WHITE PAPER CONFERENCE 2024

PRIVATE CHILDREN LAW

SERIAL NON-COMPLIANCE:
HOW AND WHERE DO YOU DRAW THE LINE ON IMPLACABLY HOSTILE CARERS AND SERIAL NON-COMPLIANCE AND SO SECURE A FAIR OUTCOME FOR YOUR CLIENT?

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Introduction and definitions

1. I could be wrong, but this, I believe, is my 10th White Paper Conference. And to celebrate I thought that I would try something new. And that is actually to seek to answer the question that I was originally asked by the conference organisers to address. So, unlike previous years, I have decided not to indulge in a bit of freestyle redrafting, let alone choose an entirely new question, usually based on one of my recent cases, that I would sooner answer. I am actually going to do what it says on the tin and, tin being what you are supposed to give on a 10th wedding anniversary, that seems to be an entirely appropriate way to mark my long-standing union with the White Paper Conference.

2. So to this year's question which is asked under the general heading of serial non-compliance: how and where do you draw the line on implacably hostile carers and serial non-compliance and so secure a fair outcome for your client?

3. And, to begin with, I am going to start with some definitions because, rather like a law exam, my question this year is replete with words and phrases that require a degree of interpretation and explanation if my question is to be understood in its correct context and properly answered.

4. Serial non-compliance. Well, let's get the cheap jokes out of the way first. Serial non-compliance is not choosing a croissant over your morning cornflakes, nor would it be the inexplicable failure to watch the last episode of the latest series of 'Slow Horses'. For children lawyers, it describes the continuing failure of a carer, most typically a parent – and, for ease, I am going to use those words interchangeably - to comply with orders of the court, most commonly but not exclusively a child arrangements order providing for the subject child or children to have or spend time or otherwise have contact with their other parent. But, on a broader construction, it could also encompass a failure to comply with agreements between parents to similar effect.

5. Implacably hostile. Well, this is an expression that I remember well from my early years of practice, long before talk of parental alienation let alone alienating behaviours

filled the family law air space, but which, as a simple case-law search reveals, is still being regularly used to this day. And it is a concept that requires some degree of explanation.

6. For definition purposes, it is appropriate to start with the distinction drawn by Mrs Justice Hale (as she then was) in the 1996 case of ***Re D (Contact: Reasons for Refusal)*** [1997] 2 FLR 48, where she observed that the term 'implacable hostility' usually referred to the type of case where no good reason could be discerned for a parent's opposition to contact, adding conversely that "where there were good reasons for opposing contact, such as where a parent had genuine and rationally held fears for the child or for themselves, it could be misleading to describe the parent's opposition to contact as 'implacable hostility'".

7. Almost 30 years and a lot of learning on, I would simply replace the word 'could' with 'would' and suggest that it is completely inappropriate to describe as 'implacably hostile' a carer who, by reason of the actions of the other parent, has suffered abuse themselves and/or is at risk of doing so and/or whose child has suffered or is at risk of suffering harm themselves and who is worried about their safety and/or that of their child and whose stance on the involvement of the other parent in their child's life is rooted in that concern.

8. And in that regard, we remind ourselves that Practice Direction 12J is focused not just on the safety and well-being of the child but also of the parent with care; that although expressed by reference to domestic abuse, its approach and principles, the case-law makes clear,[1] apply also to other forms of harm and risk; and that at its heart is the core general principle set out at paragraph 4, which always bears repeating:

> "Domestic abuse is harmful to children, and/or puts children at risk of harm, including where they are victims of domestic abuse for example by witnessing one of their parents being violent or abusive to the other parent, or living in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with and being victims of

[1] *D v E (Termination of Parental Responsibility)* [2021] EWFC 37.

> domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents."

9. But for me, implacable hostility is not just about ongoing opposition to the child having or spending time or otherwise having contact with their other parent but is based in and usually extends more generally to one parent's opposition to the other parent, which opposition will encompass opposition to the child's relationship with their other parent, to that parent having a meaningful role in the life and upbringing of the child, to that parent exercising parental responsibility for that child.

10. Is implacable hostility the same as alienation or more appropriately alienating behaviours, alienating behaviours now being the preferred terminology? Not least given the frequency with which our clients will raise with us the issue of 'alienation' and because the terms 'alienation' and 'implacable hostility' are terms that are often used interchangeably, it is a question that warrants addressing.

11. Drawing on the relevant case-law, so starting with the seminal Court of Appeal case of ***Re S (Parental Alienation: Cult)*** [2020] EWCA Civ 568, and including the President's decision in ***Re C (Parental alienation: permanent removal to Germany)*** [2023] EWHC 1955 (Fam), and with regard for the Family Justice Council's draft guidance which seeks to build on ***Re C*** (and we should bear in mind that, as I speak, it is still only a draft), I derive the following:
    (1) that insofar as it is still appropriate to talk of parental 'alienation':
        (a) it is to be found when a child's resistance/hostility towards one parent is not justified and is the result of psychological manipulation by the other parent;
        (b) it is an emotionally abusive process; and
        (c) the manipulation of the child by the other parent need not be malicious or even deliberate - it is the process that matters, not the motive;
    (2) that the focus should be on the behaviours that have occurred within the family and their impact on the child's relationship with either or both of their parents;
    (3) that, accordingly the identification of 'alienating behaviour', which is a question of fact, should be the court's focus, rather than any quest to determine whether the

label ‘parental alienation’ can be applied;

(4) that, for a court to make a finding of alienating behaviours, three elements need to be in place:

(a) that the child is refusing, resisting or reluctant to engage in a relationship with a parent;

(b) that the refusal, resistance or reluctance is not consequent on the actions of the non-resident parent towards the child or the resident parent; and

(c) that the resident parent has engaged in behaviours that have directly or indirectly impacted on the child, leading to the child’s refusal, resistance or reluctance to engage in a relationship with the other parent.

12. As therefore can be seen, with ‘alienation’ and alienating behaviours the central focus is upon the child’s relationship with the alienated parent, which is being actively (even if not deliberately or maliciously) influenced by the alienating parent in an undermining and emotionally abusive way.

13. With implacable hostility, the focus is on the other parent, with typically the hostility being directed at that other parent, though with the child and their time and relationship with their other parent often caught in the crossfire.

14. Thus, whereas with ‘alienation’ or alienating behaviour the child is directly drawn into the conflict and manipulated, with implacable hostility the child may and will frequently be a secondary victim of the actions of the implacably hostile parent.

15. So is there an overlap? Yes. Many parents who are implacably hostile to their child’s other parent may also seek to alienate the child from that parent. Are they the same thing? No. You can be an implacably hostile parent without being an alienating parent and not every alienating parent would necessarily be described as implacably hostile.

16. For present purposes, does the distinction matter? Yes and no. No, because the steer from above is clear, don’t get hung up on labels, look at what is happening on the ground and how it is impacting the child. And in that context, I always steer my clients

away from trying to prove 'alienation' as if it some prize to be won. And secondly no, because actually a large number of behaviours that could properly be characterised as alienating would also customarily be seen with an implacably hostile parent. But, yes because most psychologists would say, when considering treatment and outcomes, that the intent and focus of the parent at fault (if I can inelegantly use that term) matters.

17. The other distinction to draw from the outset is between 'hostility' and 'implacable hostility'. With the cases that reach us, especially those which are consequent on recent parental separation, a certain degree of parental hostility is hardly unsurprising and at one level can be readily understood. The separation may not have been amicable, it may not have been the choice of both parents, and it will likely mean adjustment to new roles and to a future (at least an immediate one) beset by anxiety and uncertainty.

18. Separation and its aftermath, we should never forget, can be an extremely emotional experience, parents often feel ill-equipped to deal with it, and it may be asking too much to expect parents in that situation to be responsible, respectful, communicative and objectively child-centred. So a degree of hostility, not infrequently characterised by unpleasantness towards and about the other parent, difficulty over agreeing child arrangements and some inflexibility and selfishness when dealing with the other parent and with the child's time with them, while not to be excused, should not really surprise.

19. But this must be distinguished from a wholly unacceptable level of hostility which persists over time, which does not reduce in severity, which shows little regard for the child's best interests, objectively considered, and which profoundly impacts the other parent and their time and relationship with their child and their role in their life.

20. Finally, in this necessarily lengthy dissection of my question, in two places it uses the 2nd person singular and, I am quite sure, deliberately so.

21. I am not being asked to opine on how and where the court would draw the line on implacably hostile carers and serial non-compliance; I am being asked where the

parent affected and/or those advising them should draw the line, effectively say enough is enough, and how they should draw it, which inevitably invites some consideration of the enforcement options that would be open to them.

22. Nor, this being a White Paper Conference where the emphasis is on solution-focused advice for your clients, am I being asked about securing a fair outcome for the child concerned but for the client. And, as anyone tuning into this lecture will know, securing a fair outcome for the child and securing a fair outcome for your client are often not one and the same thing.

What to look out for

23. So what are the behaviours that we are looking out for, the signs that implacable hostility and/or serial non-compliance might be at work.

24. I provide the following extensive but non-exhaustive list.

25. First and foremost is the refusal to comply with orders of the court, which if continuing would properly be described as serial non-compliance as well as being evidence of implacable hostility.

26. So what we are looking out for here most obviously is non-compliance with child arrangements orders, be they an order providing for a child to live with a parent, one providing for them to spend time with a parent or one providing for them to otherwise have contact with a parent. But, depending on their terms, we could also be looking at specific issue orders, for example one providing for one parent to inform the other parent about matters relating to the child's schooling, or prohibited steps orders, for example one prohibiting one parent from making significant medical appointments for the child without the consent of the other parent – so in both cases orders dealing with matters of parental responsibility.

27. And, while naturally we tend to focus on orders of the court, as I have already hinted at, where child arrangements agreements or bespoke agreements as to aspects of

parental responsibility are in place, whether in a parenting plan or otherwise, then continuing non-compliance with those could also be considered serial non-compliance and evidence of implacable hostility.

28. Inevitably, though, disobedience of a court order, especially repeated disobedience, is, given its nature, self-evidently of a different magnitude of seriousness, speaking to a level of hostility towards the other parent that subsists notwithstanding the court's intervention and a preparedness to defy that which the court has expressly ordered.

29. But implacable hostility is not just about non-compliance with orders of the court or agreements to the same effect, and I set out next in no particular order other behaviours that might appropriately be classed as evidence of implacable hostility:

    A. I begin by highlighting, even where the ordered or agreed time itself occurs, actions that undermine the arrangements for the child and impact adversely the child's experience of time with their other parent, whether by making it difficult for the child to transition to their care or by creating problems within their period of care which negatively affect its quality and the child's experience of it - so, for example, making the transfer of care difficult for the child by arguing or discussing adult issues in front of the child and/or with similar subversive effect failing to send the child with all the right clothing, materials and equipment (often school kit, homework and equipment) that they will need when with the other parent.

    B. Next, impeding or obstructing communication – so beyond preventing phone and/or video calls between the child and the other parent which will often be ordered or agreed (something that would fall under our heading of 'serial non-compliance'), undermining the viability and success of those calls by distracting the child and/or ensuring that they cannot speak freely; blocking or refusing to share the child's contact information with the other parent; and mislaying or withholding devices provided by the other parent to facilitate their communication with the child.

    C. Next, withholding significant information from the other parent, for example about the child's schooling, health, religious upbringing or extracurricular activities, and failing to notify the other parent of significant events or decisions involving the

child that they have arranged or taken and/or know about.

D. Next, ignoring communications from the other parent about the child's well-being.

E. Next, insisting on communicating only through lawyers over minor issues that could easily be resolved directly.

F. Next, engaging in unnecessary, vexatious and costly litigation by making repeated groundless applications to the court.

G. Next, delaying or frustrating court proceedings by failing to comply with directions for evidence or disclosure.

H. Next, not engaging in non-court dispute resolution when appropriate and/or failing to agree that which objectively ought to be capable of ready agreement.

I. Next, frustrating and undermining the goal of constructive co-parenting – whether by failing to collaborate on parenting decisions that should or would be best taken jointly and/or engaging in unilateral decision-making and/or refusing to engage in interventions that have been recommended and/or directed by the court.

J. Next and strikingly, making false and/or unfounded allegations about the other parent to the court and/or to the police and/or to children's services, especially where this is calculated to frustrate or interfere with the other parent's time and relationship with the child and their involvement in the child's life.

K. Next, disparaging or unnecessarily criticising the other parent to professionals involved in the life of the child, such as teachers, doctors and dentists.

L. Next, insisting on controlling every aspect of the child's life, seeking without justification to impose their rules on the other parent's household, meaning that which should be simple and straightforward becomes a constant power struggle between parents.

M. And finally in our non-exhaustive and non-prioritised list, isolating the child – so not just impeding the child's time with the other parent but also with their extended family and/or family friends on that parent's side and/or refusing invitations for shared celebrations or milestones to avoid interaction with the other parent.

30. Now I imagine that many, probably most, maybe all of these examples will be sadly familiar. But what should not be lost sight of in cases where they are prevalent is their cumulative effect – that atmosphere of constant ongoing conflict that the implacably

hostile parent creates, to the obvious detriment of the emotional well-being of any child caught within it.

31. I am going to move on next to consider where one should draw the line when faced with implacable hostility and/or serial non-compliance of the kind just described. But, before I do, and having already signposted by way of exclusion from the label of implacable hostility those cases and carers where the opposition to the other parent's time and relationship with the child is rooted in genuine safety concerns, I want to mention, even if only briefly, the views of the older child and also sound a cautionary note about the issue of parental responsibility.

32. Older children may and often will have views of their own and, as the mantra goes, the older the child, the more their views deserve respect and the greater the weight the court will accord to them. They may choose not to have or to limit their time and communications with one parent and to restrict that parent's involvement in their life for reasons that may not have anything to do with the views and stance of their other parent.

33. So we and moreover our clients must not naturally assume with the older child that non-compliance with a child arrangements order, even repeated non-compliance, is a marker of implacable hostility. And, where that repeated non-compliance is in effect being driven by the uninfluenced views of an older child, then invariably the attitude of the court will be different from the scenario where the child's resistance to time and a relationship with one parent has been shaped by the views of the other parent.

34. Secondly, parental responsibility. Why do I express some caution in that regard? Because, in my experience, many clients do not know quite what their parental responsibility entitles them to and as a result perceive fault and hostility on the part of the other parent where in legal reality none exists.

35. If your case-load is similar to mine, then you may have clients who expect to be consulted over everything pertaining to their child, who believe that any decision in

respect of the child, however relatively minor, needs to be agreed. And, while the law is not as black-and-white in this regard as one would like, that is not what the law says.

36. Let's start with the basics. Because multiple people can hold parental responsibility for a child, it is self-evident that they may disagree as to how it should be exercised. Does the Children Act 1989 mandate joint decision-making? Quite the opposite, with section 2(7) expressly providing that "where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility", subject to the qualification that "nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child". And this statutory provision has been interpreted to mean that having parental responsibility does not provide a mandate to interfere in the day-to-day decision-making of the other parent.[2]

37. Nevertheless, beyond issues such as surname-change and removal from the UK where the necessity for agreement or court order is enshrined in statute, courts have imposed a duty on holders of parental responsibility to consult and in effect agree on certain matters. According to the Court of Appeal, "there is … a small group of important decisions made on behalf of a child which, in the absence of agreement of those with parental responsibility, ought not to be carried out or arranged by a one-parent carer although [they have] parental responsibility under section 2(7) Children Act 1989 … without the specific approval of the court".[3]

38. The extent and precise make-up of that "small group of important decisions" is unclear. The Court of Appeal has emphasised that "in general terms, it must be the case that where two parents share parental responsibility, it will be the duty of one parent to ensure that the rights of the other parent are respected, and vice versa, for the benefit of the child".[4] The duty to consult has been applied to education[5] and to sterilisation

[2] *P (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 578.
[3] *J (Child's Religious Upbringing and Circumcision)* [2000] 1 FLR 571.
[4] *W (Direct Contact)* [2012] EWCA Civ 999.
[5] *G (Parental Responsibility: Education) [1995] 2 FCR 53*

and circumcision.[6] And in ***A v A (Shared Residence)*** [2004] 1 FLR 1195 Mr Justice Wall (as he then was) broke down parental responsibility decisions into three distinct categories: first, decisions that could be taken unilaterally and without any consultation with or notification to the other parent, including how the child is to spend their time when with one parent, the child's personal care, activities undertaken and continuation of GP prescribed medication; secondly, decisions where one parent would always need to inform the other parent of the decision, but did not need to consult or take the other parent's views into account, including medical treatment in an emergency, booking holidays within their time and planned visits to the GP and the reasons for them; and thirdly, decisions requiring both notification to and consultation with the other parent prior to making the decision, including the school the child is to attend and admissions applications, and planned medical and dental treatment.

39. And I set this all out because, if we are considering whether a given case is one of implacable hostility, then we need to be clear ourselves and accordingly clear with our clients as to what actions of the other parent are in law and in fact unobjectionable and conversely where complaint properly lies.

When do you say enough is enough?

40. So, having satisfied yourself that there is genuine evidence of implacable hostility (so something beyond the kind of emotion-laden, post-separation hostility that I spoke of earlier which in many cases will settle down) and/or that there has been serial non-compliance on the part of the other parent in the case, where do you draw the line? When do you say enough is enough?

41. And, while inevitably each case will turn on its own merits and an individual judgement call falls to be made in each, my general rule of thumb is not to delay to call out implacable hostility and/or serial non-compliance out for what it is. And I say that, for two key reasons.

[6] *J (Child's Religious Upbringing and Circumcision)* (above).

42. First, because the typical trajectory, if unchallenged, is clear. Parents who are implacably hostile don't tend to wake up one morning and suddenly stop being implacably hostile – the clue really is in the word 'implacable'. And similarly those who are prepared to defy the authority of the court once and feel that they have got away with it simply become emboldened and tend to think little of doing so again. So inaction or indifference will just breed a continuation or more likely an expansion of the behaviour in issue.

43. Second, because the longer you leave it, the longer the behaviour in issue goes unchallenged, the worse it becomes for the child, the more they are embroiled in and affected by the parental conflict, the more damage will be done to their relationship with your client.

44. So be alert to what constitutes implacable hostility and serial non-compliance and draw the line early – and, at the risk of stating the obvious, look to call out the non-compliance before it becomes serial non-compliance.

45. The real question, though, is not where you draw the line but how you draw the line, and that involves consideration of the various realistic options and remedies available to you and your client.

How do you say enough is enough

46. So how do you say enough is enough? Well, the first point to make is that, whilst you may consider proceedings to be inevitable, the decision whether to initiate proceedings is always one that needs to be carefully considered.

47. My question ends with the stated objective of securing a fair outcome for your client. When I am instructed, I am usually brought in right at the outset of a case and the one question that I always ask my clients in our first meeting is: what do you want to achieve? Because, for me, it is not for us as lawyers to dictate to our clients the answer to that question, rather it is for us to hear their aspirations, to give them advice including as to how realistic their objectives are, and then seek to do our best to turn

their goals into reality.

48. They may want to avoid court at costs, they may not aspire to 50-50 care, they may view with horror the prospect of their child being ordered to live primarily with them, so, for me, the first step is always to find out what they want to achieve and then to take it from there.

49. In general terms, as we all know, the family court can be slow, costly and unpredictable; their concept of what constitutes an urgent case will likely not be yours; and, once proceedings have been issued, we lose control of the process, are subject to the rules of court as to what we can and cannot do, and are in the hands of others and their timetables.

50. So, when on the ground you are seeing implacable hostility and/or serial non-compliance with child arrangements agreements, you may wish to consider as a first step a carefully constructed solicitors' letter identifying the unacceptable actions and behaviours and making very clear that there needs to be an immediate and complete cessation to such conduct.

51. In times gone by, that letter might be accompanied by a threat of proceedings without further notice, but, unless one of the NCDR exceptions applies, it should be proposing an immediate resort to NCDR and, insofar as it mentions proceedings, unless the nature of the case makes arbitration unsuitable, then, given the attraction of its speedy decision-making, there should be an invitation to consider arbitration as an alternative to court proceedings.

52. But I suspect that, when my question asks how do we draw the line on implacable hostile carers and serial non-compliance, what it really contemplates is the scenario of already being in court proceedings, with any serial non-compliance being with orders rather than simply agreements.

53. So what are your options? Dependent on the particular circumstances of your case,

including the nature of the orders breached, and the particular objectives of your client, they are these.

54. Applying for an enforcement order, so let's remind ourselves of the basics of what that involves. Pursuant to section 11J(2) Children Act 1989, if the court is satisfied beyond reasonable doubt that a person has failed to comply with a provision of a child arrangements order – so pausing there, this is not a remedy available for breach of a prohibited steps or specific issue order - then it may make an enforcement order imposing on that person an unpaid work requirement, comprising between 40 and 200 hours of unpaid work. But, under section 11J(3) Children Act 1989, 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, the burden of proof lying on the person claiming to have had a reasonable excuse, the standard of proof being the balance of probabilities, reasonable excuse arising where, although it was in the power of the person claiming such excuse to comply, they had some good reason, such as a child's illness, for not doing so.[7]

55. Is it quite a blunt instrument? In some ways, yes, and some courts do not like it for just that reason. But then again this is the very remedy that Parliament introduced to address the problem of non-compliance with – what were then known as – contact orders because contempt proceedings, with the threat and possibility of imprisonment, were seen as the bluntest of instruments. So, if you do have a sceptical judge, you may wish to remind them of that.

56. Critically, though, under section 11J(9) Children Act 1989, the court may suspend an enforcement order and suspending it on terms of future compliance with an ongoing child arrangements order can be a very effective way of ensuring that compliance. And pitching for just such an outcome tends to sideline any counterpoints about the unattractiveness of one parent making the other do unpaid work and the welfare impact on the child of their parent having to do that work and thereby enables you to present

[7] *LW (Children) (Enforcement and Committal: Contact); CPL v CH-W & Ors* [2010] EWCA Civ 1253.

your client as reasonable, measured and child-centred.

57. And do bear in mind that, when making an enforcement order or a suspended enforcement order, the court does have the power to make a fresh child arrangements order, so you may wish to – and, I would suggest, should - seek compensatory time to make up for that lost by reason of the other parent's non-compliance.

58. You could of course just return the matter to court anyway on an application to vary the subsisting child arrangements order, seeking an order that provides for that compensatory time, and you may take the view that the judicial admonition for the non-compliant parent that will often accompany any fresh order made will, together with an order for compensatory time, be a sufficient deterrent.

59. And this may appeal if you and your client are not too interested in the enforcement order route, which can be quite costly, time-consuming and cumbersome because, before a court makes an enforcement order, it does need to be satisfied of various matters which will ordinarily be addressed by a report from a Cafcass officer. So, with any application for an enforcement order, you would usually be looking at least at two hearings to deal with it.

60. And, if you have a sufficiently engaged and concerned judge, you could invite them to list a further hearing after the next period of ordered time for the child and your client, such to be vacated if that time takes place. And that can be a very useful sword of Damocles hanging over the head of the non-compliant parent.

61. You could of course do a variety of those things, but, if you have a serial non-complier, my advice would be not to dismiss the enforcement order route lightly. Findings of non-compliance without reasonable excuse can be a very clear and useful marker within the proceedings as a whole, painting the other parent unambiguously as a non-complier, curtailing their ability to obfuscate and deflect then and later on, and findings like that, coupled with a Cafcass report addressing the making of an enforcement order, can really serve to put that parent on the back foot, even if the court does not go the

full way and make an enforcement order (suspended or otherwise).

62. Among your other remedies where a contempt has occurred are imprisonment (including a suspended order for imprisonment), fine and seizure of assets, and these are available:
    - (additional to the powers provided by the enforcement order regime) where there has been non-compliance with a child arrangements order (or an order varying a child arrangements order) or an enforcement order;[8] and
    - where there has been a breach of any other private children law order carrying a penal notice - so that would be your remedy if you are dealing with the breach of a prohibited steps or specific issue order but only if it carries a penal notice, and, if it does not already, then you should apply first to attach a penal notice to the order in question.

63. And, while ordinarily you are not going to consider contempt proceedings as a first option, they may be something to bear in mind, dependent on the circumstances of the case, down the line.

64. If your most immediate aim is to have the child in your client's care as soon as possible when pursuant to an order of the court they should have been, then you may want to consider applying for a 'search and recovery order' under section 34 Family Law Act 1986.

65. For our purposes, that section in material part provides that, where a person is required by a child arrangements order to give up a child to another person and the court which made the order imposing the requirement is satisfied that the child has not been given up in accordance with the order, then the court may make an order authorising an officer of the court or a constable to take charge of the child and deliver them to that other person. And the authority so conferred includes authority to enter and search any premises where the person acting in pursuance of the order has reason to believe

[8] *Re S* (A Child) [2004] EWCA Civ 1790.

the child may be found, and to use such force as may be necessary to give effect to the purpose of the order.

66. So potentially a very effective remedy in terms of securing the child but also a heavy-handed one and likely a very distressing one for any child concerned and as such potentially very counter-productive and damaging to the child's relationship with your client. Hence, while it is a remedy that has its place, it tends not to be the first that you would select to pursue.

67. But where it might usefully and appropriately be employed is where there has been an order transferring the care of the child from one parent to another which has not been complied with.

68. And that leads me neatly on to the final option that I am going to address – one that invariably arises within the worst cases of implacable hostility and serial non-compliance. And that is applying for an order to change the living arrangements of a child - what used to be termed, and commonly still is, a transfer of residence.

69. And, while there was a time when it was seen as an option of last resort, no more. In ***Re L (A Child)*** [2019] EWHC 867 (Fam), Sir Andrew McFarlane P made very clear that, in determining whether a child's living arrangements should change – and that would encompass moving from the care of one parent to the other and also moving from a shared care arrangement to one of primary or sole care - the welfare of the child must be the court's paramount consideration. The test is, and must always be, based on a comprehensive analysis of the child's welfare and a determination of where the welfare balance points in terms of outcome. It is not apt, our President said, to refer to the decision as to whether to change the child's residence as being 'a weapon' or 'tool'; and use of phrases such as 'last resort' or 'draconian' cannot and should not indicate a different or enhanced welfare test. What is required is for the court to consider all the circumstances in the case that are relevant to the issue of welfare, consider those elements in the section 1(3) Children Act 1989 welfare checklist which apply on the facts of the case and then, taking all those matters into account, determine

which of the various options best meets the child's welfare needs. And, in considering those matters, the court will of course be assisted by a section 7 report and possibly other expert evidence.

70. And, as we all know, it is an order that we do see in practice where child arrangements orders have been repeatedly flouted, where in particular all contact (if I can use that term loosely) has broken down, where the reasons for that break-down lie squarely with the resident parent, and where, as in ***Re RH (Parental Alienation)*** [2019] EWHC 2723 (Fam), a decision of Mr Justice Keehan's, the court sees a transfer of residence (in that case from an alienating parent to an alienated parent) as being the only means by which the child could have a full relationship with both their parents.

71. And under this heading we also take the following matters from the case-law:
    - that the opposition of a child to a transfer of residence had to be taken into account but could not be determinative of outcome, especially where tainted by the influence of their resident parent;[9]
    - that an immediate change of the primary residence of a child during the course of ongoing court proceedings, where further assessment has been ordered, is permissible but must be supported by evidence which establishes that such an interventionist step is proportionate to the need to safeguard the child's welfare on an interim basis;[10]
    - that, in an appropriate case, a final decision on a change of parental care may be postponed, thus hanging over the head of the non-compliant parent;[11] and
    - in similar vein, stemming from the well-known case of ***Re M (Contact)*** [2012] EWHC 1948 (Fam), a decision of Mr Justice Peter Jackson (as he then was), that the court has the power to make an order for a conditional change in residence, being an order transferring the child's care, directed not to come into effect if contact resumed – an order intended to offer the resident parent one final chance

[9] *V v V [2004] EWHC 1215 (Fam).*
[10] *Re H (Children) [2014] EWCA Civ 733.*
[11] *Re S (Parental Alienation: Cult) [2020] EWCA Civ 568.*

and one to be considered appropriate where the court can confidently foresee the circumstances in which it might come into effect.

72. Now, while I did say that transfer of residence is an option that invariably arises within the worst cases of implacable hostility and serial non-compliance, it should certainly not be confined only to the very worst types of these cases, nor should you feel the need to build up months of non-compliance before you make that application. Consistent with what I said earlier, delay is not your or your client's friend.

73. And, if I may add a caveat to what I said earlier about finding out at the outset what your client wants to achieve and seeking to realise that for them. Circumstances change and advice has to change accordingly. It may well be that your client started the proceedings with no aspiration for the child to live with them but have come to realise that is the best option, and quite possibly that will be because you have had to tell them that, without that outcome, they would not be likely to have any relationship with their child.

Conclusion

74. So there, you have it. That is my take on how and where you draw the line on implacably hostile carers and serial non-compliance and so secure a fair outcome for your client.

75. It simply remains for me to thank the White Paper Conference for inviting me once again to be part of their magnificent programme.

76. I am no money practitioner, but I am reliably told that a 10 year union qualifies as a marriage of moderate length. Whether the White Paper and I make it to a long marriage, I guess, will as ever depend on the feedback.

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