

# Once more into the breach



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*The courts have a number of powers to enforce compliance with child arrangement orders but each needs to be carefully considered in the circumstances of the case*

“The days are long gone when mothers can assume that their role as carers of children protects them from being sentenced to immediate terms of imprisonment for clear, repeated, and deliberate breaches of contact orders” – Wilson LJ, *B v S* [2009] EWCA Civ 548

“There is a positive obligation on the state and, therefore, on courts to take measures to maintain and to reconstitute the relationship between a parent and child, in short, to maintain and restore contact. The judge has a positive duty to attempt to promote contact.” – Munby J, *Re C (A child) (Suspension of contact)* [2011] EWCA Civ 521

The court has a wide range of powers available to it on an application for enforcement of a child arrangements order (CAO). Judges repeatedly decry those who breach them and threaten use of the most stringent enforcement mechanisms – but the court can act only within the limits of the welfare principle as any measure punishing a parent may impact on the child. While the court has a wide range of powers available to it, the exercise of some of those will only very rarely be appropriate.

The situation is rendered more complicated by the current climate of remote hearings in which the psychological effect of going to court is muted. It’s hard to stare imposingly from a small square on a screen or down a telephone line (although some judges still manage it!).

In light of this, how effective are these powers of enforcement?

Specific enforcement powers are found within section 11 of the Children Act 1989 (CA 1989). The court may also use other powers as enforcement mechanisms, most notably variation of a CAO, interim transfer of residence, or committal.

Practice Direction 12B paragraph 21.6 sets out the powers available to the court on an application for an enforcement order. The range of options available is wide and ranges from softer, conciliatory measures like attendance at a

Separated Parents Information Programme (SPIP) or a family assistance order, to measures more akin to those seen in the criminal courts (unpaid work requirements, committal). In theory this enables courts to deal with the great variety of enforcement cases – from a breakdown in co-parenting to repeat breachers who pose a risk of parental alienation.

We will review each of these measures in turn, assessing their effectiveness in light of the welfare considerations.

## Variation

While not a specific enforcement mechanism, variation of the existing CAO can be a useful tool for enforcement.

Tightening the terms of the contact ordered may make it harder for the other parent to take liberties as well as easier to prove breach later. While significantly further down the line, the threat of an interim transfer of residence or change of primary residence can be an incredibly useful tool both for getting parents to comply with orders and for parental alienation cases. In *Re M (Children)* [2012] EWHC 1948 (Fam) Munby J made an unless order for transfer of residence, providing the breaching parent one last chance to comply while emphasising the gravity of the situation. ➤

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## Activity directions and conditions

Activity directions and conditions are found at sections 11A-11G of the CA 1989. Directions occur during proceedings and conditions are contained within any final order. Activity directions and conditions include schemes with Cafcass-approved providers for:

- SPIPs
- Domestic Violence Accountability Programmes (DVAP)
- child contact interventions

These courses work best when the participants actively engage – attendance purely as a box-ticking exercise is unlikely to engender real progress. Yet even for these softest, most conciliatory measures, the court can only order attendance if the activity is appropriate in the circumstances of the case, appropriate for the individual, and at a suitable location (s11E(3)(6) CA 1989). With courses of short duration (remote SPIPs can be done in an afternoon), activity directions and conditions are less likely to be denied on a welfare basis due to the lesser impact on the participant as a carer of a child. However, even at this lowest level, the court is only permitted to make activity directions and conditions if appropriate in light of the particular individual involved. Of course, this might be a good thing: these courses are likely to be beneficial in cases where parents need a nudge and assistance and may not be appropriate at all if the case requires more punitive measures.

## Family assistance orders (FAOs)

In a similar vein, family assistance orders (s16 CA 1989) enable Cafcass or the local authority to befriend and assist an adult family member. This is also likely to bring the greatest benefits if that adult wants to be helped and can only be ordered if the parties named in the FAO agree. For certain cases it can provide some much-needed oversight: having a neutral third party play a role in the family’s life might mean the difference between success and another breakdown in the child arrangements.

If the aim of the court in enforcement proceedings is enforcement by conciliation, then it seems right that these measures cannot be imposed without consideration of the likelihood of achieving their aims – the court could force

parents to attend courses, but it cannot force them to engage. At this level with the right cases, the court’s powers of enforcement appear to do the job.

## Monitoring

If the parents need stronger persuasion from the court of their need to comply with CAOs, more stringent powers do exist. At a lower level, the court can order monitoring by Cafcass to report back on compliance with measures imposed by the court (s11G CA 1989). Ongoing surveillance may be enough to persuade reluctant parents that court proceedings need to be taken seriously – even if simple monitoring itself does not sound like a severe measure. It has the added benefit of a third party being tasked to assess and report back if things do not go well or according to plan, potentially sidestepping some of the he said/she said-type disagreements.

## Enforcement orders and compensation orders

Looking at what might be viewed as the key enforcement-specific powers of the court, the court has the power to make enforcement orders (s11J CA 1989) and compensation orders (s11O CA 1989).

Enforcement orders are unpaid work requirements, up to a maximum of 200 hours to be completed within a 12-month period (Schedule A1 s9(2)(a-b) & s9(9) CA 1989). They are available whenever the court is satisfied beyond reasonable doubt that a person has failed to comply with a CAO without reasonable excuse. An enforcement order cannot be made unless the court is satisfied that the order is necessary to secure the person’s compliance with a provision of the CAO and the likely effect of the enforcement order is proportionate to the seriousness of the breach (s11L(1) CA 1989). When determining appropriateness, the court must take into account the likely impact on the individual and the welfare of the child who is subject to the contact order (s11L(7) CA 1989). The court will likely want a Cafcass report assessing the potential impact before taking the step to make the order.

Compensation orders can be made when an individual has failed to comply with a contact order and the other has suffered financial loss as a result of this breach – the classic example would be flights booked for contact which was not permitted without reasonable cause. The level of compensation cannot exceed the loss incurred and must take into account the individual’s financial circumstances (s11O (9-11) CA 1989).

Enforcement orders and compensation orders demonstrate clearly the difficulties that the court faces when seeking to impose punitive orders on a carer of a child. When making an enforcement order the court is forcing a carer of a child to spend time away from the child to do unpaid work. Particularly for low-income families or those with multiple children, it is unlikely to be in the child’s best interests for their parent to be forced to do unpaid work –

or it may simply not be viable. Similarly, compensation orders take funds away from the family and from the relevant child. For parents who have no funds to spare, it is unlikely to be suitable given the requirement that the individual's financial circumstances be taken into account. At the other end of the spectrum, for parents who can afford to pay, compensation orders are less likely to be a deterrent to breaching CAOs and may give the impression that a wealthy party can simply pay their way out of breaching the CAO.

Neither enforcement orders nor compensation orders will be appropriate enforcement mechanisms when taking into account the characteristics of many families who find themselves in the family court. There then appears to be a relatively narrow range where enforcement and compensation orders can be both appropriate and effective.

However, simply being in a courtroom and in front of a judge who is explaining the gravity of breaching a CAO can be sufficient to persuade many people to comply – although, as noted, that effectiveness may be hampered by hearings taking place remotely rather than in a physical courtroom. That the court is unlikely to actually make the enforcement order may be irrelevant if the mere threat of such an order is enough to engender compliance. On that basis, while enforcement orders and compensation orders themselves may rarely be appropriate, if their existence can achieve compliance, then the aims of those provisions may have already been met.

## Committal

While not a measure strictly limited to enforcement of CAOs, a similar approach can be taken to committal orders: if the court is unlikely to force a parent to undertake unpaid work, it is even less likely to send them to prison. An example of this is *M v M* [2005] EWCA Civ 1722, in which, despite a father's repeated breaches of contact orders justifying a committal order, the Court of Appeal confirmed that the trial judge was entitled to conclude that while a committal order could be justified, it should not be made due to the consequential impact on the welfare of the child. In *M v M* the threat was not enough, but for many parents the process of facing committal proceedings will be sufficient to cause them to comply with a CAO,

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particularly if attending court and engaging in proceedings allows them to purge their contempt. Whether committal is implemented is irrelevant if compliance comes simply with the commencement or threat of committal proceedings.

## Conclusion

Given children are involved, CAOs are less suited to simple enforcement by punishment than other types of proceedings: the court needs a generous toolkit to deal with a range of delicate situations and to prevent escalation. For many parents the threat of enforcement and the imposing nature of judicial intervention is sufficient. Issues with specific enforcement mechanisms arise with parents for whom a threat is not enough, ie those who never intend to comply. However, the court does not rely simply on the specific enforcement provisions to ensure compliance. If they prove to be insufficient, the courts have other options including interim transfer of residence and committal.

The aim of enforcement proceedings is to ensure compliance with CAOs. It is not to imprison or fine parents nor to vary CAOs for the sake of it, no matter how much one parent may feel aggrieved and want the other parent punished. How compliance is achieved is usually of little importance to the court as long as it is secured. It may be that enforcement cases turn into long-running disputes and the court's long-term intervention is required, or it may be that one hearing in front of a mildly terrifying circuit judge is sufficient to impress the importance of compliance on a parent. Either way, it matters little if certain measures are unlikely to be implemented as long as the existence of those mechanisms have a role to play in ensuring compliance with the CAO in effect.

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