Court In The Act

Part two of a three part series on Family Law

This second of three articles on how men fare under the Family Court examines the lack of sanctions against custodial parents who deny access to their children. This failure to deal with breaches of access orders, writes BETTINA ARNDT, is the greatest cause of the court's troubled reputation and the source of much heartache for fathers.

THE judge was clearly angry. He thumped the bench. "This man must see his boy!" he said. His comment came at the end of the third round of hearings regarding a Sydney man whose wife had spent the previous 13 months denying him access to his son.

Douglas, a Sydney consultant, wasn't optimistic that the judge's action would have any effect. He left the court with a variation on the orders for the fortnightly access he'd been denied for the past year. His attempt to have his wife charged with contempt had been dismissed on technical grounds.

The final blow came when his ex-wife's lawyer turned to the lawyer who was representing the child and said: "Well, you'd better get your warrant ready because he won't be seeing his boy."

The warrant was never used. Over the next four years, more than $200,000 was spent on legal battles as the couple warred over the denial of access. Yet no action was taken by the court over the wife's persistent breach of court orders.

Douglas has managed to see his son seven times in the past 3years. On a number of occasions, he has driven the two hours required to reach his wife's house for a court-ordered access visit, sometimes accompanied by his other child, only to discover nobody at home."My son wanted to see his brother. He'd end up in tears. It was just too hard," Douglas says.

Douglas is giving up but he's now a bitter man. "I believed in an honest system. I've been barbecued, done over. I've had it with the Family Court."

The Family Court's failure to deal with breaches of access orders has been, without a doubt, the greatest cause of its troubled reputation. The court's impotence in the face of the continuing defiance by women of access orders has a long history.The court hasn't hesitated to severely punish men for non-payment of maintenance orders or absconding with their children – in the past, men have been imprisoned for such offences. But when it comes to taking sanctions against custodial parents who deny access to their children, judges have traditionally gone to water.

"As a general rule, the non-custodial parent has had to spend a fortune on solicitors, with no guarantee that they will see their children again," a Melbourne criminologist, Maartje Irvine, says in her submission to the Joint Select Committee on the Family Law Act, which reported in November 1992.

"Yet they will be dragged into court immediately if they fail to pay maintenance. So much for justice.

"Women refuse to allow their children to see their fathers even when a court order exists. Until the day that one of them is jailed or fined or made to work at community orders, this will continue … People want offenders punished, not slapped on the wrist with a wet tram ticket."

A slap with a wet tram ticket is a colourful description for the stern lecture, the bond or threat of a fine that women customarily receive on the rare occasions they are charged with contempt for denial of access.

Nine years ago the Law Reform Commission held a review which included an examination of non-compliance in family law. The review provided ample proof that most cases involving breaches of access have been shunted aside or dismissed on technical grounds. The evidence included testimony from lawyers: “The other side has clearly breached the access order … I’ve got my client on the other end of the phone saying, ‘What are you going to do about it?’ I go ahead and file the contempt application knowing full well that the judge is just going to refuse flat out to deal with it. Some of them have got their little speech to the parties down pat, and when I hear the opening few words I just pack up my file and try to work out how I’m going to face my client and explain why the court won’t enforce its own orders.”

And from judges: “I am very slow to attach any sanctions at all to breaches of access orders,” one Family Court judge told the commission.

The commission’s report concluded: “It seems clear that Family Court judges do consciously ‘shunt’ a significant proportion of contempt applications relating to access orders in order to avoid making a final determination and that when they do make a determination of liability, their sentences are markedly lenient … An impression can be conveyed to the community which, in its extreme form, is summed up in the phrase ‘Family Court orders are not worth the paper they are written on’.”

Almost a decade after that review, little has changed. “You can see it in their faces. They know they’ll get away with it. The general public knows bloody well that there’s nothing you can do about it,” says Justice Walsh, a recently retired Victorian Family Court judge, describing the women who have appeared before him on contempt charges related to denial of access.

That’s certainly the impression in the community – and a major reason why women have continued to flout the law when it comes to denial of access. The joint select committee quoted the following comment as typical: “I have an access order to see my children, but my wife pleases herself as to whether she will abide by them. Why? Because she knows that courts are reluctant to do anything about it if she disobeys.”

Well, what could the court do? “Jail them!” is the common refrain from many of the family-law men’s groups. Indeed, custodial sentences are listed as a possible sanction in contempt cases related to denial of access. But judges have rarely followed this course.

In one of the few exceptions, Justice Peter Hilton sent a Brisbane woman to jail for eight weeks for a breach of an access order. She had pleaded guilty to numerous deliberate breaches of the order and had hidden the children from the father for eight months, resulting in a $45,000 search by the police to track them down. Justice Hilton’s action was overruled by the Full Court, which stated it did not consider prison an appropriate sanction. The woman received a $500 good behaviour bond.

The arguments given against imprisonment of mothers usually focus on the welfare of the children while Mum is away, and the risk that Dad might be blamed by the children for putting Mum in jail. Clearly these arguments carry weight among the judiciary, who appear to apply similar logic even to more lenient sanctions such as weekend detention or community service orders, which are also rarely used. The joint committee’s report argued strongly that these alternative sanctions “need to be used and seen to be used” if the court is to gain public confidence in its determination to enforce orders. (These alternative sentencing provisions are not yet available in NSW.)

Despite the history of failure in tackling this problem, there is some evidence that the tide may be turning. The Commonwealth Evidence Act, introduced last year, lowered the standard of proof required to show that access has been breached. Now, proof is the balance of probabilities rather than beyond reasonable doubt. New simplified court procedures have enabled speedier court action in cases of denied access and this, combined with the new requirements for counselling in such cases, means access agreements can sometimes be achieved before attitudes become entrenched.

One recent example involved a woman who had left Canberra and taken her children to Adelaide and was refusing the father any contact. When proceedings were immediately put in action requiring her prompt appearance in Canberra before a judge on a contempt charge, she caved in and access became available.

But, most importantly, there appears to be a new determination in some members of the judiciary to ensure children's contact with both parents – a resolve that should be strengthened by the recent amendments to the Family Law Act promoting such contact.

Kate Hughes, the acting head of the family law section of Legal Aid in the ACT, reports that in her experience the judiciary has in recent years given more weight in custody cases to parents' attitudes towards allowing children contact with the other parent.

"If one parent is consistently denying contact, he or she is regarded as having an inappropriate attitude to the duties and responsibilities of parenthood and that is seen to reflect poorly on the parent's ability to provide for the emotional needs of the child – two factors considered by judges in deciding appropriate residency for children," Hughes says.

In fact, with a pattern emerging where consistent numbers of fathers are gaining custody (or "residence", as it has been called since the recent amendments), some lawyers report that an application for reversal of residence may be a more effective strategy than the punitive approach of seeking penalties for breach of access orders.

IF a man is willing to care for the children, and in a strong position to apply for reversal of residence, then it is sometimes possible to negotiate better contact with the children under threat of a court action for residence.

And as the community becomes more aware that this threat is real, it may be that denial of access will become less prevalent. Family law action groups could help this process by publicising recent actions of judges who are showing they mean business in enforcing contact with children.

For instance, in a 1995 case involving a woman persistently denying her ex-husband access to their two-year-old, a Judicial Registrar in the Parramatta Court in Sydney, David Halligan, took the unusual step of making a warrant available for use in delivering the child to the father any time the mother failed to comply with future access orders.

In a separate judgment relating to the same case, Justice Ian Coleman supported this action – which resulted in the mother complying with the orders. The Full Court has just ruled the approach was inappropriate but by now access is well established and looks likely to continue, according to Justin Dowd, the lawyer acting for the father.

There's a steady trickle of women receiving fines for breaches of access orders, plus increasing numbers of men recovering costs in such cases. Anecdotal evidence suggests that the combined effect can pack quite a punch.

"She just wet her pants when she was found guilty," says Jim, an Adelaide bus driver who fought a prolonged battle to see his children. Every fortnight for more than a year he filed his own applications for contempt when his ex-wife failed to comply with his access orders. After 14 such applications, he represented himself in court in a three-day trial. The result: his wife was fined $8,000 for the contempt charges, had to pay Jim's costs and lost work expenses, as well as being threatened with nine months' jail if she failed to comply.

It worked. "She's settled down a lot now," says Jim, who has been having his children for the past two years whenever he likes, on weekends and often during the week. There was one hiccup when his ex-wife announced recently that she was moving to the country but after Jim's discovery that he could take out a restraining order to prevent the move, he and his wife have agreed the teenage girl will stay with him and the younger boy will go to the country until he's 10, when he will move in with Dad.

"She's pulled her head in again," says Jim. "We can talk now about what's best for the children. Be civilised rather than acting like animals."

The Family Law Council is collecting data on penalties currently being applied for breaches of orders. It is to be hoped that by the time the results appear, in a year or two, they will reveal judges showing new backbone on this contentious issue. But there's no doubt there are still many determined to confine such cases to the too-hard basket.

A Question Of Attitudes.

I WOULD have thrown in the towel if this hadn't worked. Something had to give," says Tony, a happy man who has finally regained the care of his three children after four years locked out of their lives.

His ex-wife left him in 1991, took off with the children and ended up living on the NSW Central Coast – a 24-hour return trip from her former home near Toowoomba, in Queensland. Over the next few years, Tony made that trip scores of times, in what usually turned out to be a forlorn hope of seeing his children.

Again and again he'd make the 900-kilometre trip and discover the arranged access was denied. His ex-wife would fail to show up at the arranged meeting place, or she'd call and say the children were sick.

"They have chickenpox," she told him on one such occasion – but the next day they were seen at the Easter Show looking just fine. Post was never delivered, telephone contact denied. Between 1991 and 1994, Tony travelled about 22,500 kilometres for access that failed to take place and averaged three hours contact a year with his children.

The final court battle took place in Sydney only six weeks ago.

There were other factors contributing to Justice Rourke's decision to place the children in their father's home, particularly the domestic violence between the children's mother and stepfather. But there's no doubt a lot of weight was given to the mother's attitude towards contact with the father.

“On the view I take of (the mother), no orders of this court defining contact by this husband to his children will ever be successful while ever they reside with their mother,” the judge said.

And that was enough to swing the case towards the father.

The emphasis in this case on the children’s right to contact with both parents is hopefully a sign of things to come.

IN THE north of Queensland, there’s a judge who is blazing a reputation for enforcing laws about parental contact with children. As the only Family Court judge in North Queensland, Justice James Barry approaches intractable access problems with an inventive spirit.

Faced with a woman who was consistently denying access, he threatened her with a community service order. He had arranged for a probation officer to be in the court.

Justice Barry describes the dialogue that followed: “I said to the officer, ‘What jobs have you got going for community service?’ ‘Oh well, scrubbing toilets in the old peoples’ home … Painting the boys’ Scout hut’ came the reply. ‘Would the Scouts be there?’ the woman asked. ‘Oh yes, yes,’ was the response.

“The woman went ashen at the very thought of it.”

The decision on sentencing was adjourned for a time to see if the access orders would be complied with and indeed they were.

Justice Barry has a lot of contact with local family lawyers and feedback from them suggests his methods have been successful. This is one judge determined to enforce the notion that it is generally in children’s best interests to have contact with both parents and that parents comply with court orders. In his court, parents who break these rules risk losing the care of their children. He regularly hauls back to North Queensland mothers and fathers who have breached access orders by moving interstate without first seeking permission from the court.

One such example involved a woman who abruptly moved to Tasmania to be with a new boyfriend, thereby denying her ex-husband his regular contact. Justice Barry gave the woman three days to return the child to Townsville, warning her that if she decided to remain in Tasmania, custody of the child would be transferred to the father. After a contested hearing, the father was granted custody and Mum chose to return to the boyfriend.

Justice Barry believes that, as with disciplining children, threats can work very well – provided people know you are prepared to follow through. For instance, Justice Barry has had success simply threatening to reverse custody for regular periods throughout the year “in order to give the custodial parent a taste of what it feels like to be an access parent”. This judge stresses his impartiality and his determination that court orders are complied with but, above all, he’s out to protect children’s interests.