

The new contact provisions—*brave new world or bark worse than bite?*



By **Samantha Cooper**

Implementation of the remaining provisions of Part 1 of the Children and Adoption Act 2006 came into effect on 8 December 2008 in the form of an amended s.11 of the Children Act 1989. The amendments aim to produce a flexible contact regime, tailored to the parties' circumstances, coupled with an effective and meaningful array of enforcement measures.

These powers are to be utilised whenever a court is considering whether to make, vary or discharge a contact order under s.8. Implementation provides for Contact Activity Directions (at directions and review appointments) and Contact Activity Conditions (at final hearing only) and positive new powers of enforcement.

Contact Activity Directions (s.11A) are intended to promote contact with the child concerned by requiring a named individual to participate in an activity which may include information or assessment meetings about mediation, parenting information programmes or an extensive domestic violence prevention programme that requires sixty hours of intervention. The programmes are intended to assist in facilitating, establishing, maintaining or improving contact with a child but do not directly involve the child. The domestic violence programme is limited to those who have conceded or have been found, through a court finding, to have been responsible for causing harm. The requirements cannot however be used to require the individual to undergo medical/psychiatric assessment or treatment or to actually participate in mediation.

Although these options may appear attractive to parents seeking reassurance and guidance, practical uptake may be another matter, with costs for privately-funded parties ranging from £200 for parenting information programmes to £2,500 for domestic violence courses, on top of existing costs. Thus the attitude of parties towards the activity will be

a key consideration and perhaps a limiting factor for judges.

Section 11H-P gives CAFCASS the power to monitor contact for twelve months without the parties' consent. The assumption appears to be that such orders will only be made where there is a significant feeling of dissatisfaction on the part of one or both parties following a determination of the substantive contact issues. It is not intended to be a punitive intervention but more of a 'watchful brief'. Quite how CAFCASS will carry out the monitoring remains to be seen; there are considerable resource implications involved. A Family Assistance Order might produce more involvement

Section 11J-N concerns enforcement. Where the court is satisfied to the criminal standard that a named person has failed to comply with a contact order and there is no reasonable excuse for the failure then an unpaid work requirement is possible, monitored by the National Probation Service. The court must however be satisfied that an enforcement order is necessary to ensure compliance with the order and that the likely effect on the person is proportionate to the breach. Further, it must consider the likely effect of the order on that person including their religious beliefs and work commitments. The child's welfare must be considered by the court but is not paramount.

There are other means of enforcement. Financial compensation is another option where a party has suffered financial loss by reason of the breach. An example might be a lost family holiday resulting from the failure of the other parent to release the child or deliberately withholding necessary documentation. Such an order creates a civil debt (s.11O) and can also be avoided upon proof of a reasonable excuse. The level of compensation ordered will depend upon an individual's financial circumstances. The child's welfare is also a consideration (s.11O(14)).

(continued on page 3)

Inside this issue:

Children—Private Law	2
Ancillary relief	2
Contact provisions (continued)	3
Property	3
Practice and In Force Now	4

Ancillary relief and child support

The issue before the Court of Appeal in **Myerson v Myerson** [2008] EWCA Civ 1376, 11.12.08, was whether a judge who had heard an FDR could subsequently deal with any remaining contentious matters within the application for ancillary relief. At FDR the parties reached agreement and the judge was informed. The consent order consequently drawn up was not comprehensive on a number of subsidiary matters. The FDR judge listed those matters before her. The husband objected on the basis that FPR r.2.61E debarred her from any further involvement. The Court of Appeal agreed and held that where at the conclusion of the FDR the parties had not reached a comprehensive agreement (including issues of security or enforcement), the dispute had to be listed before another judge.

Fallon v Fallon LTL 20.11.08 was a ‘small money’ short marriage decision of the Court of Appeal concerning after-acquired assets. The marriage was of four years duration, the parties occupying the husband’s local authority property. There were two children. Following separation the husband exercised his right to buy and then sold the property at an advantageous price. The District Judge ordered a lump sum payment of £75,000, the transfer of an endowment and nominal spousal periodical payments, of all of which was effectively upheld on the first appeal. The Court of Appeal noted that this award equated to

30% of the husband’s assets which was plainly excessive given the short duration of the marriage. A lump sum of £40,000 was awarded to the wife, the endowment policy was not transferred and there was a clean break.

Whether pre-nuptial contracts bind the parties in an ancillary relief application was considered by Baron J in **NG v KR** [2008] EWHC 1532, Family Division 28.7.08. The German wife and French husband had entered into a pre-nuptial contact which was enforceable in each of those jurisdictions. The terms of the contact had been explained to them by a German lawyer but the husband had not sought independent legal advice. The wife was immensely wealthy as a result of her father’s business interests. The husband applied for financial relief on the basis of his needs. Baron J made an award in his favour. Notwithstanding recent cases such as *Crossley* [2008] 1 FLR 1467, the pre-nuptial contact in the instant case was not enforceable. The husband had received no legal advice, the contact deprived him of all claims to the fullest possible extent, there had been no disclosure by the wife and two children had been born during the marriage. The judge said that the husband’s award should be circumscribed to a degree to reflect the fact that he had signed the pre-nuptial contact since it was part of all the circumstances of the case.

A party to family proceedings will not be committing a contempt of court if they disclose information about those proceedings (such as a Form E) to the new **Child Enforcement Agency** once the new s.49B of the Child Support Act 1991 is brought into force. Further requirements are that the parties must be either a resident parent or non-resident parent, that an assessment is in force (or an application has been made) and that the person making the disclosure ‘reasonably considers the information to be relevant to the exercise of the Commission’s functions relating to child support’. This is a useful and commonsense provision but, as yet, there is no commencement date.

Children—Private Law

Continuation of direct contact, in the face of opposition from the children, was the basis of the Court of Appeal judgment in **Re P (Children)** [2008] EWCA Civ 1431. Following findings of domestic violence against the father direct contact at a contact centre had initially proceeded. At a trial the judge however found that the children were now so afraid of unsupervised contact with the father that he made orders providing for indirect contact only. Ward LJ allowed the appeal because the judge had not sufficiently considered the alternatives available and that “contact should not be stopped unless it is the last resort for the judge”. In particular the judge should have heard submissions on the possible benefits of counseling for the parents and

he should not have made his order without this evidence.

A father acting without representation brought an appeal in respect of a s.91(14) made against him and a residence order made in the mother’s favour in **Re G** [2008] EWCA Civ 1468. The trial judge made the s.91(14) order because of the father’s entrenched views that he should have 50 per cent of the child’s time and the risk that he would make further applications to the court that would be detrimental to the child. The mother brought to the judge’s attention that there was no residence order and invited to make one in her favour, to which he agreed. The father objected, seeking an adjournment in order to consider the legal implications. Ward LJ

held that the guidelines for making s.91(14) orders were clear and had not been followed. The judge failed to take into account that the order was a remedy to be used sparingly as an exception. Where the father’s applications had been well-founded and not excessive in their demands or their number, there was no evidence of a risk of detriment to the child. Further, the failure to give the father, a litigant in person, an opportunity to deal with the mother’s residence application amounted to a procedural irregularity and had been unfair.

The new contact provisions (continued from page 1)

My hope is that these new powers provide an intermediate yet meaningful solution in many cases, particularly in instances of implacable hostility or where flagrant breaches are occurring of an order which is effectively unenforceable.

On a practical level, the following points are worthy of note:

- Standard warning notices alerting of the risk of sanctions for breach of an order are to be featured on every court-produced contact and enforcement order. Those representing must therefore be sure to explain the full implications of the notice to their clients.
- Warning notices may be attached to old orders.
- The orders are only enforceable against a party who is positively required to do something under the order (making a child available for contact, etc); a point worth considering when drafting orders.
- Enforcement is also only possible against a person who can be shown to be aware of the consequences of breach. Asking the judge to warn the person in court and then to record the fact that this has occurred in a preamble might assist.
- A well-connected member of chambers reports that judges have been told to verbally warn the parties of the consequences of a breach.
- Where parties wish to escape the new provisions (perhaps to preserve cor-

diality) then an appropriately-worded preamble dividing the children's time between the parties and a no-order order might suffice.

- Under an Enforcement Order the National Probation Service provide the unpaid work. The court's leave must be obtained for CAF/CASS to disclose information to the Probation Service about the case.
- The CAF/CASS website has some useful information about contact activity provisions and an initial spreadsheet of contact activity providers. The link is: www.cafcass.gov.uk/system_page/contact_activity_provisions.aspx

As far as Cambridgeshire is concerned, an approved provider is the Cambridge Family Mediation Service (www.cambridgefms.co.uk). They will offer three distinct services, the first two are provided for the purposes of a contact activity direction or condition:

- The first is a mediation assessment meeting which will last for 45 minutes. They are free to legally-aided clients but otherwise cost £65. The mediator will briefly ascertain the client's circumstances and explain the mediation process. They will screen for domestic violence, child protection issues and provide information about any link services. There is no compulsion to actually proceed to mediation. Notification of attendance is provided to CAF/CASS.

- Parenting Education Workshops will involve either one-to-one or group sessions (of up to 12 people) for a period of 4 hours split over two weeks. Parties will be in separate groups if both are ordered to attend. A thought-provoking 17-minute DVD compiled by children and produced by the National Mediation Service will be shown to participants which will then be discussed. There will also be interactive group exercises. The sessions are again free to legally-aided clients but otherwise will cost £200. In cases where CAF/CASS certify that a participant will suffer financial hardship the fee can be waived but, at the time of writing, the criteria for this discretion has yet to be determined. As with mediation assessment meetings, it is anticipated that CAF/CASS will be informed of attendance or non-attendance.
- Finally, a Resolution-driven initiative called 'Parenting After Parting' will provide privately-paying clients the opportunity to take part in voluntary workshops. It is hoped that solicitors will refer clients prior to the involvement of the court. The cost may be less than the Parenting Education Workshops and the first sessions are due to take place in February.

Property

Although not a family law case, the recent Court of Appeal decision in **Parris v Williams** [2008] EWCA Civ 1147 is of interest. The Appellant purchased two flats in his sole name. Some years later the Respondent, his friend and business partner, asserted a beneficial interest in respect of the properties based upon the fact that he had made maintenance payments over a number of years and assisted with the refurbishment. The Recorder held at first instance that the flats were purchased as a

joint venture and that there was an informal agreement that the beneficial interest would be shared equally. The Court of Appeal upheld the Recorder's approach. They said that it was wrong to contend that an express agreement was necessary in order to prove such an interest. Lord Bridge's guidance to trial judges in *Lloyds Bank v Rossett* [1991] 1 AC 107 put the correct principle beyond doubt. It was plain from *Rossett* that once a finding of an express agreement had been made all that

was then required was that the Claimant had acted to his detriment or significantly altered his position in reliance on the agreement. There was no need to show that the agreement involved the making of a bargain between the parties which the party asserting an interest had proceeded to perform.

Practice and In Force Now

The **Forced Marriage (Civil Protection) Act** came into force on 25 November 2008. It empowers the High Court and County Court to make various injunctive orders aimed at preventing a prospective marriage where an individual is coerced by “threats or other psychological means” into a marriage. Individuals who have already been married in such a way can also be protected. The Applicant need not be the individual concerned but a relative, interested third party or any other person who secures the leave of the court, thereby enabling applications by social workers. Forced Marriage Protection Orders can place prohibitions, restrictions or any requirements that the court believes necessary to secure the victim’s welfare. They are available against any person (not limited to the other party to the marriage) although clearly international enforcement is likely to be a consideration in many cases.

The **contact** provisions contained in the Children and Adoption Act 2006 came into force on 8 December 2008 (see page 1).

The duty upon Counsel to operate a system alerting them to any appellate judgment concerning family law was considered in **Williams v (1) Thompson Leatherdale (A Firm) (2) Nicholas Francis QC** [2008]

EWHC 2574, QBD 10.11.08. The claimant wife retained the first defendant solicitors to advise her on her proposed claim for financial provision against her husband. The first defendant instructed the second defendant counsel to advise on settlement, which was eventually achieved three months before the decision of the House of Lords in *White v White* [2001] 1 AC 596, resulting in a consent order. At the time both defendants were aware of the pending appellate decision but neither mentioned its possible favourable implications to the wife. In giving judgment to the defendants, Field J held that while the second defendant had been negligent in failing to advise on the possible implications of *White*, the wife had failed to show that she had suffered any recoverable loss as it was clear that she would not have postponed settlement in any event. There was no duty on the first defendant to withdraw the application for the consent order and to advise on the pending appellate decision as they were entitled to rely on the second defendant’s advice.

On 14 October 2008 the President re-issued guidance regarding the presence of **McKenzie friends** in the light of the decision of Munby J in *Re N (A Child)*

(*McKenzie friends: Rights of Audience*) [2008] EWHC 2042.

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And finally...

His Honour Judge Alan Garfitt died on 18 December 2008 aged 87. For many years Judge Garfitt sat in Cambridge County Court where he made an indelible impression on all who appeared before him. The son of a village cobbler, Alan Garfitt was initially drawn to work for the Metropolitan Police. He was too young to become a constable, ending up instead as a clerk in Brixton Police Station. He served in the RAF during the war and was then called to the Bar in 1948. He was appointed a Circuit Judge in 1977, quickly attracting national notoriety after summoning the Commissioner of the Metropolitan Police to the RCJ to explain why the police had failed to enforce a protection order that he had made. In his later years he took to sailing and ran a smallholding near to Soham.

District Judge Robert Blomfield TD has retired from Cambridge County Court. We wish him a happy retirement and a very well-earned break!

Dates for your diary

30 January, 6, 9, 11 & 12 February at 2.30pm: LSC workshops on consultation concerning changes to funding proposals in Cambridge, Norwich, Stevenage, Ipswich and Chelmsford respectively. Details from 01223 417982

5 February: CDLS music quiz, CB2 cafe, Norfolk Street, Cambridge at 7.30pm, details from 01223 367007

18 February: Cambridge Resolution—seminar at Mills & Reeve, Cambridge by Roger Bamber, ‘Life After *Charman*—a review of 2008’. Details from Hannah Wilson on 01223 222430

12 March: Young Resolution talk on co-habitation by Annabel Hayward and Tom Bailey, details from 01223 222430

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