

THOMAS · MORE · CHAMBERS

**SENDING ROUND THE  
HEAVIES:  
ENFORCEMENT IN  
MONEY & CHILDREN  
CASES**

**Wednesday 10th June  
2009**

**6.00pm to 7.00pm**

**FAMILY LAW GROUP**



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- A) Methods of Enforcement
- B) Rules
- C) Restrictions on Enforcement
- D) Interest
- E) Leave
- F) Problem Solving

### A) Methods of Enforcement

METHOD	FEATURES
Attachment of Earnings Order	Requires employer to make deductions from earnings in compliance with order. May make suspended order. Application may be issued in County Court after High Court Order without a transfer order. Available in High Court, County Court and Magistrates' Court.
Charging Orders	Imposes a charge on property of Debtor. Whether claimed or not, interest accruing on the original order and costs of enforcing the security are included in the sum charged and recovery of such sums not subject to any limitation period.
Garnishee Orders <i>(akin to CPR third party debt orders)</i>	For sums over £50. The garnishee is ordered to pay the judgment creditor. This cannot be a future debt and the person must be in the jurisdiction.
Order for the execution of documents	In High Court pursuant to s39(1) Supreme Court Act 1981 or CCA 1984 s38(1). Where a person neglects or refuses to comply with order, or cannot be found, court may order nominated person to execute. Note <i>Danchevsky v Danchevsky</i> [1974] 3 All ER 934, CA order for committal will not be enforced if same can be achieved by getting third party to execute.
Judgment Summons  <i>Proceedings on a judgment summons are classified as criminal proceedings and therefore must be Art 6 compliant</i>	Application to High Court or CC by person entitled to enforce judgment or order (under s5 Debtor's Act 1869). If the creditor proves to satisfaction of court that debtor has had means to pay and refuses or neglects, debtor may be committed to prison for period of 6 weeks or until the prior payment of the sum owing. N.B, costs orders most likely not enforceable by judgment summons. Creditor must prove "beyond reasonable doubt". Committal is discretionary.

	Committal does not extinguish the judgment debtor's liability. Judgment creditor can use other methods of enforcement to recover arrears which remain due following committal.
Order for sale	Having made an order for secured payments order, a lump sum or property adjustment order at same time or later court may make order for sale, being property in which or in proceeds of sale which either /both parties have beneficial interest.
Appointment of a receiver by way of equitable execution	Available in High Court and CC. Receiver can be appointed where "just and convenient" to collect rents and profits and pay into court or to judgment creditor (to prevent judgment debtor dealing with money to judgment creditor's detriment). Receiver is an Officer of the Court and interference with execution of his receivership is contempt. N.B creditor himself may be appointed in appropriate cases.
Sequestration <i>(CPR PD 70 which does not apply also only refers to High Court)</i>	Only available in High Court. This is a process of contempt – there must be preceding personal service of the relevant order with requisite penal notice (unless order is for judgment debtor to abstain from act and has had notice of terms of order). Orders sequestrators to take possession of judgment debtor's assets/ property and hold it until the contempt is purged. No rights are acquired by the judgment creditor.
Execution against goods	Writ of fieri facias or warrant of execution. Enforcement Officer of High Court or bailiff in CC to seize goods and sell. Exempt from this are tools of trade etc and those for basic domestic needs.
Writ and warrant of delivery	Enforcement Officer of High Court and bailiff in CC physically take goods and deliver them to the judgment creditor
Writ and warrant of possession of land	Enforcement Officer of High Court and bailiff in CC to take possession of land and give it to judgment creditor. Force can be used.

## B) The Rules

1. The enforcement provisions of the CPR do not apply (CPR69-73) but CPR does apply to proceedings which are not family proceedings but may be heard in the Family Division e.g. proceedings under the Inheritance (Provision for Family and Dependents Act 1975) and TOLATA 1996, (see Practice Direction [1999] 1 FLR 1295).
2. Procedure governed by Rules of Supreme Court 1965 and County Court Rules 1981 in the form they were in force immediately prior to 26 April 1999.
3. Procedure in the Magistrates' Court governed by the Magistrates' Court Act 1980 and the Magistrates' Court Rules 1980.

## C) Restrictions on Enforcement

4. The right to take enforcement proceedings is unaffected by the rules of limitation.
5. The right to apply for leave to issue a writ of fieri facias or warrant of execution has been held to be a matter of procedure and not a fresh action, *Lowsley v Forbes* [1999] 1 AC 329.
6. However, a bankruptcy petition is a fresh action, *Chohan v Times Newspapers Ltd* [2001] EWCA Civ 964.

#### D) Interest

7. Interest on a judgment debt is not recoverable after 6 years have expired from date when it became due, Limitation Act 1980 s 24(2), even though there is not such limitation on the enforcement of the judgment itself.
8. Interest accrued before 6 years is enforceable in same way as sums due under a substantive judgment or order.
9. Interest will run from date stipulated for payment, rather than date of order in the High Court, despite the wording of s17 Judgments Act 1838, see *Preston v Preston* 1982 2 FLR 333, CA.
10. Interest on costs runs from date of judgment (not assessment) unless court makes a different order, under CPR 44.3(6)(g) applied to family proceedings by the Family Proceedings (Miscellaneous Amendments) Rules 1999 r 4(1).
11. In the High Court, interest continues to run when enforcement proceedings are commenced until the order is satisfied. “Where, however, a judgment creditor takes proceedings in a county court to enforce payment under the judgment, including any proceeding for examining or summoning a judgment debtor or attaching a debt owed to him but excluding proceedings under the Charging Orders Act 1979, the judgment debt ceases to carry interest thereafter, except where those proceedings fail to produce any payment from the debtor...” *Rayden and Jackson*, (18<sup>th</sup> ed) Vol 1(1) 28/18.

#### E) Leave

12. A party is not entitled to enforce through the High Court or County Court
  - payment of arrears under order for MPS (ie under MCA 1973, s22)
  - interim order for maintenance

- any financial provision order (as defined by MCA 1973 s 21(1))  
without leave of that Court if those arrears became due more than 12 months before  
proceedings to enforce are begun, s32(1) MCA.

13. Leave is discretionary.

14. Onus is on the judgment creditor to show why the stale arrears should be enforced  
rather than on the judgment debtor to show why they should be remitted, *B v C*  
(*Maintenance; Enforcement of Arrears*) [1995] 1 FLR 467.

15. Leave also required for sequestration: writ of possession and in some instances writ  
of specific delivery of goods; if more than 6 years leave required for writs/warrants  
of execution; change of party; where goods are in hands of receiver.

#### F) Problem Solving

16. No address for the debtor? Court may on the application of judgment creditor  
seeking to enforce request an order for the disclosure by government departments  
of the address of a judgment debtor who cannot be traced, PD [1989] 1 All ER 765  
(*Disclosure of Addresses: 1989* 1 FLR 307)

17. Death of debtor? Death of either party will not act as a bar to enforcement  
proceedings. (But obligations of a continuing nature cease, other than orders for  
secured provision.) Obligations may be enforced both by the creditor against the  
estate of the debtor and by the estate of the creditor against the debtor, e.g. see  
*Lane v Lane* [1986] 1 FLR 283.

18. Bankruptcy? A financial obligation arising in family proceedings is capable of being a  
bankruptcy debt and therefore founding a bankruptcy petition. Since 1<sup>st</sup> April 2005  
an obligation arising under an order made in family proceedings to pay a lump sum  
or costs is provable in the bankruptcy.

19. Unsure which method of enforcement to use? Consider whether an oral examination would assist. Application may be made to High Court or County Court for an order that the judgment debtor be orally examined as to means and may be ordered to produce books or documents. In County Court, hearing conducted by DJ or nominated court staff. Judgment creditor may attend to cross-examine.
20. Undertakings: a financial undertaking may be enforced by judgment summons if it is an integral part of the order within which it is given, *Symmons v Symmons* [1993] 1 FLR 317 but beware, in *Re Hudson* [1966] 1 ALL ER held that an undertaking to the court did not confer any personal right or remedy on any other party (unless a collateral contractual obligation was created).

10<sup>th</sup> June 2009  
VICTORIA MORGAN  
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## ENFORCEMENT OF CONTACT ORDERS:

### Part I of the Children and Adoption Act 2006.

This Act came into force on 8 December 2008 following a variety of research into how to improve enforcement of contact orders and the quality of contact: In 2002 the “Making Contact Work” report of The Children Act sub committee considered such issues; followed by the Green Paper, Parental Separation, Children’s Needs and Parents’ Responsibilities (2004) and the follow up response, Parental Separation, Children’s Needs and Parents’ Responsibilities: Next Steps (2005) continued this research. This was followed by Making Contact Happen or Making Contact Work, The Process and Outcomes of In-Court Conciliation (2006) published by the DCA and the follow up report, The Longer Term Outcomes of In-Court Conciliation, published in 2007 by the Ministry of Justice.

It has been clear for some time that contact orders needed more thought and control than currently available to make them work.

The research concluded that professional support and guidance was essential to ensure successful contact for some families, and recommended useful ways to avoid repeated court appearances due to difficulties in enforcing lasting arrangements.

The Act introduces a number of new ideas:

#### Contact Activities:

A Contact Activity is an activity undertaken by a party to the proceedings (excluding the subject child), that promotes contact with the child (See s 11A, 11B art 1 of the Children and Adoption Act 2006 and 11E to G of The Children Act). The activity, which must be specified along with the provider, may include programs, classes and counselling to assist in establishing,

maintaining or improving contact with the child, or, by addressing violent behaviour, enable or facilitate contact with the child, or sessions in which information or advice is given regarding operating arrangements for contact with the child including making arrangements for mediation.

A contact activity order cannot be used to force any party to take part in mediation or psychiatric assessment, examination or treatment. Funding for contact activities is broadly means tested and paid direct to approved providers by CAFCASS. The Legal Services Commission will not fund those activities;

Parties who would not qualify for legal aid will usually be expected to pay for any activity themselves, although there are no powers to force them to pay for an activity. Details of approved activity providers are published on the CAFCASS website. Available contact activities are limited at present to parenting information programs, typically two, two hour group work sessions at a cost to an unsubsidised party of around £200 and domestic violence prevention programs involving 60 hours or so intensive intervention at a cost to an unsubsidised party of around £2,500. Such costs are prohibitively expensive to many parties, especially as such a recommendation would follow the costs of a fact finding hearing trial, likely to last at least 1 day.

The court must consider the following factors:

The child's welfare is paramount;

The court must be satisfied that the activity is appropriate in the circumstances of the case;

That the provider is suitable to provide it.

The court must consider the likely effect upon the parties including any conflict with their religious belief or interference with work or education that the direction may entail. In some areas travel distances required are unreasonable

and this will therefore prevent any orders being made. The court is required to obtain information in order to enable to consider these points via CAFCASS. A contact activity condition is an order imposing a condition upon a person with whom a child lives or a person who she is to have contact with to take part in an activity to promote contact (See s 11C to G of The Children Act). A condition can be imposed when a court makes or varies a contact order, that is to say it is expected to run alongside contact. Unlike a contact activity direction it may be made in the case of a final order. S 11B of the Children Act, which requires there to be a dispute about contact in order for an activity direction to be made, does not apply to a condition. An activity condition can only be imposed on a party habitually resident in England and Wales and only has effect as long as they remain so habitually resident (See s 11D, sub-s 3 of The Children Act). It seems that there is more scope, in theory at least, for the enforcement of contact activity conditions if breached as compared to contact activity directions (see below).

#### Warning Notices:

A Warning Notice is a specific type of penal notice warning of the consequences of failure to comply. It must be attached to any order for contact, any order varying contact, including a variation of a contact order made prior to 8 December 2008 (when the Act came into force,) and any enforcement order (See s 11I and 11N of The Children Act). Transitional provisions provide that the court will attach a warning notice on a pre-implementation order (that is an order made before 8 December 2008) on application. That application is ex parte and usually without a hearing. NB: The application is made on new form C78 and the fee is £40 (See rule 4.4a of The Family Proceedings Rules 1991 as amended). A penal notice therefore need not be applied for as in the past.

The warning notice will read “Warning, where a contact order is in force, if you do not comply with this contact order you may be held in contempt of court and committed to prison or fined and/or the court may make an order requiring you to undertake unpaid work (an enforcement order) and/or an order you pay financial compensation.”

This notice is now incorporated into the standard template for s 8 orders but should be drafted into manuscript orders which are being served at court pending typed copy so that breaches can still be enforced pending service of delayed orders from the court.

Enforcement orders impose an unpaid work requirement, that is community service of between 40 and 200 hours, upon a person who has breached a contact order (See s 11A to 11N of The Children Act). A Contact Activity Direction is not part of a contact order and therefore cannot be enforced under this provision. However, a Contact Activity Condition is a part and parcel of the Contact Order (see s 11E (1) of The Children Act) and a breach of it would therefore fall to be enforced by way of enforcement application.

An enforcement order can be made only on application by the other party, or in appropriate circumstances, the child: that is to say when they have sufficient understanding and the leave of the court (See Rule 4.4a of The Family Proceeding Rules 1991 as amended).

Applications are made on a Form C79. Either party can apply for an order; that is to say, the beneficiary of the contact order or the person with whom the child lives. For example, a breach of a contact order could, in theory, include the failure to comply with a condition imposed pursuant to pre-existing s 11 and sub-s 7(b) of The Children Act, such as a requirement to attend or collect

on time, or to give advanced notice of cancellation (See s 11J, sub-s 5 of The Children Act).

An enforcement order can only be made if a warning notice has been properly attached and served. S 11K of The Children Act requires proof of service or knowledge of the order and the warning notice, apparently on the civil standard. However, the court must be satisfied to the criminal standard, that is beyond reasonable doubt, that the person has failed to comply with the contact order (See s 11J, sub-s 2 of The Children Act). There is a defence if the person in breach has a reasonable excuse for their failure: the burden of proof is on the person subject to the proposed enforcement order on the balance of probabilities (See s 11J, sub-s 4 of The Children Act).

An enforcement order must be necessary to secure compliance with the contact order and proportionate to the seriousness of the breach, bearing in mind the likely effect of the enforcement order upon the subject of it (See s 11L of The Children Act). The court must also consider the likely effect of the enforcement order upon that person including any conflict with religious belief or interference with work or education a direction may entail.

When making a first enforcement order, the court must consider the welfare of the child but it is not paramount (See s 11L, sub-s 7 of The Children Act).

Pursuant to Family Proceedings rule 4.21(aa), the order must be personally served by the applicant unless the court directs otherwise. Committal pursuant to County Court Rules Order 29 is still expressly preserved as an alternative sanction by Family Proceedings Rule 4.21(b).

Once an enforcement order has been made, standard directions will apply to enable CAFCASS to disclose information to probation, for example, convictions and risk related information. A Practice Direction entitled Enforcement Orders, Disclosure of Information ([2008] 1 WLR 2650) has

been issued. The work must be carried out but not less than 6 hours per week and must be completed within 12 months subject to any suspension period (See Schedule A1 of The Children Act). The Probation Service will operate a written warning system in the event of breach (See Part 2 of Schedule A1 of The Children Act). If more than one breach occurs in 12 months they are under a duty to notify CAFCASS of the breach and to provide documentation to them to enable the breach to be heard within 20 days of the last failure. CAFCASS is the intermediary between the Probation Service and The Court.

There is no direct communication link between the Probation Service and The Court. The Probation Service is tasked with reporting non-compliance to CAFCASS (See Part 1 of Schedule A1 to The Children Act) and CAFCASS must then report on to the court. However, it is incumbent upon the beneficiary of the contact order to apply to the court in respect of a breach of the enforcement order. In the absence of any application from them no further action will be taken, except possibly the revocation of the enforcement order which can be done at the suggestion of the Probation Service via CAFCASS. Form C79 can be used *ex parte* where an enforcement order needs amending due to a change of residence to a different local justice area.

Because enforcement orders are intended to encourage compliance with the substantive contact order and not primarily as a punitive measure they may be revoked if, in all the circumstances, no enforcement order should have been made, or if having regard to the circumstances which have arisen since the order was made, it would appear appropriate for the order to be revoked, or in having regard to the satisfactory compliance with the contact order, it would be appropriate for the enforcement order to be revoked (See Part 2 of Schedule A1 to The Children Act).

The Court has power in cases of a change of circumstances to reduce the

number of hours, extend the timing in which the hours must be completed, or vary the local justice area responsible for the unpaid work requirement; for example in cases of change of address (See Part 2 of Schedule A1 to The Children Act).

CAFCASS, in conjunction with the responsible office at the Probation Service, can also report to the court if there is a change of circumstances.

Compensation orders: This may be made if any of the following persons has suffered financial loss caused by a failure to comply with the contact order:

A person with whom the child lives;

A person who is given contact; someone subject to an activity condition

A subject child who has sufficient understanding and the leave of the court.

For example a compensation order might relate to the costs of a missed holiday or avoidable travel expenses (See s 110 and 11P of The Children Act in relation to compensation orders).

This could cover a resident or non-resident parent through failure to make available, or failure to return in good time. Orders can be made on application via Form C79. The standard of proof required to be met is the civil standard and the reasonable excuse defence applies.

Again the burden is on the person relying on the excuse (See s 110 of The Children Act). The welfare of the child must be considered; (again s 110, sub-s 14) and compensation cannot exceed actual loss; (s 110, sub-s 9 of The Children Act). The court must take into account the financial circumstances. S 110, sub-s 10 Children Act only refers to the circumstances of the person paying, but bearing in mind the welfare of the child, the financial circumstances of both the payer and payee may be relevant in any given case. As for enforcement orders, the proposed subject of the order must have been given a

warning notice or told about it before a compensation order can properly be made. A compensation order is recoverable as a civil debt (See s 11, sub-s 11 of The Children Act).

The Children Act as amended states that in order to make enforcement or compensation order, the court must be satisfied to the civil standard that the person in breach has been given, in accordance with rules of court, a copy of, or otherwise told of, the terms of the warning notice. However although the rules expressly require personal service by the applicant of an enforcement order they are silent as to the service of contact orders with warning notices attached. Court service of contact orders by post will therefore probably suffice, however, although not expressly required by the rules, personal service may be sensible in order to avoid problems with enforcement further down the line.

#### CAFCASS duties to monitor/force compliance

The Act also creates a range of new monitoring and information provision duties upon CAFCASS : In a case of contact activity direction or condition, the court can ask CAFCASS to provide information about the activity, the provider and the likely effect of the direction on the person who is to be subject to it. CAFCASS has a duty to provide that information. The Court may make an order requiring a CAFCASS officer to monitor compliance with an activity direction, condition, or a contact order, or to report any failure of the individual to comply with it.

The Court may order any person required to allow contact, who is given contact, or is subject to a condition, to take such steps as is specified to enable the CAFCASS officer to comply with the monitoring request (See s 11H, sub-s 8 of The Children Act).

In the case of an enforcement order the court can ask CAFCASS to provide information about the likely effect of the order on the person who will be subject to it and as regards the availability of unpaid work for him to do.

CAFCASS has a duty to provide that information.

CAFCASS can be required

- to monitor compliance with any enforcement order,
- to report on the person who is subject to the enforcement order
- and to notify the court if the person becomes unsuitable to do the work required.

Whilst the court may require monitoring of the substantive contact order at any time in the course of proceedings, monitoring of contact activity directions, or contact activity conditions, or of enforcement orders, must be directed at the time that the order is made (See s 11H of The Children Act). CAFCASS has agreed with the President of The Family Division that the general assumption is that directions for the monitoring of contact should not be used in consent orders where proceedings have ended, but only in cases where a final order has been the result of a contested hearing. This presumes that orders made by consent will be readily followed, which of course is not always the case.

The above enforcement powers only apply to contact orders and not to residence/joint residence orders which may be an oversight in the Act?

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