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Child contact and contempt of court

Introduction

Contempt of court in the specific context of child contact is an issue which has troubled the courts on a number of occasions in recent years, most notably in the Inner House decision of *CM v SM* [2017] CSIH 1; 2017 S.C. 235; (*sub nom SM v CM*) 2017 S.L.T. 197, and also in the Sheriff Appeal Court in *TJ v SB*, 2017 Fam. L.R. 119 and again in *TJ v SB*, 2018 S.L.T. (Sh Ct) 277 the following year, and more recently in *B v A*, 2021 S.L.T. (Sh Ct) 301, a decision of Sheriff Welsh in Edinburgh in 2021. Despite the recent judicial guidance, addressing a Minute of contempt in child contact cases remains challenging. This brief note sets out some of the specific issues which emerged from the recent decision in *B v A*.

The case concerned a dispute between the mother, A, and father, B, regarding contact with their eight year old daughter, D. The parties had had a short relationship which ended in November 2012. D, the only child of the relationship, was born in 2013. B, the father, was not married to the mother, nor was he named on the birth certificate.

After extensive legal proceedings, a final contact order was eventually made, stipulating contact between D and her father, which was to be in a contact centre for the first eight weeks and thereafter to be outside a contact centre, but supervised. This order was contrary to A's wishes, as she opposed direct contact at all. In this she was supported by her new husband, M. The father was supported by P, his father and D's paternal grandfather. After the court ordered contact, P contacted M to arrange it. It became apparent that M and A had no intention of facilitating direct contact and complying with the order of the court. The parties returned to court, and the Sheriff ordered direct contact between D and her grandparents at the Museum of Scotland. This was attempted, with varying success, on a number of occasions. Thereafter there were attempts to organise indirect contact.

The action for contempt

By the time this case was heard by Sheriff Welsh in 2021, B had not seen his daughter since 2018. The issue between the parties, as narrated by the Sheriff, was as follows (2021 S.L.T. (Sh Ct), p.306, para.1): B sought "an order for A to be found in contempt of court and for her

to be punished for her contempt because he says she has no intention of allowing him direct contact with D and wilfully frustrates the court order at every turn.” In response, A denied that she was in wilful contempt of the order (p.306, para.1): “Her position is that both she and M have tried to encourage D to go for contact but she will not go.”

A number of distinct points emerged from the Sheriff’s judgment.

(i) *Standard of proof*

Before turning to the issue of whether contempt had been established, the Sheriff made some preliminary observations. The first was to emphasise that the standard of proof was “beyond reasonable doubt” and that all parties agreed this. (Contempt of court is an action *sui generis*: it is not specifically criminal but requires the higher standard of proof.¹)

(ii) *Third party conduct?*

A second issue was whether A could be in contempt of court based to some extent on the conduct of M, her husband. The Sheriff stated (p.313, para.14, emphasis added):

“There was some discussion about whether vicarious contempt arose, or could M be liable as agent for A or for acting in association with M.² The question of the application of the criminal concert rule to the evidence was discussed. Having considered these questions I am of the opinion that concepts like concert, vicarious liability and agency do not assist. Contempt of court is a jurisdiction *sui generis*. My task is to decide if A is in contempt of court. *I have decided that she could be, if there was evidence I accepted to support a finding she was acting in conjunction with her husband M, even though he is not convened as a formal party to the proceedings and is not named in the Minute.*”

¹ Contempt of court is “conduct which challenges or affronts the authority of the court or the supremacy of the law itself”: Sir Gerald Gordon, *Criminal Law in Scotland Vol.II* (4th edn), by J Chalmers and F Leverick (2016) para.58.01. Where contempt occurs in a civil action, it is treated as a civil matter, despite the possibility of a custodial sentence and the use of the higher criminal standard of proof.

² The final clause of this sentence isn’t quite clear: the sentence currently reads “... could M be liable ... for acting in association with M.” It could be interpreted as referring to M being liable for acting in association with A, or alternatively, and perhaps more appropriately in this context, as referring to A being liable for acting in association with M.

Thus, a finding of contempt could be made based not solely on the actions of the person named in the Minute. A situation where contact has been frustrated by someone closely connected with the parent could still constitute contempt by that parent, if there is evidence that they were acting together. In this case, the Sheriff found that M had been closely connected with the proceedings, including acting as an unofficial lay representative of his wife.

However, not only could A be found in contempt of court based in part on the actions of M, the Sheriff went further, stating (p.313, para.14, emphasis added):

“If a future minute were thought necessary a contempt could competently, in my opinion, be libelled against him alone *even although he is technically a stranger/third party to the action*, or while acting with A, if there was evidence to support that.”

The Sheriff’s decision was that he was satisfied beyond reasonable doubt that A was in contempt of court, while acting with M, as she had “deliberately and wilfully” refused to obtemper the relevant order of the court (p.315, para.20).

(iii) Punishment for contempt

Having found the mother in contempt of court for wilfully refusing to facilitate court ordered contact, the next question for the Sheriff was what punishment was appropriate. He started by saying (p.317, para.26) “In my opinion, in such cases there is a residual locus, which lies with the minuter, to prosecute the minute to the pain of punishment, subject to judicial oversight, should the minuter be so inclined.” This allows the Minuter some power to move for – or magnanimously to elect not to move for – punishment, balanced of course by the critical exercise of judicial oversight. The eventual decision as to whether to impose any punishment (and, if so, what that should be) would always remain in the hands of the Sheriff.

One of the solicitors suggested that the Sheriff should delay imposing punishment, to allow the mother to facilitate contact, thereby purging the contempt. However, the Sheriff rightly dismissed this “sword of Damocles” approach, since “it falls foul of the decision in *CM v SM* [2017] CSIH 1” (p.317, para.26). Instead, any punishment should be swift and effective.

In this case, solicitors for both the father and the Curatrix were content not to move for punishment, especially given the length of time that had passed since the contempt. It was also observed that there was “a wider picture to consider in mitigation and the contemnor was the mother of two small children who rely on her” (p.318, para.26). Nevertheless, the Sheriff concluded by explaining to the mother, and her husband M, the possible consequences for them if future orders are breached (p.318, para.29):

“if further orders of the court are not obeyed they could both be brought before the court and face being committed to prison for contempt for up to 90 days. I also informed them that such a course of action while rare was not unknown and could be repeated, subject to the bar of oppression, if the contempt persisted. I am satisfied that A (and M) have been sufficiently punished by the stress of the contempt process, for now.”

This seems an entirely appropriate outcome, given the factors mentioned by the Sheriff: the length of time that had passed; the fact that A is the primary carer not only for D but for her other child (with M); and the fact that neither the Minuter nor the Curatrix moved for punishment. It also supports the concerns raised by the Inner House in *CM v SM* in the specific context of imprisonment (2017 S.C., p.254; 2017 S.L.T., p.212, para.62):

“Ultimately, the court must enforce its orders, but in many cases the contempt proceedings themselves will provide a salutary reminder to the defaulting party of the need to comply. A custodial sentence, particularly on a mother with whom the children live, should only be imposed with reluctance and as a last resort.”

However, the fact that the Sheriff indicated that, in his opinion, it lay with the Minuter to prosecute “to the pain of punishment” is of particular significance in the very personal context of family actions. By this stage, relations between the parties will inevitably be strained past any point of reconciliation or constructive dialogue, and a Minuter, as the aggrieved party, may not be inclined to seek a more lenient outcome. This concern is further heightened where there is a history of abuse between the parties.

(iv) *Abuse*

Of note – and some concern – is the following observation from the Sheriff (pp.315-316, para.21, emphasis added):

“The relationship between A and B was toxic. I was told Sheriff Holligan found there was bilateral abuse in the case. There appears to have been a criminal court case in which B pled guilty to an offence and not guilty to others. *The precise details do not matter here because I am dealing with contempt by A and not contact for B.* For whatever reason this wound between A and B has not healed.”

Without commenting on the specific facts of this case, a number of points can be made of a more general nature, concerning child contact and abuse. The growing understanding we have of domestic abuse and coercive control suggests that any history of abuse between the parents might matter a great deal. The possibility for abusers to use contact with children to perpetuate abuse is well-recognised and a serious concern.³ The use of litigation and contact as an instrument of control has recently been explicitly recognised in an English decision from Mrs Justice Lieven (*MacDougall v SW* [2022] EWFC 50, at para.78), where a known sperm donor sought contact with some (but not all) of the children born as a result of his sperm donations: “In my view, a large part of his [the known sperm donor’s] motivation for making these applications is to control SW and EG [the two mothers] and have control over their lives”. Thus, incidents of abuse between two parties are *not* separate events, but should be viewed as part of the bigger picture. Perhaps the reason that one party is failing to obtemper the court order for contact is a result of that very abuse?⁴ Moreover, the risk of abuse and coercive control is of very grave concern in light of the Sheriff’s statement that the choice of whether to press for punishment lies with the Minuter. If a victim of abuse did frustrate contact, out of fear or in an attempt to protect the child, then the abuser could seek to

³ See M Coy, E Scott, R Tweedale, and K Perks, “‘It’s like going through the abuse again’: domestic violence and women and children’s (un) safety in private law contact proceedings”, (2015) *Journal of Social Welfare and Family Law*, 37(1), 53-69; Scottish Women’s Aid have also published a Briefing on “Domestic Abuse and Child Contact”, which notes that abusers may use the court processes “to routinely disrupt women’s lives”: <https://womensaid.scot/wp-content/uploads/2018/08/SWA-Briefing-Child-Contact.pdf>.

⁴ This may be either because of the very real difficulty for the abused parent in communicating with their abuser in order to arrange contact, or because they are attempting to protect the child from direct or indirect abuse. These issues were explored in *LRK v AG* [2021] SAC (Civ) 1, and discussed by Gillian Baker in “Child Contact and protection from domestic abuse” March 2021 JLSS: <https://www.lawscot.org.uk/members/journal/issues/vol-66-issue-03/child-contact-and-protection-from-domestic-abuse/>.

use the threat of punishment, including imprisonment, to threaten and control the victim still further.

A further point to note is that the Children (Scotland) Act 2020 inserts a new s.11G into the Children (Scotland) Act 1995, imposing a statutory duty on the judge to seek to discover why there has been a failure to obey.⁵ Once in force, it will mean that where a court is considering whether to find someone in contempt for failing to obey a s.11 order, or to vary or discharge a s.11 order on the basis of non-compliance, the judge must seek to establish the reasons for that failure, and give the child an opportunity to express a view. Under this new section, the court may also appoint a child welfare reporter to investigate and report back about the failure to obey. It is the case that the court could appoint a child welfare reporter at present, and of course the court must currently establish the background to non-compliance in any case: not every failure to comply will be a contempt of course. Nevertheless, this provision should help to ensure that any abuse is brought to light before the court, through a clear statutory duty to investigate what lies behind a parent's seemingly implacable opposition to contact. In doing so, any history of abuse between the adults would also be relevant to the question of child contact and contempt of court.

Conclusion

How to deal with one party's consistent refusal to facilitate contact, and their frustrating of an order of the court, is a vexed and complex area. In particular, identifying an appropriate punishment for such contempt is almost impossible: imprisonment usually deprives the child of their primary carer; a fine usually takes much-needed money out of the child's house. Any punishment will typically not be in the best interests of the child, resulting in not only the punishment of the parent in breach, but also the indirect punishment of the child. Even when contempt is made out, the tricky – and some may say well-nigh unachievable – task for the judge is how to balance the need for the court to assert its authority and ensure compliance with its orders, against the best interests of the child, which will almost inevitably be damaged by any penalty imposed. This decision takes a forbearing approach, while also

⁵ For a more detailed account of the legislative history to this provision, see LA Barnes Macfarlane, "The Children (Scotland) Bill 2019: Balancing the Rights of Parents and Children," Report for the Scottish Parliament Justice Committee, October 2019, pp71-72: https://archive2021.parliament.scot/S5_JusticeCommittee/Inquiries/Balancing_the_Rights_of_Parents_and_Children_Reportv2.pdf.

issuing a clear warning to the mother and her husband. It also offers some useful clarification on the effect of third party conduct in constituting the contempt, although the suggestion of a history of abuse between the parties could perhaps have been more fully explored.

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