



FAMILIES NEED FATHERS – SCOTLAND
Both Parents Matter
Feumaidh na Teaghlaichean Athair Alba
Tha an Dà Phàrant Cudrom

PE1529/C

We are grateful for the opportunity to contribute to the Committee's deliberations on the issues raised by Mr John Ronald in Petition PE1529.

We note from the official record that several members observed that the subject matter overlaps in some degree with that of the Petition PE 1513 raised by Mr Ron Park. We agree.

We reiterate our strong belief that these petitions taken together should be seen as a timely invitation to the Scottish Parliament to review and update Scottish Family Law which has been overtaken both by social and economic changes within families in Scotland and by government policy which now recognises more clearly the obligations of both parents to promote the wellbeing of their children and also their children's right to family life.

The majority of separated parents do not go to court to resolve contact and residence disputes. FNF Scotland always advises avoiding court if at all possible on the grounds that the adversarial nature of proceedings is as likely polarise attitudes and may often generate entirely new areas of conflict.

However, it is clear that the numbers going to court have been steadily increasing since 2006 when the law was last examined in broad terms by the Scottish Parliament. There is a spectrum of reasons for this increase that we do not need to explore in this response.

Our observations here are based on the cases brought to us at group meetings and directly to our Edinburgh office. Most meetings hear at least one example of great frustration at the problems of securing contact as ordered by a court.

We are aware that at FNF Scotland we are likely to see the most troubled cases with contact orders being complied with irregularly or not at all. We know that many fathers despair of the support the courts give to their own orders and some decide to give up. We are contacted by some non-resident mothers and appreciate that the problems of enforcing compliance are rooted in the inherent weakness of the position of the non-resident parent rather than gender though of course the vast majority of non-resident parents are fathers.

Contempt of Court

We note the Minister's letter of response to this petition. The Minister writes: *If one parent does not obey a contact order, the other parent can return to court to ask the court to deal with the breach of the order. Requiring the parent to return to the court enables the court to determine whether the order was breached, examine the reasons for any breach and decide how to proceed [sic], having regard to the welfare of the child.*

You asked about our policy intention in this area. The Government considers that going back to court is the right approach to enforcement. There may be a variety of reasons why a court order has not been obeyed

and the court must assess [sic] each case on a case by case basis. In addition, any dispute is a private matter between the parents.

If the Minister is referring to the potential remedy for a “breach of the order” then the action is for a failure to obey. As the sheriff in a recent contempt case, *JDE v SDW*, in Dumfries <https://www.scotcourts.gov.uk/search-judgments/judgment?id=46709da6-8980-69d2-b500-ff0000d74aa7> pointed out: *“There is a difference between an application to the court under section 11 of the Children (Scotland) Act 1995 for an order relating to parental responsibilities and rights; and an application to the court under its inherent common law jurisdiction to punish a contemnor for not obeying such an order.”*

The distinction clarified by the sheriff is that an order under section 11 of the Children (Scotland) Act 1995 must put the interests of the children above all others but once an order is made it is an offence against the court to fail to obey it. The sheriff in a failure to obey/contempt of court action will not, as the Minister suggests, have to have regard to the welfare of the child because the order that has been breached already regarded the welfare of the child as its paramount consideration.

That distinction has been clearly spelled out by Lord Gill in the Inner House in the separate cases of *AG v JB* in 2011 and *TAM v JHS* in 2009. In *AG v JB* [2011] CSIH 56 Lord Gill said: *“This case exemplifies yet another attempt by a custodial parent to sever the bond between the other parent and their child by means of delaying tactics and in due course by protracted defiance of an order of the court. This court has already made clear its disapproval of such conduct”* [Lord Gill then refers to *TAM v JHS* an Inner House decision of December 2009] CSIH 44). ... *Her defiance not only thwarted the respondent's rights but undermined the rule of law. Conduct of this kind constitutes a grave contempt of court.”*

In contrast with the Minister’s assertion that “any dispute is a private matter between the parents” Lord Gill has made clear that a breach of an order is a matter for the court and is a matter of upholding the rule of law. In *JDE v SDW* the sheriff explained that if the mother had had concerns about the welfare of the child it was for her to raise an action to vary the contact order or reduce it to nil. She had not done so.

Disincentives to pursue contempt of court actions

JDE v SDW is a sheriff court decision and is not binding in the way the Inner House decisions are. However it spells out very clearly the tests that have to be satisfied for a contempt of court action to be proved and that the failure to obey the contact order is wilful rather than due to coughs, colds, birthday parties etc. Sufficient evidence of wilful failure to comply will only become clear after months of missed contact. All the cases cited above state that contact between the child and the non-resident parent had been lost for a year and half or more.

The reality for the majority of non-resident fathers (and other family members) who contact FNF Scotland is that their legal advisers will be advising them not to pursue the contempt of court route but instead to persist with child welfare hearings where they are the pursuer. For those in receipt of legal aid for the initial contact action their certificate will continue. For those who do not have legal aid the projected costs may be prohibitive and the outcome will be dependent on the amount of leeway the sheriff will give the parent with care.

What does a sheriff do when the contact order is disobeyed once out of three, four or five dates? Is that complying or not complying? We are aware of a spectrum of tolerance among sheriffs leading to differences in outcome that are often difficult to explain. What is clear that the effect of occasional and irregular contact can be irreparably damaging to the relationship between father and children and does not help settle matters between the parents.

Research

We note the Minister gave the Committee a link to some research with sheriff clerks carried out in 2006. We do not think it assists the Committee. The researcher herself explains that the research was a “limited exercise” and carried out among only nine sheriff courts.

As explained in our discussion of disincentives above we suspect that clerks would not be among those most likely to have a clear view of the whole matter of breach of court orders. The research was carried out before the 2006 Family Law Act was embedded; before the dramatic increase in contact and residence cases; before the changes that we have explained – and the Equal Opportunities Committee recently explored – in family life and the expectations of both parents; and before the evolution of Scottish government policy in this area.

Wider issues

We found some the ancillary issues explored in *JDE v SDW* to be most instructive.

The sheriff criticised the social worker and health visitor for giving the mother in the case advice that was simply incorrect in law and confused their wish to support her with their duty not to connive with her pick and mix approach to obeying the contact order.

It was also clear from the evidence given by the mother herself to the sheriff that she believed a court order was in some way discretionary in terms of her convenience, her feelings about the father on any particular day and how her son was responding to her general discouragement of spending time with his father. Being as generous as possible to her, perhaps she genuinely believed that she had a duty above that of the court to regulate contact. It is certainly an explanation that comes up again and again among fathers who contact us and is extremely difficult to deal with without appearing to be oppressive and uncaring.

Recommendations

We respect the aims of the Petition and support its general objective in asking the courts to be robust in enforcing the orders that it has made. These orders are usually the outcome of a series of child welfare hearings that will already have taken many months, often at the expense of the relationship between non-resident parent and child. It seems entirely reasonable to expect that orders should be upheld immediately without further expense to the pursuer.

We suggest that a review of Family Law will also create an opportunity for an active programme of training among the professionals who may be in contact with the mother and who rarely think of looking at the situation from the non-resident parent’s eyes.

It would also create the conditions for awareness raising among both parents about their duties and obligations in terms of their Parental Rights and Responsibilities. We believe a statutory presumption of ‘shared parenting’ will be as helpful to mothers as fathers in clarifying their obligations and responsibilities to their children and to each other as parents. We note that research carried out in Sweden showed that children in separated families experiencing shared parenting (spending at least 30% of time with each parent) showed significantly higher scores for many indicators of wellbeing than those with only one involved parent. These Swedish findings are comparable to the recent [Growing Up in Scotland study](#), in which seven-year old children not in regular contact with their father were more than twice as likely as those who have regular contact with their father to show behavioural and emotional difficulties (36% vs 15%, figure 3.2 on page 18).

We know that the Judicial Institute is incorporating a broader perspective in its training of new judges. If specialist family law sheriffs will become a feature of the new system we would urge that there may be a firmer view taken at an earlier stage where there is a suspicion that the parent with care is failing to uphold the court’s intentions.