

Enforcing Contact

The starting point

Contact is the right of the child and not the right of the parent¹. The child has a right, where the parents are separated, to know the non-residential parent and his brothers or sisters¹. There is a normal assumption that a child will benefit from continued contact with his parent, but that assumption can always be displaced if the child's interests indicate otherwise². The normal assumption in favour of contact is based upon the harm that a child would suffer if contact with a parent were to be denied³.

When considering whether contact should resume after a long break, the test to be applied is whether there are any cogent reasons why the child should be denied the opportunity of contact with his natural parent⁴. Before ruling out the establishment, or re-establishment, of contact, the court will wish to be satisfied that all avenues have been tested. The possibility of short-term upset must be balanced against the long-term benefits which are likely to accrue if contact is established⁵.

- 1 *Re S (Minors: Access)* [1990] 2 FLR 166; *Re R (A Minor) (Contact)* [1993] 2 FLR 762.
- 2 *Re KD (A Minor) (Access: Principles)* [1988] AC 806 (HL).
- 3 *Re H (Minor) (Access)* [1992] 1 FLR 148; *Re F (Minors) (Contact: Mother's Anxiety)* [1993] 2 FLR 830; *Re J (A Minor) (Contact)* [1994] 1 FLR 729.
- 4 *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1; *Re R (A Minor) (Contact)* [1993] 2 FLR 762; *Re M (A Minor) (Contact: Conditions)* [1994] 1 FLR 272.
- 5 *Re H (Minors) (Access)* [1992] 1 FLR 148 at 153A; *Re M (Contact: Supervision)* [1998] 1 FLR 727.

Implacable Hostility

Parent implacably opposed to contact

The implacable hostility of a mother towards contact is a factor which is capable, according to the circumstances of each particular case, of supplying a cogent reason for refusing contact. Mother's attitude put the child at serious risk of major emotional harm if compelled to accept contact against her will.

Re D (A Minor) (Contact: Mother's Hostility) [1993] 2 FLR 1

Contact: mother's anxiety

Where a parent objects to contact on the grounds of anxiety, any medical evidence should be tested in cross examination if the court is to attach weight to it. An order denying contact is a Draconian order.

Re F (Minors) (Contact: Mother's Anxiety) [1993] 2 FLR 830.

Court reluctant to allow hostile parent to prevent contact

Cogent reasons are required to terminate or fail to restart contact with an absent parent. There are strong policy reasons for saying that a recalcitrant parent should not be allowed to frustrate what the court considered the child's welfare required. The court should be very reluctant to allow the implacable hostility of one parent to deter it from making an order which the child's welfare otherwise required.

Re J (A Minor) (Contact) [1994] 1 FLR 729

[For an example of allowing contact after a long break and in the face of hostility see *Re P (A Minor) (Contact)* [1994] 2 FLR 374]

Court will not be told "I shall not obey order"

A judge who avoided making an order on the basis that the mother would not obey it was abdicating his responsibility. The court could not be put into the position where it was told "I shall not obey an order of the court". The court should make some order to recommence contact.

Re W (A Minor) (Contact) [1994] 2 FLR 441

"No order" not appropriate where parent is hostile to contact

Where a mother was hostile to contact by grandparents, and, after 17 hearings, the court took the view that contact was not only in the child's best interests, but that the child would suffer significant harm if contact did not occur, the judge was wrong to make no order for contact (in the expressed hope that the mother would in time change her mind).

Re S (Contact: Grandparents) [1996] 1 FLR 158

The implacably hostile parent - European perspective

Despite 8 years of various court and welfare authorities in Finland ordering access between a father and his child and/or orders for custody, the child's grandparents, with whom she lived, refused to comply. In the end, taking account of the age of the child and her settled home, the court lifted all of the orders against the grandparents and lifted the penal fines levied against them. The father complained to the European Court of Human Rights, who upheld his complaint that there had been a breach of Article 8 of the ECHR regarding family life and awarded the father substantial compensation. However the delay in the proceedings of 17 months did not amount to a breach of Article 6 (right to fair trial).

Hokkanen v Finland [1996] 1 FLR 289

'Implacable hostility': term misused to describe valid opposition to contact

The decision of a judge who found that a mother had valid reasons to be fearful of future violence to herself and to the child was upheld on appeal when he refused to order direct contact. Hale J observed that the term 'implacable hostility' usually referred to cases where there was no good reason to oppose contact and in such cases court should only refuse contact if satisfied there was a serious risk of harm.

Re D (Contact: Reasons for Refusal) [1997] 2 FLR 48

Summary dismissal of father's application for contact

Upon a father making an application for contact, the children's step-father made it plain that, not only would he reject the child, but also the mother. At a directions hearing (which the father did not attend, but was represented) the judge summarily dismissed the father's application. The Court of Appeal dismissed the father's appeal. Lord Woolf MR repeated the general approach of the court to contact applications, but held that, in an appropriate case, the court did have power to dismiss an application at a directions hearing. But the court must bear in mind that the more Draconian the order, the more unique the situation must be to justify it.

Re B (Contact: Stepfather's Opposition) [1997] 2 FLR 579

Mother of disabled child hostile to contact: should court attach a penal notice to order

Some defined contact had taken place between a father and his disabled child at the mother's home, however the mother's hostility led the father to withdraw from contact. When the case returned to court the judge discharged the defined order and merely ordered "reasonable contact". The judge declined to attach a penal notice to the order. On appeal, the Court of Appeal held that the judge had been right not to attach a penal notice, and had been right to consider the effect on a disabled child of starting a process of enforcement which might lead to his mother going to prison. If a court was to put enforcement above the risk of harm to the child, it must be very clear about the correctness of the orders it was seeking to enforce.

OS only to be involved in cases where the child's interests could not be safeguarded by the Family Court Welfare Service. In the event, a defined order was substituted with no penal notice.

Re F (Contact: Enforcement) [1998] 1 FLR 691

'Implacable hostility': use of term [1]

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Re D (Contact: Reasons for Refusal) [1997] 2 FLR 48

'Implacable hostility': use of term [2]

Wilson J held that where there were no rational grounds for a mother's hostility to contact, the court would only refuse to order contact if satisfied that an order would create a serious risk of emotional harm for the child. Where the hostility was based upon grounds which were themselves strong enough to justify refusal, the hostility itself was largely irrelevant. Where the hostility was based upon rational but not decisive grounds, the hostility could be an important factor, occasionally determinative, provided that what was being measured was the effect on the child.

Re P (Contact: Discretion) [1998] 2 FLR 696

Re P (Contact: Disclosure) [1998] Fam Law 585

CA 1989, s 31 criteria satisfied by mother's attitude to contact: supervision order

The mother was diagnosed as suffering from a personality disorder and was strongly opposed to contact. Children had been in favour but were now fearful of the father. Mother's allegations against the father were not made out. Charles J found s 31 satisfied on the basis of emotional harm arising from the mother's attitude to the father and made an interim supervision order. Therapy was to be attempted. An interim order was made to ensure that the case came back to court in the event of a breakdown in therapy. The court might make a care order in due course.

Re Z and A (Contact: Supervision Order) [2000] 2 FLR 406.

Court should not give up too easily in face of mother's unfounded opposition

Where a parent objects to contact, the court should first evaluate whether that opposition was with or without objective foundation. Where it was without objective foundation the court should not give up the prospect of achieving contact at too early a stage. Rather than use its coercive powers, the court should work with local agencies for counselling and mediation to achieve contact.

Re H (A Child) (Contact: Mother's Opposition) [2001] 1 FCR 59

Indirect contact even with genuine and intense phobia

Father had history of violence. Stabbed mother, he solicitor and her boyfriend. During relationship there had been extreme domestic violence and thereafter harassment and stalking. Mother had phobia of the father which was genuine and intense. Direct contact would be profoundly destabilising. Nevertheless indirect contact was containable and outweighed in the balance by the potential benefit to the child of retaining some awareness of the father.

Re L (Contact : Genuine Fear) [2002] 1 FLR 621

Domestic Violence: impact on contact arrangements

Past domestic violence is a factor in determining contact, but not an automatic bar

Despite past domestic violence, which led the mother to oppose any form of contact, the court ordered some indirect contact with three supervised sessions and a further review. The mother's appeal was dismissed by the Court of Appeal, who observed that this was not a case of implacable hostility (ie without foundation). Domestic violence was not, of itself, a bar to contact, but one factor in a complex equation. The order had substantial safeguards in the supervision arrangements which addressed the mother's rational fears.

Re H (Contact: Domestic Violence) [1998] 2 FLR 42

Past domestic violence can provide the necessary cogent reason for refusing contact

The father suffered from a behaviour disorder, which in the past had led him to be violent to one of the child (twice) and on a number of occasions to the mother. He had undergone intensive therapy. No contact for two years. Father sought unsupervised contact on basis of significant change in his behaviour. Justices decision to dismiss his application upheld on appeal on basis that there were cogent reasons for denying contact in this case.

Re A (Contact: Domestic Violence) [1998] 2 FLR 171

Court should not minimise the weight to be attached to past domestic violence

Wall J held that a father, who had been guilty of past domestic violence, should demonstrate that he had changed his behaviour and was a fit person to have contact before a contact order was made.

Re M (Contact: Violent Parent) [1999] 2 FLR 321

Effect of past domestic violence on mother would in turn harm child if contact occurred

A mother, who had been so traumatised by the father's violence to her in the past, and his subsequent abduction of the child (for which he went to prison), was granted a variation of the direct contact order (3 x pa, supervised) to her 6 year old son, substituting only indirect contact. Wall J held that the mother's view of the father was such that the idea of direct contact instilled a heightened state of anxiety and fear which were inevitably conveyed to the boy. Direct contact would place unmanageable stress on him and divide his loyalties, causing him significant harm.

Re K (Contact: Mother's Anxiety) [1999] 2 FLR 703

Court of Appeal review of impact of domestic violence upon contact decision

The Court of Appeal [Butler-Sloss P, Thorpe and Waller LJ] considered four appeals raising issue of impact of domestic violence on contact decision:

- (a) courts need heightened awareness of the existence and consequences on children of exposure to inter-parental violence;
- (b) allegations of violence made in course of contact application must be adjudicated upon and determined;
- (c) no prima facie barrier of no contact if violence proved;
- (d) in assessing impact of past violence on contact issue, the ability of the violent party to recognise past conduct, to be aware of the need to change and to make a genuine effort to do so were likely to be important considerations;
- (e) when making an interim order, before adjudication on factual allegations, the court should ensure that the safety of the child and the residential parent is secured before and after any contact occasion.

Re L; Re V; Re M; Re H (Contact: Domestic Violence) [2000] 2 FCR 404

Indirect contact order made in case of past violence

After a history of violence and abuse to the mother and her family, the mother went to live in Cyprus for a year. The father, who had disputed paternity to the youngest child, had never had effective contact to him. On the mother's return to England the father was granted an interim contact order in order to build a relationship with the children, notwithstanding the fact that the mother was due to return to Cyprus to live.

Re S (Violent Parent: Indirect Contact) [2000] 1 FLR 481

Children Act Sub-Committee Guidance on Domestic Violence and Contact

The CA Sub-Committee of the Advisory Board on Family Law has issued guidance for good practice on parental contact where there is domestic violence. The guidance, in particular, stresses the importance of courts giving early consideration to such cases and making findings of fact wherever possible.

Section 5 of the 2001 Report of the Advisory Board

Past domestic violence does not give rise to presumption against contact

The Court of Appeal allowed an appeal against an order refusing any order for contact. There was a history of domestic violence. The judge had held that the father had failed to demonstrate that he was a fit person to have contact. The Court of Appeal held that there was no presumption against contact simply because domestic violence was alleged or proved.

Re F (A Child) (Contact Order) [2001] 1 FCR 422

Conditions on contact orders

Supervision of contact to be achieved under FAO

Where the court requires a local authority to supervise contact in a private law case, it is wrong to make a supervision order. The appropriate order is a Family Assistance Order [CA 1989, s 16]. The court has no power to impose conditions or directions, made under a s 8 order, upon a local authority as such an authority is not one of the category of persons listed in s 11(7).

Leeds CC v C [1993] 1 FLR 269.

Contact order with conditions

Father was in prison. Justices made an order for indirect contact by post with a condition that the mother had to read any letters to the child and make 3 monthly progress reports on the child to the father. On appeal it was held that the condition requiring the mother to read out the letters could not stand and could only be made with the mother's consent; the mother must at least have a right to censor the correspondence. Further, the court did not have jurisdiction to order progress reports.

Re M (A Minor) (Contact: Conditions) [1994] 1 FLR 272

Court has wide powers to attach conditions to indirect contact order

CA 1989, s 11(7) gives the court wide and comprehensive powers to ensure contact between a child and a non-resident parent. Where parents separate, it is almost always in the child's interests to have contact with the other parent. An intransigent mother has no right of veto over contact. The decision of Wall J in *Re M (Contact: Conditions)* [1995] 2 FLR 272 is not to be regarded as an accurate statement of the law. In the present case the court directed the mother to provide photographs every 3 months, reports after every term, details of any illness/medical reports and to accept delivery of letters and cards. The court has jurisdiction to require a parent to read such letters out to the child; the parent does not have a general right to decide what should or should not be read.

Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124

S 8 orders to prevent future contact

On the discharge of a care order, Singer J made a residence order to the children's mother with conditions that should she become aware that the father was trying to contact the children, she must immediately notify the local authority. A s 8 order for no contact was made against the father and a s 91(14) order was made prohibiting the father from making any further application without the leave of the court. The judge directed that if leave was sought by the father, the application should first be served on the LA and notice should not be given to the mother until further direction of the court.

Re G and M (Child Orders: Restricting Applications) [1995] 2 FLR 416

Enforcing contact orders

Note: difficulty in enforcing contact order

A contact order will only be enforceable by committal proceedings if it is specifically defined, is in the form of a direction and (in the county court) contains a penal notice [see *D v D (Access: Contempt: Committal)* [1991] 2 FLR 34]. However a number of authorities stress that it is generally inappropriate to use committal proceedings to enforce a contact order [see

Ansah v Ansah [1977] 2 All ER 638

Paterson v Walcott [1984] FLR 408

Churchyard v Churchyard [1984] FLR 635

Thomason v Thomason [1985] FLR 214

R v R (Contempt) [1988] Fam Law 388

I v D (Access Order) [1988] 2 FLR 286]

The CAAC in their Annual Report 1992/3 (p 44) state:

The committee would stress that the difficulty which any court faces in seeking to enforce an order for contact is that the court may do more harm to the child by punishing the contemnor, for example by sending him or her to prison, than by failing to enforce the order or taking no action.

Despite these difficulties, committal orders for breach of contact orders are occasionally made [see *Re X (A Minor) (Contact: Committal)* [1993] Fam Law 246].

The more appropriate course is to try and get the order working, or put something more workable in its place [*I v D* above]. In addition the court may vary the residence arrangements in order to ensure that contact takes place [*Re S (Minors) (Access)* [1990] 2 FLR 166]. Orders for costs may also assist.

Example of committal being used to enforce contact order

County court judge committed mother to prison in the face of her express defiance to the judge indicating that she would not obey a contact order. Judge maintained strict control over the length of committal and mother purged contempt and released after a short time.

Z v Z [1996] 1 FCR 538

Suspended committal order against mother upheld in Court of Appeal

Following the attachment of a penal notice to a contact order, the mother acted in breach of the order (as found by the judge). A fresh contact order was made with a requirement that the mother produce and hand over the child. A 7 day committal order was made suspended for 6 months upon compliance with the new order. The Court of Appeal dismissed the mother's appeal. It was in the interests of the children that contact took place, the mother had sabotaged contact by effectively indoctrinating the children against it. The judge was ultimately obliged to make a committal order.

F v F (Contact: Committal) [1998] 2 FLR 237

Suspended committal order upheld by Court of Appeal

After many hearings, a mother steadfastly refused to comply with the court's orders over contact. The county court judge sentenced her to 42 days imprisonment, suspended for six months. On appeal, in two firm judgments, the Court of Appeal upheld the actions of the judge and endorsed the judgment of Sir Stephen Brown P in *F v F* (above):

"Where the order of the court is that there should be contact, it must not be disobeyed. This was in my judgment a case where the judge was ultimately obliged to make an order for committal. He was able on the facts to provide that it should be suspended.

Ward LJ went on to say that the message should

"go out in loud and in clear terms that there does come a limit to the tolerance of the court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault, not the fault of the learned judge who did no more than his duty to the child which is imposed upon him by Parliament".

The welfare of the child is a material, but not the paramount consideration.

A v N (Committal: Refusal of Contact) [1997] 1 FLR 533

Committal proceedings for breach of contact order

At a review hearing following a tightly drawn contact order, endorsed with a penal notice, the father did not apply for a committal order, but the judge himself initiated a committal hearing. The judge drafted the particulars of breach, directed that there was no need for an application by the father, or an affidavit in support or for service on the mother. The mother appealed. The Court of Appeal allowed her appeal. The judge did have jurisdiction to proceed of his own motion [RSC Ord 52, r 5 + CPR Sch 1]. If one judge initiates the process, a different judge should determine the issue.

In relation to a contact order, committal should be the remedy of very last resort. Where it is thought that committal might be necessary, the judge should pause for reflection, should invite the OS to represent the child

or to report on the child's position and could consider transferring the matter to the High Court. The crucial consideration was the interests of justice.

Re M (Contact Order: Committal) [1999] 1 FLR 810

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Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124

General principles: court's power to order contact to grandparent

It is a matter of general principle that it is in the interests of both parent and child that they should have mutual contact [relying on *Re R (A Minor) (Contact)* [1993] 2 FLR 762]. Although there had been no application by the grandmother, the judge was entitled of his own motion to make an order in her favour under CA 1989, s10(1)(b). *Re H (Contact: Principles)* [1994] 2 FLR 969

No presumption that grandparent should have contact

A grandparent requires leave to apply for a contact order. If leave is granted, that does not create a presumption that the grandparent should have contact unless there are cogent reasons for denying it to her. The granting of leave to apply for a section 8 order does not cause the burden of proof to shift to the respondent. Where a parent applies for contact, there is a presumption in favour of contact unless cogent reasons exist, the same approach does not apply to applications by other family members.

Re A (Section 8 Order: Grandparent Application) [1995] 2 FLR 153

Contact to step-father: court's approach

There is no presumption that a step-father should continue a relationship with a step-child. However some people, who have no biological relationship with a child, are nevertheless very important to the child.

Re H (A Minor) (Contact) [1994] 2 FCR 419

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