

# Intractable Contact

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# What is Intractable Contact?

intractable

/ɪnˈtræktəb(ə)l/

*adjective*

Hard to control or deal with.

*Synonyms:* unimaginable, uncontrollable, ungovernable, out of control, out of hand, impossible to cope with ; more

(of a person) difficult or stubborn

*Syn* stubborn, obstinate, obdurate, inflexible, unadaptable, unmalleable, unbending, unyielding,  
*Ony* uncompromising, unaccommodating, uncooperative, difficult, awkward, perverse, contrary,  
*Ms:* disobedient, indomitable, refractory, recalcitrant, pig-headed, bull-headed, wilful, more;

# “Intractable Contact”

- The term derives from a series of English cases;
- Extreme negative behaviour exhibited by one parent undermining a child's relationship with the other;
- Implacable or intractable hostility – a term applied to a parent who would do almost anything to frustrate a relationship between the child and their other parent;
- Parental Alienation



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# PARENTAL ALIENATION

“I think the way you treat your children after a relationship has broken up is just as powerful a public health issue as smoking or drinking”

*Anthony Douglas , Chief Executive Officer of Cafcass*

# Parental Alienation

- Constant criticising or belittling of the other parent
- Preventing the child talking about the other parent
- Limiting contact
- Removing any presence of the other parent from the life of the child
- Promoting the idea that the other parent does not love the child
- Giving the impression that the child must choose between parents or be punished

# Intractable Contactable Disputes

- Hardest Cases to resolve for Practitioners and the court
- Not only legally complex, but physiologically and emotionally complex
- Views need to be taken carefully

# Contact Disputes in General

A standard contact dispute has a fairly predictable path:-

1. Have Writ warranted
2. Serve Writ
3. Lodge Notice of Intention to Defend
4. Court fixes court timetable including Child Welfare Hearing
5. Defences are lodged
6. Action progresses in accordance with court timetable

# Child Welfare Hearing

- Interim awards are often made
- A report may be ordered
- A further Child Welfare Hearing will be fixed
- Subsequent Child Welfare Hearings
- Further interim orders will often be made
- A final disposal may be capable of agreement
- The court may fix an Evidential Child Welfare Hearing or a Proof
- Court makes a final disposal

# Chapter 33AA

## Ordinary Cause Rules

Sets out the procedure which applies where cause is proceeding to Proof or Proof before Answer in respect of a crave for an order under Section 11 of the Children (Scotland) 1995 Act

- The Sheriff is required to fix a date for a Case Management Hearing not less than 14 days and not more than 28 days after the interlocutor appointing the cause to a Proof or Proof before Answer;
- In advance of the Case Management Hearing the Parties are required to hold a Pre-Case Conference in which they must discuss settlement of the action, agree so far as possible the matters which were not in dispute between them and discussing information referred to in Rule 33AA.4 (1);
- Prior to the Case Management Hearing the Pursuer must lodge with the court a Joint Minute of the Pre-Hearing Conference or explain why this has not been lodged;
- If a party is not present during the Pre-Hearing Conference that party is represented and must be able to contact their client during the conference and be in full possession of all relevant facts.

# Case Management Hearing

Parties must provide the Sheriff with sufficient information to enable the Sheriff to ascertain:-

- a. The nature of the issues in dispute including any questions of admissibility of evidence or any other legal issues;
  - b. The state of the Pleadings and whether amendment will be required;
  - c. The state of preparation of the parties;
  - d. The scope for agreement of facts, questions of law and matters of evidence;
  - e. The scope for use of affidavits and other documents in place of oral evidence;
  - f. The scope for joint instruction of a single expert;
  - g. The number and availability of witnesses;
  - h. The nature of productions;
  - i. Where the sanction is sought for the employment of Counsel;
  - j. The reasonable estimate of time needed by each party for examination in chief, cross examination and submissions;
- At the Case Management Hearing the Sheriff will fix the Diet for Proof or Proof before Answer, and a Pre-Proof Hearing.
  - The Diet fixed is to be assigned for the appropriate number of days for resolution of the issues.
  - The number of days allocation for Proof may be extended or varied on exceptional cause shown and subject to such orders (including awards of expenses) as the Sheriff considers appropriate...

# Case Management Hearing cont'd

The Sheriff may make such orders as thought fit to ensure compliance with this rule and to the expeditious resolution of the issues in dispute including:-

- a. Restricting the issues for Proof;
- b. Excluding specified documents, reports and/or witnesses from Proof;
- c. Fixing other hearings and awarding expenses.

In due course the Proof will take place and a decision will ultimately be made.

# Cases Where a Parent is Implacably Opposed to Contact

- Many contact disputes relate to issues surrounding the exercise of contact – when, where, for how long and for how often;
- Minority of cases in which the resident parent is implacably opposed to any form of contact;
- Reported English cases which are often referred to in Scotland

# Justification for referring to English Authorities

1. There is no material difference between Scottish and English law in this area;
2. Welfare of the child is the paramount consideration in both jurisdictions and both require regard to be had to the abuse of the child;
3. Article 8 of ECHR underpins the domestic law in both jurisdictions

## AH v CH 2016 CSOH 152

Lord Brailsford refers to a number of English authorities.

- The mother was highly resistant to any form of contact;
- The child had told a psychologist in clear terms that he wished no direct contact with his father;
- The psychologist was of the opinion that the child views were genuine but not independently formed as they were influenced by his mother's negative views towards his father.

The psychologist set out the following options:-

1. Indirect contact;
2. A routine order for direct contact;
3. An order for direct contact with a “strong compulsitor”

Lord Brailsford put the case out by order for orders to be made with a view to establishing unsupervised direct contact.

# Non-Compliance with Court Orders

- Wilful Refusal – “you’re not having the kids”;
- Creative Refusal - “Johnny has a cold/vomiting bug/ingrown toenail”;
- Child-related Refusal – “Johnny won’t go with you”

# Options For Dealing with Non-Compliance

## Variation of existing Court Orders

A court has a discretion to vary the terms of any residence order in place as well as any contact order.

- In **AH v CH** the psychologist had suggested an order for contact with a “strong compulsitor”;
- Lord Brailsford took that to mean warning the mother that the child’s residence could be changed should she not comply and was not prepared to sanction that approach;
- As the welfare of the child is the paramount consideration, such orders are rare;
- Scope for altering existing orders to remove some elements of control from a non-compliant parent.

# Contempt of Court

- Sanctions are fine and/or imprisonment;
- Contempt proceedings should be dealt with separately to the substantive action (**SM v CM 2017 CSIH 1**);
- Burden of Proof is the criminal standard of beyond reasonable doubt;
- Minute and Answers followed by hearing and subsequently Proof

# Contempt of Court Cont'd

- Failure to obey a court order will not always amount to a contempt;
- Must be a deliberate lack or respect for, or defiance of, the authority of the court;
- **AB & CD v AT [2015] CSIH 25** – Social Worker case. Finding of contempt turned over on appeal.

# JDE v SGW 2014 SC DUM 32

- Case dealt with via the correct procedure of Minute and Answers followed by a substantive hearing
- Mother sought to justify her failure to comply
- Very helpful decision

# JDE v SGW 2014 SC DUM 32

## Legal Test for Contempt of Court

Must approve beyond reasonable doubt that:-

1. The non-compliant parent was aware of the order;
2. He/she refused to obtemper it;
3. His/her refusal is wilful; and
4. He/she had no reasonable excuse for doing so.

# JDE v SGW 2014 SC DUM 32

Sheriff considered the mother's responsibilities:

***Blance –v- Blance 1978 SLT 74***

***Brannigan –v- Brannigan 1979 SLT (Notes) 73***

- Duty of the Parent to tell the child to go, firmly if necessary; and
- Not to leave it to the child to make a decision without positive guidance and genuine encouragement;
- Wording of the 1995 Act makes reference to parental responsibilities being without prejudice to duties imposed on parents at common law

# Reasonable Excuse

- No exhaustive list but would include:-
  1. Refusing contact on a one off basis where the child is ill;
  2. Non-resident parent turning up drunk and unable to care for the child;
  3. Non-resident parent intends to use the contact visit to harm the child or subject the child to an illegal procedure (such as FGM);

# Views of the Child in Contempt Action

Decision as to what is in the child's best interest has already been determined by court in the substantive action

- Views are not entirely irrelevant as may be relevant to the issue of reasonable excuse;
- BUT contempt action is not the place for general enquiry in relation to views;

# Decision in SGE –v- SGW

- Mother found in contempt
- No “reasonable excuse”
- Warrant for imprisonment for 21 days but suspended on condition of contact being reinstated per court order

# Contempt of Court

- Existence of contempt proceedings may be sufficient to motivate a change in attitude
- Open to the court to impose an appropriate punishment albeit restricted scope
- **SM –v- CM 2017 CSIH 1** - finding of contempt quashed on Appeal
- Appeal Court made it clear that a sentence of imprisonment of any duration would be regarded as excessive in the circumstances of that case

# Children and Adoption Act 2006

Equivalent to Section 11 Orders can be made under Section 8 of the Children Act 1989 in England and Wales)

- The court can use as contempt of court powers and impose a fine or custodial sentence;
- Child's living arrangements can also be altered although the welfare of the child is the paramount consideration;
- 2006 Act introduced new enforcement powers for breaches of contact orders;
- These include the power to impose an unpaid work requirement and the power to require the person to pay compensation for financial loss suffered to the other parent.

# Review of Part 1 of the Children (Scotland) Act 1995

- Consultation closed at the end of September;
- Views sought as to what action (if any) should be taken to try to stop children being put under pressure to reject the other parent;
- View sought on the possible introduction of alternative sanctions for enforcement of contact orders;
- Specific reference to new strategies employed south of the border.

# M v S

The story of a (very) intractable contact dispute....

# Summary

- No magic solutions;
- Better education;
- Outcome of ongoing consultation;
- Meantime make use of the rules for case management;
- Use correct processes where breaches do arise.

Any questions?