotional harm from false allegations being repeated. Judgement firmly couched in language to do with balancing of risks inherent in each option for care. Note existing warm relationship with F (no doubt making transfer easier).

H (Children) [2014] EWCA Civ 733 – leading judgment McFarlane LJ

- Three children, all boys, A age 15, B age 13 and C age 11
- A was violent and disruptive at home and had lived with PGM for some time
- M made a series of increasingly serious allegations of controlling behaviour, physical sexual and emotional abuse of herself by F; eventually she alleged repeated rape
- The children later alleged physical abuse of themselves by F
- The children voiced strong views in the proceeding against contact

- F alleged M was a heavy drinker, and physically abusive to the children
- After a protracted and strung out fact finding hearing, Parker J dismissed the Mother's allegations ordered immediate (interim) residence of A to PGM, and of B and C to F despite the "welfare stage" assessments being incomplete
- In so doing Parker J rejected the SW and CG's opinions which were heavily based on the children's expressed wishes and feelings, despite contact having been successful

OUTCOME

- The Court of Appeal refused permission to appeal

- McFarlane LJ: "**a*n immediate change of the primary residence of children during the course of ongoing court proceedings, where further assessment has been ordered, must be supported by evidence which establishes that such an interventionist step is proportionate to the need to safeguard the children's welfare on an interim basis***"

- Parker J was entitled to consider the "dynamic event" of her findings of fact to decide whether they materially altered the potential for the children to suffer emotional harm if they remained with M; she considered it did.

POINT OF INTEREST: of course, a change of interim residence is more than likely to tip the scales in the direction of the party in whose favour it is made. From McFarlane's judgment – shades of comparison to the test for interim removal in care proceedings?

Y (Private Law: Interim Change of Residence) [2014] EWHC 1068 (Fam)

- 22 month old girl, Y
- There had been a fact finding hearing which resulted in no findings that impeded contact
- M remained convinced F had sexually abused Y
- Interim contact since then had been fraught with difficulty and mounting concern re M's mental health
- The child had since been presented with various bruises and injuries which M alleged F was responsible for
- The LA and CG both supported an immediate transfer of residence to F
- The final "welfare" hearing was listed to take place in around 6 weeks' time

OUTCOME:

- Immediate transfer of (interim) residence to F

- Pauffley J expressly recognised that in private law proceedings, the "test" for interim removal in public law cases (Re L-A) does not apply

- However, there are parallels and it was appropriate to apply the "*closest and most stringent scrutiny*" to an application for alteration of interim residence and **only order it "*on the basis of compelling reasons – where the child's physical and emotional safety needs require that alteration to be effected*"**

Re K (Breakdown of Arrangements: Urgent Hearing) [2014] EWCA Civ 1195 – Leading judgment Ryder LJ

- Two boys, age 14 and 12 lived with M and her partner
- Litigation ongoing for 10 years
- Weekend staying contact ordered in May 2012 but repeatedly broke down
- In 2014, an order for staying contact was made by a recorder coupled with a conditional and temporary residence order for the summer, if contact did not take place, with immediate effect
- Recorder's "strategy" (according to C of A) was to enforce May 2012 arragements
- Recorder found the children were suffering significant harm and directed an LA assessment pursuant to s37
- Two days after implementation of the conditional residence order, both boys absconded from Fs care to a former child minder
- Came before HHJ Marshall as an emergency; M seeking to suspend contact and conditional residence order
- The previous court expert indicated he was unable to assist in the circs; the CG had no public law experience and asked to be replaced
- The judge made an interim care order placing the elder boy in foster care and an interim residence order for the younger to F
- A recovery order was made and effected in the middle of the night, causing distress
- M appealed

OUTCOME:

- Appeal allowed in part; orders reversed
- Interim Care Orders made with respect to both boys
- Boys to return in interim to care of M
- Case remitted for rehearing once s37 report available
- All sorts of problems identified with the judgment
- **The odd nature of a "temporary conditional" residence order was pointed out – what was it intended to achieve beyond enforcing holiday contact? Quite possibly an inappropriate coercive measure**
- Judge failed to consider proportionality of interim removal and separation of siblings; inappropriately relied on outcome of her own interview of children; should have taken a step back, and focussed on case management to identify issues and evidence required before making orders

POINTS TO NOTE:

Per Ryder LJ at paragraph 31: "**In a private law case where the issue was the removal of a child from the care of one parent or the denial of a relationship with a parent by cessation of contact, nothing less than a comparative welfare analysis of the options for each child would do**…." - The **balance sheet approach** recommended in public law children cases was equally applicable to the welfare analysis of options in private law cases

And at paragraphs 59-60:

59. Mothers, fathers or both are just as likely to be responsible for the precipitating circumstances in such a case which may be far removed from and are sometimes if not often, irrelevant to the conflict which endures. Such research as there is into available and workable solutions suggests either a) that there should be a careful analysis of the reasons for the conflict by fact finding to identify and assess risk to the children and sometimes to one or other of the adults and/or b) that if the reasons for the conflict do not present identifiable risks to the children or their carer and sometimes even if they do, a **resolutions approach to the conflict can be adopted to try and resolve it by professional intervention such as individual or family therapy, external support from local authority children's services or education and assistance from the various parenting programmes and activity directions that are now available under the CA 1989 or otherwise. Sometimes it is necessary to fundamentally alter a child's arrangements by removing that child from the adverse influence and control of one parent by placing the child with the other parent and making a child arrangements order that has the effect of limiting the relationship with the harmful parent**. In an extreme case (and I emphasise they are and should be rare) where the child is suffering significant harm or is likely to suffer significant harm, the court can intervene and exercise its ultimate protective function by removing the child from its parents and by placing the child into public care so that the local authority shares parental responsibility with the parents.

60. The removal of a child from the care of a parent whether by a transfer of living arrangements from one parent to another or by placing the child into public care is not, and must never be a coercive or punitive measure. It is a protective step grounded in the best interest of the child concerned.

POINT TO NOTE: We have moved a long way from language of "weaponry" and judicial coercion – now firmly in territory of comparative welfare analysis and seeing transfer of residence as one of the options in the panoply of enforcement, but **only if the holistic welfare analysis required of the judge supports it** as being in the child's best interests. Note the emphasis on the use of professional intervention, including therapy to address the difficulties.

Re J and K (Children: Private Law) [2014] EQHC 330 (Fam) – Pauffley J

- 12 year old twins
- Proceedings ongoing for ten years, about PR, contact, change of names
- 24 hearings before 5 DJ's; 8 reports by 6 FCA's
- Pauffley J gave an indication that, if she concluded that the children were being emotionally harmed as a result of M's intractability and opposition then active consideration would be given to altering residence
- Further indicated that if the "threshold" was crossed, she would consider making ICO's with a transitional plan for foster care
- Peace broke out in the course of the hearing; with both parents stepping down from attacking the other and proposing constructive sensible and appropriate contact arrangements
- In that light, Pauffley J indicated she would not make a "suspended transfer of residence order" (as in Re M above) as to do so would be inapposite, if not positively harmful

POINT OF INTEREST: a "suspended transfer of residence" was mooted; but in the end, this case is really an advert for judicial intervention, sensible representation and the shedding of scales from eyes

U (Children: Residence Order) [2016] EWCA Civ 1332 – Leading judgment McFarlane LJ

- Four children (16, 14, F aged 12 and Y aged 6)
- Parties separated in mid-2014
- M falsely alleged extensive DV; allegations all dismissed and M found to be unreliable; some criticisms also of F's behaviour pre-separation
- Children had apparently happy contact with F in August 2014 but by Sep 14 elder 3 refused to see him and became entrenched
- Youngest Y lived with Fa from September 2014
- 14 hearings had taken place
- Family had therapeutic assessment and extensive input from Dr Asen, C and A psychiatrist, and visiting contact with F had been reinstated
- Depending on a crucial finding with regard to M's contact with Y, Dr Asen suggested better for all 4 to live with Fa but given ages of elder children an order should only be made for F to do so
- Keehan J found that M had lied, manufactured evidence and recruited the older children to lie
- Keehan J concluded there was **no prospect of M promoting positive relationship with Fa; and no prospect of her desisting from actively involving children in her campaign against Fa**
- Found it was **positively harmful for children to remain in Ms care** given her entrenched views against Fa
- Therefore in welfare interests of all 4 children to live with Fa
- But in light of ages of children a CAO for **immediate transfer of residence of F only** was made
- M appealed

OUTCOME

- Appeal dismissed

- The C of A described Keehan J's findings as "*damning*" and indeed "*depressing*" given he identified no change in M despite intervention of a highly skilled therapeutic unit

- The judge was "*steeped in the case*" and had conducted and articulated an appropriate welfare balancing exercise

POINT OF INTEREST: The judgment is firmly rooted the balancing of the children's best interests. Note contact had already been reinstated with Fa, and Y continued to live with him, so fewer barriers to immediate transfer of residence than in some cases.

WHAT IF TRANSFER IS NOT AN OPTION? ALTERNATIVES……

Re C (A Child) (Suspension of Contact) [2011] EWCA Civ 521 Munby LJ

Per Ward LJ in **Re P (Children) [2008] EWCA Civ 1431** at paragraph 38: "*contact should not be stopped unless it is the last resort for the judge*" and (paragraph 36) until "*the judge has grappled with all the alternatives that were open to him*"

Measures under Section 11 Children Act 1989?

s11A **Activity Directions**:

(5)The activities that may be so required include, in particular—

(a)programmes, classes and counselling or guidance sessions of a kind that—

(i)may assist a person as regards establishing, maintaining or improving involvement in a child's life;

(ii)may, by addressing a person's violent behaviour, enable or facilitate involvement in a child's life;

(b)sessions in which information or advice is given as regards making or operating arrangements for involvement in a child's life, including making arrangements by means of mediation.

BUT NOTE

(6)No individual may be required by an activity direction—

(a)to undergo medical or psychiatric examination, assessment or treatment;

(b)to take part in mediation.

s11C – **Activity Conditions**

s11J – **Enforcement Orders**

If the court is satisfied beyond reasonable doubt that a person has failed to comply with a provision of the child arrangements order, it may make an order (an "enforcement order") imposing on the person an **unpaid work requirement**.

(3)But the court may not make an enforcement order if it is satisfied that the person had a reasonable excuse for failing to comply with the provision.

(4)The burden of proof as to the matter mentioned in subsection (3) lies on the person claiming to have had a reasonable excuse, and the standard of proof is the balance of probabilities.

Any order may be suspended on such terms as the court thinks fit.

s11(L(1)Before making an enforcement order as regards a person in breach of a provision of a child arrangements order, the court must be satisfied that—

(a)making the enforcement order proposed is necessary to secure the person's compliance with the child arrangements order or any child arrangements order that has effect in its place;

(b)the likely effect on the person of the enforcement order proposed to be made is proportionate to the seriousness of the breach ...

Other provisions require the court to be satisfied the unpaid work is available within the local justice area and to consider the impact of the proposed order including conflict with religious beliefs and impact on attendance at work or place of study.

s11O - **Compensation for financial loss**

(2)If the court is satisfied that—

(a)an individual has failed to comply with a provision of the child arrangements order, and

(b)a person falling within subsection (6) has suffered financial loss by reason of the breach,

it may make an order requiring the individual in breach to pay the person compensation in respect of his financial loss.

(3)But the court may not make an order under subsection (2) if it is satisfied that the individual in breach had a reasonable excuse for failing to comply with the particular provision of the child arrangements order.

(4)The burden of proof as to the matter mentioned in subsection (3) lies on the individual claiming to have had a reasonable excuse.

Re K (Children) [2016] EWCA Civ 99 – Leading judgment King LJ

- Two children, age 8 and 6
- F applied for direct contact
- M took children to refuge and alleged routine violence
- Fact finding determined one finding of violence and F at times controlling and aggressive but dismissed routine violence; findings no bar to contact
- Children voiced opposition to contact
- CG initially recommended a programme moving to direct contact via indirect contact but then shifted position without further interview or discussion with F
- In oral evidence F lacked insight into his own behaviour; M remained very anxious
- Recorder considered contact would be harmful now but might be right for the future
- Dismissed application for direct contact
- F appealed
- Grounds that no attempts had been made to set up direct contact despite lack of barrier findings

OUTCOME:

- Appeal allowed and case remitted

- F disadvantaged by being an LIP so did not know about options such as Child Contact Intervention Programme funded by CAFCASS

- Judge failed to follow **PD12J** for cases where there has been or is a risk of DV

- Judge **should have considered paras 33 and 34 of the PD which mandate the court to consider advice, treatment or other intervention as a precondition to any CAO being made or to assist in the assessment of risk; and allow for the making of an Activity Direction under s11A or B CA 1989 – such as a DVPP**

- King LJ referred back to Munby P's principles in Re C (above) and determined the recorder erred by failing to "*grapple with all the alternatives before abandoning hope of achieving contact*"

Committal?

The authorities are a mixed bag – committal to prison for breach of a properly defined order remains an option; but carries the obvious risk of entrenching antipathy toward the parent who is held "responsible" for putting the child's carer in prison.

In **Churchard v Churchard [1984] FLR 635** Ormrod LJ expressed himself in trenchant terms: *"To accede to the father's application for the committal order would not conceivably be in the best interests of the children. It would mean two things: first, if committed, that the mother would be taken away from them for a time and the father would be branded in their eyes as the man who put their mother in prison….. It is the most deadly blow that a parent can inflict on his children."***[p638]**

In **Re S (Minors: Access) [1990] 2FLR 166** Balcombe LJ said:

"…. It is a rare case- although I would not go so far as to say that 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." **[p170]**

In **Re S (Contact: Promoting Relationship With Absent Parent) [2004] EWCA Civ 18,** Dame Elizabeth Butler-Sloss emphasised the fact that the sanction of imprisonment may well be self-defeating.

However, in **A and N (Committal: Refusal of Contact) [1997] 1 FLR 533** Ward LJ said:

"*The stark reality of this case is that this is a mother who has flagrantly set herself upon a course of collision with the court's order …. 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"* **[p541]**

In **Re S (Contact Dispute: Committal) [2004] EWCA Civ 1790** Neuberger LJ said:

"It seems to me that this was an order which was justified both in terms of enforcing respect for the orders of the court and, therefore, for the rule of law in society, and also, as a last resort, to coerce the mother into complying with court orders." **[para 14]**

In **B v S [2009] EWCA Civ 548** Wilson J said:

"The days are long gone when mothers can assume that their role as carers of children protects them from being sentenced to immediate terms of imprisonment for clear, repeated and deliberate breaches of contact orders" **[para 16]**

In **L-W [2010] EWCA Civ 1253** Munby LJ agreed with the observations of Wall J in **Re M (Intractable Contact Dispute: Interim Care Orders) [2003] EWHC 1024 (Fam)** that short sentences of 1,2 or 3 days may suffice to achieve the necessary deterrent or coercive effect without significantly impairing a mother's ability to look after her children **[para 95]**. Munby LJ stated that although committal may be a remedy of last resort, this does not mean it should be left too long. On the facts of the particular case, committal and compensation orders were overturned on appeal. This was partly on technical grounds due to the loose wording of the contact order, but also because, by the time committal proceedings were launched, the eldest child's view had become so entrenched that the resident parent's committal to prison would be unlikely to persuade the child to take up contact with the absent parent – in fact, it risked yet further ill feeling. Munby LJ speculated whether earlier use of the sanction might have yielded results.

Directing therapy?

Re Q (A Child) [2015] EWCA Civ 991 – leading judgment Munby P

- Q, a boy, aged 7 had lived with M since parents separated when he was aged 6 months
- At least 11 hearings, and 8 judgments had been delivered by HHJ Brasse
- M had made false allegations against F and Q had been influenced by M's hostility
- Direct orders for contact had been made, and failed
- CG's position was that Q required therapy; advocated a final hearing ASAP and disposal of proceedings without an order for direct contact
- The therapeutic resource had identified that it could not offer therapy while proceedings were afoot
- HHJ Brasse at a review hearing dismissed the options of a direct contact order (deeming that this would presently be harmful to Q), or s37 direction for a report, or to end the proceedings with no order; instead he made a **specific issue order** that both parents should cooperate in a referral to a therapeutic centre, so that Q should undertake therapy as recommended
- **Notably removal of Y from M's care was not regarded as a reasonable option by any party**
- HHJ Brasse directed that, *if* the matter returned to court, it should be reserved to him
- F appealed

OUTCOME:

- Appeal dismissed

- Munby P referred back to the principles in C v C (A child) (Suspension of Contact) [2011] EWCA Civ 521 – notably that the judge "*must grapple with all the available alternatives before abandoning hope of achieving some contact…for contact is to be*

stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt"

- He acknowledged that the judge had adopted a **change of strategy** in stepping away from direct orders for contact

- But he did so when he realised his strategy "*had not worked, in circumstances where, moreover, there was no reason to think that this strategy would work in future*"

- According to Munby P, "***he took a course that was not merely open to him but which was, in reality, probably the only course that stood the slightest chance of achieving what was so pressingly needed – the resumption of Q's relationship with his father***". He contemplated a return to court in due course (even if none was specifically planned for) and so had not simply abandoned all efforts to resolve the case.

POINT TO NOTE – a **contact activity direction** cannot be made to compel a person to undergo medical or psychiatric examination, assessment or treatment. Here a Specific Issue Order was used to ensure the child Q received therapy. Where family therapy is recommended, there is still no obvious mechanism to require the participation of a reluctant parent.

Interim care orders to support transfer of residence?

Where it considers the "threshold" for significant harm is met, the Court may make a section 37 direction or indeed an ICO of its own motion to support interim removal to foster care or the care of another family member as a means of transitioning a child to the other parent more gradually.

In **Re M (Intractable Contact Dispute; Interim Care Orders** [2003] 2 FLR 636, [2003] EWHC Fam 1024, an appalling case of repeated false sexual abuse allegations by M against F, the Court invited the LA to bring care proceedings and ultimately transferred residence to F.

In **Re W [2014] EWCA Civ 772** the Court of Appeal dismissed M's appeal against ICO's made upon a s37 report for removal of the children to foster care. Ryder LJ endorsed the need for the interim test for removal in public law proceedings to be met and a proper balancing exercise to be conducted with reference to all the realistic options for care of the children.

And finally….judicial emphasis on parents' duties and responsibilities in the exercise of Parental Responsibility…..**and the acknowledged limits of the family justice system's problem solving….**

The theme starts to develop in **Re W (Children) [2012] EWCA Civ 999**, where McFarlane LJ added a "postscript" (at paragraphs 72 onwards), identifying the potential for the concept of parental responsibility "*to be given greater prominence in the resolution of private law disputes……(as) part of the wider context in which the family courts seek to encourage parents to see the bigger picture in terms of the harmful impact upon their children of sustained disputes over contact*". McFarlane LJ exhorts parents to step up to the mark of discharging their duties and responsibilities as a parent, even when it is a "*big ask".* Parents have primary responsibility for addressing any difficulties in the way of contact; where for example therapy has been proposed as necessary for the parents, "*It is not, at face value,*

acceptable for a parent to shirk that responsibility and simply to say "no" to reasonable strategies designed to improve the situation…"

Ryder LJ in **Re K (Breakdown of Arrangements: Urgent Hearing) [2014] EWCA Civ 1195, [2015] 1 FLR** at 113 para 61 pointed out the court's limitations, with palpable frustration:

"*It is time for this court to start saying that which is obvious. The family court is empowered to make decisions for parents who cannot make them for themselves but it cannot parent the children who are involved. When parents delegate their parental responsibility to the court to make a decision, that decision will be in the form of an order. The court cannot countenance its orders being ignored or flouted unless an appropriate and lawful agreement can otherwise be reached. That is not simply to preserve the authority of the court, it is to prevent continuing and worsening harm to the children concerned. Parents who come to court must do that which the court decides unless they agree they can do better and there is no court order that prevents that agreement.*

62. In this case, the parents were both to have a meaningful relationship with their sons. That should have involved active practical and emotional steps to be taken by both parents to make it work. Instead the case is suffused with anger and arrogant position taking that has nothing to do with the children. There has undoubtedly been mutual denigration, true allegations, false allegations, irrelevant allegations, insults, wrongly perceived insults and the manipulation of the boys to an outrageous degree. ***The idea that the court can wave a magic wand and cure all of those ills is dangerously wrong. It cannot - its function is to make a decision. It does not have available to it a supply of experts, be they psychiatrists, psychologists, therapists, counsellors, drug, alcohol and domestic violence rehabilitation units, social and welfare professionals or even lawyers who can be 'allocated' to families. Experts that the court relies upon are either forensic experts i.e. they are specifically instructed to advise upon the evidence in a case or they are experts who are fortuitously already involved with the family through one agency or another. Their role in proceedings is to advise the court. There is no budget to employ them or anyone else to implement the court's decision save in the most limited circumstances through the local authority, Cafcass or voluntary agencies."***

Re A (A Child) [2015] EWCA Civ 910, McFarlane LJ returned to the theme and repeated key passages of his judgment in **Re W** (above):

"*75. In all aspects of life, whilst some duties and responsibilities may be a pleasure to discharge, others may well be unwelcome and a burden. Whilst parenting in many respects brings joy, even in families where life is comparatively harmonious, the responsibility of being a parent can be tough. Where parents separate the burden for each and every member of the family group can be, and probably will be, heavy. It is not easy, indeed it is tough, to be a single parent with the care of a child. Equally, it is tough to be the parent of a child for whom you no longer have the day to day care and with whom you no longer enjoy the ordinary stuff of everyday life because you only spend limited time with your child. ….Where, however, it is plainly in the best interests of a child to spend time with the other parent then, tough or not, part of the responsibility of the parent with care must be the duty and responsibility to deliver what the child needs, hard though that may be.*

…

77. Where there are significant difficulties in the way of establishing safe and beneficial contact, the parents share the primary responsibility of addressing those difficulties so that, in time, and maybe with outside help, the child can benefit from being in a full relationship with each parent ..".

In **Re H-B (Contact) [2015] EWCA Civ 389,** the Court of Appeal endorsed the refusal of direct contact to F with respect to his two teenage daughters (16 and 14) who were adamantly opposed to contact, mirroring their Mother's extreme hostility – a reversal of residence/care arrangements was not contemplated; nobody considered it remotely appropriate.

Instead, Black LJ specifically said at para 62 "*These parents would do well to read the postscript added by McFarlane LJ to his judgment in Re W (above)….as would all other parents attempting to sort out arrangements for their child….The fact that the courts cannot solve the problems…does not mean that they are insoluble. The solution so often lies in the hands of the parents".* She identified that the Mother could influence things for the better; "*she owes it to them to try. She also owes it to herself to try ….*"

And Munby P, too, endorsed McFarlane LJ's words on PR and added his own:
"parental responsibility is more, much more, than a mere lawyer's concept or a principle of law. It is a fundamentally important reflection of the realities of the human condition, of the very essence of the relationship of parent and child. [It] exists outside and anterior to the law. Parental responsibility involves duties owed by the parent not just to the court. First and foremost and even more importantly, [it] involves duties owed by each parent to the child."

His message was also that, whatever the age of child, it is unacceptable for a parent to shirk their responsibility by sheltering behind the assertion that the child will not do, or even that the child is adamantly opposed to doing, something –it is a parent's job to make them do it, however that is achieved short of brute force….by means of "blandishments", including confiscation of screens if necessary!

Finally, Munby P exhorted M to consider the likely harm she was doing to her own future relationship with the girls once they discovered the truth, and that M had manipulated them and denied them a relationship with F, who was not the man she portrayed him to be. She risked rejection herself, and the prospect that her daughters would have no relationship with either parent in their future.

So, transfer of residence is still available for the "right" case, but - perhaps in recognition of its limitations - judicial emphasis has moved steadily away from the language of coerciveness, to focus instead on the balancing of children's welfare interests, and clear signalling of the broader issues of adult responsibility that lie behind these most difficult and intractable cases.

PENNY HOWE QC 26TH JUNE 2017