

FOURTEEN

Serial non-compliance:
How and where do you
draw the line on
implacably hostile carers
and non-compliance and
so secure an outcome for
your client?

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1. Introduction

“Justice based purely on laws is about as accurate as a portrait created out of large low-resolution colour pixels. If you stand back far enough it looks good.

Come any closer and the glaring approximations overtake all semblance of the original.

Justice should be viewable under the microscope, not from a telescope. And for that it needs to be based not on law but on truth.”

– Vera Nazarian

- Research suggests that about 1 in 25 of all private law cases involve implacable hostility; *Tinder et al, Enforcing Contact Orders: Problem solving or punishment?* Exeter University 2013
- The reasons for orders not working as they are supposed to are rarely clearly visualised

- So, how do you draw the line
- when do you do it?
- What is fairness and how do you achieve fairness for your client when the child's best interests are the paramount consideration of the Court?

2. How do you do it?

Drawing the line: what are the options?

- Punishment
- Care proceedings
- Transfer of primary base (possibly with a suspension of the relationship with the implacably hostile parent)

- Punishment

- Distinguish between committal and s11J

- Be aware of the strict rules that apply to committal procedure

- Penal notice

- Properly drafted application

- Formalities must be observed; Re H [2018] EWHC 3761

- Courts should be more willing to use committal;

- Re A (Intractable contact dispute) [2013] EWCA Civ 1104

– But....

- Re L-W [2010] EWCA Civ 1253
- Does not address underlying problem
- Can make the problem worse
- Can impact adversely on the child
- Courts very reluctant to use it still

- Care proceedings
 - Use of s37 and s38(1)
 - Greater resources
 - Need to meet s31(2) ‘threshold’ criteria
 - Loss of control
 - Varying levels of experience and diligence amongst social workers
 - Warwickshire CC & Ors [2023] EWHC 399 (Fam)

- Transfer of primary base
 - A number of cases which make it clear that the child's welfare may require a transfer of primary base, where the current main carer is blocking the development of a relationship
 - Dependent on it being considered that the child can make the 'leap'
 - Dependent on the current primary carer not sabotaging the process (suspension of contact in the interim?)
 - Dependent on that arrangement overall being in the child's best interests

Drawing the line: mechanical/ procedural considerations

- Good record keeping (client AND lawyer)
- Good case management
- The importance of drafting
- Separate representation of the child
- Determination of disputed facts
- Expert evidence?
- Expert support?

- Good case management
 - Re J [2018] EWCA Civ 115
 - Delay can be a breach of human rights (see Re A (contact: Human Rights Violations) [2013] EWCA Civ 1104)
 - Judicial continuity crucial

3. When do you do it?

“This afternoon, a wholly deserving and tearful father has asked the court for permission to withdraw his application to enable him to spend time with his son. It is poignant that that application comes before me just six days before Christmas” Re J (A child) [2017] EWFC B103

“In summary, in a situation of parental alienation the obligation on the court is to respond with exceptional diligence and take whatever effective measures are available. The situation calls for judicial resolve because the line of least resistance is likely to be less stressful for the child and for the court in the short term. But it does not represent a solution to the problem. Inaction will probably reinforce the position of the stronger party at the expense of the weaker party and the bar will be raised for the next attempt at intervention. Above all, the obligation on the court is to keep the child’s medium to long term welfare at the forefront of its mind and wherever possible to uphold the child and parent’s right to respect for family life before it is breached. In making its overall welfare decision the court must therefore be alert to early signs of alienation. What will amount to effective action will be a matter of judgement, but it is emphatically not necessary to wait for serious, worse still irreparable, harm to be done before appropriate action is taken. It is easier to conclude that decisive action was needed after it has become too late to take it.”

Re S (Parental Alienation: Cult) [2020] EWCA Civ 568

“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 judge to consider all the circumstances in the case that are relevant to the issue of welfare, consider those elements in the s 1(3) welfare check list 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.”

Re L (A child) [2019] EWHC 867

- Clear message that:
 - Action must not be left too late
 - Action must be proportionate
 - Action must be in the child's best interests
 - Action must be evidence-based
- But what does that actually mean 'under the microscope'?

- *Re S (A Child)* [2010] EWHC 3721 (Fam)
 - Ten years of litigation before transfer
- *Re A (A child)* [2007] EWCA Civ 899
 - 16 hearings, repeated non-compliance, fact finding hearing and an expert report before a transfer of residence ordered
- *Re B (Change of residence: parental alienation)*[2017] EWFC B24
 - 3 years+ of litigation, expert report, cessation of all contact, separate representation of the child

- *Re C (A Child)* [2018] EWHC 557
 - 3 years of litigation, child joined as a party, findings of hostility
- *Re L (A child)* [2019] EWHC 867
 - 6 years of litigation, fact-finding hearing, child joined as a party
- *Re H (Parental alienation)* [2019] EWHC 2723
 - 10 years of intermittent litigation, s37 report, expert report, fact-finding hearing

- Re S (Parental Alienation: Cult) [2020] EWCA Civ 568
 - 5 years of intermittent litigation, expert reports, mother member of religious cult, disguised compliance with requirement to abstain. ‘On balance’ mother given another time-limited chance to leave the cult

- Build your case
- Wait for when it feels that a 'tipping point' has been reached
- Don't wait too long
- If there are strong signs of alienated behaviours setting in attempt to accelerate the process
- Therapy can be a useful preliminary step, but beware of disguised compliance

4. Fairness

- Court process must be fair (*Article 6 ECHR* etc). However, the outcome will not always be fair to everyone when the focus is on the child's welfare
- Sometimes what a child needs will result in an adult being treated unfairly
- Prepare your client in advance and keep an eye on the 'roadmap'

- Ensure that the evidence-gathering process keeps the child at the centre of its considerations

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