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Comparative study on enforcement
procedures of family rights

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REPORT ON THE ENFORCEMENT OF FAMILY JUDGMENTS

ENGLAND AND WALES REPORTER – PROFESSOR ROGER KAY

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This report may very well be shorter than others and is particularly weighted towards Part 1. The reasons for this are first that there was a response to the questionnaire on The Hague Convention and, with reference to Part 1, although in theory there are multiple, specific statutory provisions relating to enforcement of orders relating to children, in practice one generic provision is applied and that is used sparingly. However, Part 1 will focus on the outline of court structures and current changes in family proceedings and the way in which extra-judicial procedures are encouraged as the primary means of resolving disputes as to orders concerning children. There is a little overlap with Part 3 as, because the reporter is an academic and not an official or practitioner, two local judges were consulted about the practice of enforcement.

Although there was a response to the questionnaire, there are two topics that will be considered in Part 2. The first is the role of the relevantly, recently appointed first Head of International Family Law and the second the first case involving a child dispute in relation to *Brussels II Revised* to reach the Court of Appeal. There will also be a gloss on some of the terminology used as to institutions and individuals in the response to the questionnaire.

In respect of Part 3, the two local judges who were interviewed in the course of researching Part 1 have indicated a willingness to be interviewed. Although it is not possible to indicate upwards of fifty names, some suggestions can be made.

Part 1 – Outline of Court Structures, Law on Judgments and Enforcement of Judgments in England and Wales

Court Structures, Jurisdiction and Personnel

All cases concerning children are heard at first instance in a family proceedings court, the County Court or in the Family Division of the High Court. This means that, depending on jurisdiction and choice, an initial judgment may be made in a magistrates' court, the County Court or the High Court. The two major appellate courts are the Court of Appeal and, ultimately, the House of Lords. However, the High Court also has some appellate functions. Thus the court system can be confusing initially. A useful summary of the courts and their personnel and

jurisdiction in family matters can be found in the annual Judicial Statistics¹. These reports relate to the criminal and civil business of the courts in England and Wales for whose administration the Lord Chancellor latterly and now the Lord Chief Justice is responsible. They also cover the work of some associated offices including the Public Guardianship Office and the Judicial Committee of the Privy Council.

Family proceeding courts' work is at present carried out by magistrates. The magistrates are either lay magistrates who have received special training in order to be part of a family panel, or legally qualified judges, known as district judges (magistrates' courts), who are also specially trained in family work. Cases are heard by a bench of three lay magistrates, who must be trained and approved to sit in family proceedings, or a district judge sitting with lay colleagues. Lay magistrates are advised by a qualified legal advisor (formerly known as a court clerk). Family proceeds courts have full private and public law jurisdiction to hear matters relating to children governed by the *Children Act 1989* (see page 4 onwards below) but they do not have jurisdiction over divorce and property. Thus disputes concerning children which arise out of divorce will be heard in proceedings ancillary to the divorce in the court in which the divorce is filed. This is overwhelmingly usually the county court².

Not all county courts have full family jurisdiction under the *Children Act*, and, indeed, each will fall into at least one of five categories. Non-divorce county courts have no family jurisdiction whatsoever. Divorce county courts can issue all private law family proceedings but can only hear uncontested cases relating to *Children Act* jurisdiction. If a case is contested, it is transferred for trial to a family hearing centre, which does have full jurisdiction over **private** family cases. The funnelling up continues with care centres, which have full jurisdiction in all private and public cases. Finally, there are Specialised Adoption Centres, which are the only county courts to have adoption jurisdiction.

In the County Court, either a single District Judge or Circuit Judge will sit. In order to hear proceedings under the *Children Act 1989*, judges must be specially nominated for family work and receive special training and guidance for carrying out such work. District judges have limited civil jurisdiction generally and in family cases can hear private but not public cases, unless they are nominated as care judges, in which case they can hear uncontested public law cases and contested

¹ Judicial Statistics (revised) England and Wales for the Year 2005 Cm 6903 14 August 2006. The original version of the judicial statistics annual report for 2005, published in May 2006, was withdrawn following the discovery of a number of errors and inconsistencies in the report. A revised version was laid in parliament on 14 August 2006. The report can also be found in the Department of Constitutional Affairs' website at www.dca.gov.uk/dept/depstrat.htm

² Briefly, as this is not germane to this report, only divorces that are defended are transferred to and heard in the High Court. Only a very small number are defended each year.

private law cases. Circuit judges³ who are authorised to hear family cases have full private law but no public law jurisdiction. Nominated care judges have full private and public jurisdiction (c.f. care district judges above). Finally, to complete the hierarchy, designated family judges also have full jurisdiction. They are based at care centres and chair local Family Court Business Committees and Family Court Forums⁴.

The High Court has three divisions, Queen's Bench, Chancery and Family. Queen's Bench and Family also have Divisional Courts that hear appeals from courts below (that is, in the family context, family proceedings courts. Appeals from county courts go the Court of Appeal). The Family Division of the High Court has jurisdiction to hear all cases involving children and, in addition, has exclusive wardship jurisdiction (see page 14 below) and deals with return orders under the Hague Convention. The court also hears cases that are transferred from the county courts or family proceedings courts⁵. The Family Division has a President and seventeen High Court judges. A single judge will hear a first instance case.

The two purely appellate courts are the Court of Appeal, where normally three Lord Justices of Appeal will sit and the House of Lords, where five Lords of Appeal in Ordinary will sit. It should be mentioned that although the titles of the judges in the two appellate courts suggest that only males are appointed, there are some (very few) female judges.

It will be readily seen that although it is now claimed that the civil law relating to children is consolidated and integrated (see page 4 below onwards) the administration and judging of that law is far from unified. What is set out above is not intended to confuse, but there are three different courts in which proceedings may commence and/or be determined and, within those courts the jurisdiction of types of designation and judges will differ.

However, this is changing. It is proposed to unify both rules and courts, at least in respect of family proceedings and county courts. As far as the rules are concerned, these are not yet unified, but there is a consultation paper out for discussion.⁶ The unification of courts is as a result of a Court Service National Strategy and will combine family functions in certain areas. Cheshire, for instance

³ So called because they used to go out on circuit, that is travel from court to court to hear civil (and criminal cases)

⁴ Since 2005, they have also chaired the newly formed local Family Justice Councils ("FJCs"). Where there is more than one designated judge in the area of a local FJC, they will co-chair. One national and forty-four regional councils have been established. The FJCs are multi-disciplinary and members are drawn from magistrates and judges, professionals, practitioners and academics.

⁵ An example of this in a non-Children Act context has already been alluded to – all proceedings for divorce are filed in the county court, but if a divorce becomes defended it is transferred to the High Court.

⁶ Family Procedure Rules CP ("command paper") 19/06. This was published on August 30th 2006 and the consultation period ends on December 1st 2006. The paper was produced by Her Majesty's Court Service, which is part of the government Department of Constitutional Affairs.

is one of those areas and there will be a project board that will bring together family work at Chester and Warrington, the two care centres in the county of Cheshire. Functions of family proceedings courts, county courts and care centres will be combined. All family applications will be issued and processed at the care centres. There has been a disparity in fees between different courts but these will come into line in April 2007⁷.

Legal System

As is generally known, English (and Welsh) law is based on common law, a system of judge-made law. However, in recent years, there has been a plethora of legislation, so that much of the law can now be found in statutes and delegated legislation. Delegated legislation is authorised by statute but is not subject to the same process of approval and ratification that primary legislation ("Acts of Parliament") is. As a result of the increasing complexity of legislation, many Acts merely provide the framework that is then fleshed out by statutory instruments, the most prevalent form of delegated legislation. Acts of Parliament may take the form of codifying the common law, consolidating previous legislation, providing new law, or a combination of all or any of these. The law on children is a mix of the above. Most of the law is now contained in legislation but the court retains some inherent jurisdiction which is not to be found in statutes, although this is used sparingly. Reported cases, whether common law proper, or interpretative of statutory provision, provide the bank of law for future cases. The *ratio decidendi* of a case, broadly the legal principles decided by the court and any directly relevant facts, sets a precedent for lower courts, and, generally, the court in which the decision is made. However normally cases are only reported at the level of High Court and above, so that most decisions made regarding children, and enforcement of orders in particular, will not be reported. It should be said that this is no different from many other areas of law and types of cases.

The Current Law

The law can be broadly split into three categories, private law, public law and inherent jurisdiction.

Private Law

Law

The overwhelming bulk of the private law provisions can be found in the *Children Act 1989*. This Act was passed to consolidate and codify previous statutory and common law provisions and, to that extent, it is generally accounted a success. The major operative section is section 8 and orders made under this section are

⁷ This was reported by a senior official at Chester County Court and care centre to a meeting of the Cheshire Family Justice Council on October 5th 2006.

called, unsurprisingly, section 8 orders. There are four such orders. The first are residence orders, which settle where a child is to live (this is not to be confused with custody orders as a residence order in itself does not determine matters of parental rights), contact orders (known as access in many jurisdictions), prohibited steps orders and specific issue orders. A prohibited steps order means that “no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court”... (Section 8(1)). A specific issue order is an order giving directions for determining a specific question in connection with parental responsibility of a child. A common example of this would be a dispute over the manner of education of a child. For the sake of completeness, it should also be noted that the court has power under s15 and Schedule 1 of the Act to make periodical payment orders (maintenance or alimony in other jurisdictions) and lump sum orders in favour of a child and there is limited power to make property orders as between the parents for the benefit of a child.

It will be noted that parental responsibility is not mentioned in section 8. This is because it is dealt with in section 2, as amended, and is not inextricably linked to residence orders. Broadly, married parents, mothers and any person who is registered as a father on a birth certificate will automatically have parental rights and will act jointly with anyone else having rights. Rights can also be acquired through agreement or court order. If a relationship breaks down and one party is awarded sole residency then, unless a court orders otherwise, any other party with parental responsibility will retain it and continue to exercise it jointly. Conversely, section 12 states that if a residence order is made in favour of a father who does not have parental responsibility, then an order giving him such responsibility will be made and if a residence order is made in respect of anyone who is not a parent or guardian, that person has parental responsibility for the duration of the order.

It should also be noted that guardians can be appointed either by the court in certain circumstances or appointed by an existing guardian or person with parental responsibility to act on the death of the appointer (section 5).

It should be stressed that the approach that the Act encourages, and which is very much put into practice is one of non-intervention. S1(5) of the *Children Act* provides that a court should not make an order unless it considers that doing so would be better for the child than not making any order at all. If the court feels that there should not be intervention, then it should actually make an order of no order. This sounds illogical, but is actually a positive statement of the primary principle of the Act.

Enforcement

The lines between encouragement of compliance and enforcement are

somewhat blurred. A specific issues order, although it is a primary order under section 8, may often be used to resolve differences between those with parental responsibility and thus can be viewed as a type of enforcement order.

A more obvious example of this can be found in section 13. This provides, with certain provisos, that where a residence order is in force no person may cause a child to be known by a new surname or remove the child from the United Kingdom without either the written consent of everyone who has parental responsibility or leave of the court. It should be noted that whilst it is not necessary to do so, as it has the force of law in any event, this is often expressly articulated in orders. Also, this does not actually effect compliance and such an order may need to be enforced.

Section 14 contains the actual sanction and stipulates that where a residence order is in force and any person is in breach of that order then, subject to a copy of the order being served on the person in breach, the order can be enforced under section 63(3) of the *Magistrates' Courts Act 1980* ("the 1980 Act") as if it were an order to produce the child. Section 13(3) specifies that this remedy is without prejudice to any other remedy available.

Section 63(1) of the 1980 Act states that....where a magistrates' court has power to require the doing of anything other than payment of money...the court can stipulate how and within what time it is to be done. This also pertains to anything which is not to be done. Section 63(3) then provides that if a person disobeys an order of the magistrates' court to do anything other than the payment of money or to abstain from doing anything the court may either order him to pay a sum not exceeding £50 a day for every day during which he is in default, or a sum not exceeding £5,000 or may commit him to custody until he has remedied his default or for a period not exceeding 2 months.

There are several points to make. First it should be noted that this only applies to residence orders and not other section 8 orders (and, in particular, not to contact orders). This may seem strange at first sight. Why should only residence orders be enforceable in this way, and why should a provision in the magistrates' court, where family proceedings courts take place, be applied when many proceedings are heard in county courts? The answer to the first question is that section 14 is not limiting this remedy to residence orders only, but confirming that residence orders as well as other orders can be enforced in this way. Contact orders, prohibited steps orders and specific issue orders by their nature will normally contain provisions relating to doing or abstaining from doing (however, this is not always so and lack of such words can cause problems on attempted enforcement – see the cases on pages 7 and 8 below). A residence order may not have such overt wording, and the key words in section 14 are "as if it were an order requiring the other person to produce the child to him." Secondly, the use of section 63(3) does not preclude any other remedy. Therefore it is highly unlikely that a county court will send a defaulter to the magistrates' court to be

dealt with. They will invoke the powers that exist in the county court (see below). This is borne out by the conversations with the two judges who sit in the county court⁸. Both not only had not utilised section 63(3) of the 1980 Act, but were unaware of it. There is no reported case on the operation of section 63(3) in respect of residence orders since the *Children Act* came into force. There is one case in respect of breach of a contact order. Contact orders can be very specific and can include supervised contact, which comes within the category of encouraging compliance. For example, contact orders may prescribe exactly the days and times when contact is to take place and where it is take place. In difficult cases, it may stipulate arrangements for the handing over and collection of children. In extremely difficult cases, an order may provide as well for certain other people to be present when contact takes place. This can be relatively informal, for instance another family member, or can it encompass a court or child care agency being involved.

The case mentioned in the previous paragraph is *Re H (Contact: Enforcement)*⁹. Briefly, a contact order was made in the magistrates' court in favour of a father. The order provided, amongst other things, for staying contact for a week in August 1993, followed by a weekend in September 1993. The mother failed to hand the child over on both occasions. The father issued proceedings against the mother under section 63(3). She pleaded guilty and was fined. She then instructed new solicitors and appealed against both the conviction and the fine to the Family Division and was successful. Even though she had pleaded guilty, that plea could be null and void if made in respect of an order that could not found a complaint under section 63(3). The order had not defined a precise place for the handing over of the child and thus section 63(3) could not be invoked. In addition, it had been found in the initial hearing that the mother had not deliberately flouted the order and that section 63(3) could not be invoked because there had been no deliberate defiance of the court. Finally, and, most significantly, this course of action was an inappropriate way to enforce the contact order unless there was no realistic alternative.

This case has been set out in a little detail because it encapsulates the two abiding issues relating to the quasi criminalisation of disobeying a civil order. The first is that the orders and breaches are treated as if they were criminal issues, that is in a highly technical manner, so that often an application to punish the breach will fail. The second is that this approach is not a constructive one in these circumstances as it does not resolve any issues. There needs to be some cooperation between the parties to allow contact (or residence) to work and enforcing in this manner is directly counter to this goal.

Thus, it is both the policy of the courts and the government to address issues of non-compliance with regard to residence (and contact in particular – see below)

⁸ His Honour Judge Kevin Barnett is the designated family judge for Chester. District Judge Cathy O'Leary is a specialist family district judge.

⁹ [1996] 1 FL 614, [1996] 2 FCR 784, [1996] Fam Law 348

as matters for further negotiation and, if possible, mediation. This will be explored a little further after enforcement in the county court and High Court has been examined briefly.

The general method of enforcement in the county court and the High Court, in respect of any order, is to punish for contempt of court. Contempt of court covers a very wide range of non-compliance, and includes any disobedience to the court, including from disrespect during a trial to non-compliance with orders. It stems from the inherent jurisdiction of the courts but has been augmented by statute, the *Contempt of Court Act 1981* and is enshrined in the rules of the respective courts. The punishment is fine or imprisonment. However, normally, a person in breach of an order cannot be dealt with for contempt of court unless the order is endorsed with a penal notice and served on the person in breach. Broadly, a penal notice states if a party disobeys the order he/she is in contempt of court and liable to be committed to prison. It is not usual to include a penal notice in the order when it is made initially, unless the court is of the view that an order is unlikely to be obeyed. So there is normally a delay as the party not in default has to apply to the court for a penal notice to be endorsed on the original order and then this revised order has to be served on the other party. That this is the usual procedure in practice was confirmed by the designated family judge for Chester. It can readily be seen that section 63(3) *Magistrates' Court Act 1980* is a legislative measure to give the magistrates' courts similar powers of enforcement to those inherent in the jurisdiction of the other courts, although there is no similar requirement for a penal notice. It will be no surprise, therefore, that similar problems arise with enforcement and these can be illustrated by a brief analysis of one case, *D v D (Access: Contempt: Committal)*¹⁰, an appeal heard by the Court of Appeal (Civil Division).

The issues are remarkably similar to those in *Re H*. The mother sought access¹¹ to the four children. An order was made by consent, giving the mother staying access for four weeks during the summer. The order then stated that the dates were to be arranged between the parties. Access was arranged through a supervising officer, but the father made it plain that he was not prepared to permit this or any future access. The mother applied for the father to be committed and the judge in the county court did so, in the father's absence. The next day it was pointed out to the judge that the order did not have a penal notice endorsed on it when it was served on the husband and thus the committal order was invalid. The judge, applying an earlier case, decided he had an overriding discretion to make a committal order, despite the absence of a penal notice. The husband appealed successfully. First an order can only be enforced by committal if it requires a person to do an act or abstain from doing an act. The court went on to say that it is not appropriate to include a penal notice in an order giving interim

¹⁰ [1991] 2 FLR 34, [1991] Fam Law 365, [1991] FCR 323

¹¹ It should be noted that this case was heard before the *Children Act 1989* came into force and thus the terminology used is "access" and "custody", not "contact" and "residence".

care and control¹² or custody of children to one parent with reasonable access to the other as there is injunction to do or abstain from doing an act. In this case, as in *Re H*, there was no order prescribing the details of access. These had been arranged separately and there was nothing in the order that, if breached, could make committal available. For the sake of completeness, it should be noted that the Court of Appeal found that the power to dispense with a penal notice only applies to a judgment or order requiring a person from abstaining from doing an act. This was clearly not the case here. Finally the court noted that the ordinary form of order was adequate in most cases, as most parents accepted the ruling of the court. However, in this case, any further orders would have to be drawn on the basis of compelling obedience by committal.

It can readily be seen that there is a pattern here. The only methods of direct enforcement available are those that serve for breach of any type of court order. They are unsuitable for orders involving residence and contact because the end result is unlikely to be achieved by the fining or committal of the defaulter and, on technical and procedural grounds, the orders are often not susceptible to being enforced in these ways. The practice of the government, courts and professional agencies is to deal with such problems by other means. Or so it seems. There is one set of statistics which seem to contradict this analysis. In a written answer to a question in the House of Commons asking for figures on the number of people jailed for obstructing access (*sic*), Harriet Harman MP, the family justice minister, replying on behalf of the Department of Constitutional Affairs, said that these figures were not recorded. However, statistics are kept for the number of people remanded in custody, remanded on bail or for medical reports.¹³ The figures for those remanded in custody have risen from just over 350 in 2001-2 to over 600 in 2004-5. These figures are high and seemingly do not support the impression that case reports and judges have given, that committal for non-compliance is not normally appropriate in child cases and is a very rare order of last resort. However, like all statistics, these are open to interpretation in many ways. In particular, they are not statistics for committal but for remands. This seems odd as remands would be unusual in these cases as would medical reports. It should be recalled that the designated family judge for Chester only recalls one case of committal. These figures were shown to District Judge O'Leary who was very surprised at them. She recalled only such two cases since 1980 in Chester that she had been involved with, either as a solicitor or a judge. She wondered whether at least some of these cases related to enforcement under the *Family Law Act 1996 Part IV*¹⁴.

¹² Now residence.

¹³ This was reported by Family Law Week, an on-line weekly journal on July 10th 2006 at www.familylawweek.co.uk/library.asp?i=2216

¹⁴ This section of legislation contains the provisions relating to orders and enforcement to prevent domestic violence and harassment. The type (if not the number) of categories in the reported answer do appear to fit enforcement of breaches of personal protection and occupation orders much more readily, but this is mere speculation. Of course, one of the common situations where there are disputes over contact is where there is actual or alleged violence or improper conduct against the ex-partner and/or the children.

District Judge O’Leary also commented that in her experience deliberate flaunting of orders was very rare and committal was “the end of the road”. She reported that the most common problem was retention after contact. This was usually for one of the three reasons: some real and genuine concern and anxiety, an ongoing battle or deliberate malice. The last of these was extremely rare. Usually the matter came before her as an emergency, that is *ex parte*, where the party alleged to be in breach has not been served with the application. The general approach is to do as little as possible until the application comes back on notice and then to encourage mediation. She also reported that it is often alleged that the child is in danger, in which case they will go to the local social services department and not the court. She also mentioned that she does make prohibited steps orders from time to time, particularly if there is a threat that a child will be removed from the parent who has a residence order. Specific issue orders tend to deal with surnames and education. Generally, on private law issues, His Honour Judge Barnett stated that there was very little that came before him on enforcement.

It is readily acknowledged that the contents of the previous paragraph are hardly statistically significant. They represent the experiences of two judges in one provincial city, Chester, which is neither one of the larger nor socially or economically deprived cities in England and Wales. However, equally, there is no firm evidence that these experiences and policies on enforcement are atypical of the rest of the jurisdiction. At the risk of repetition, the comments are offered as a snapshot of practice and much fuller information will be gathered in the empirical study.

Furthermore, as previously mentioned, the government does prefer and encourage issues of contact to be resolved through mediation, much as District Judge O’Leary mentioned. First, the government has very recently launched a telephone helpline on mediation¹⁵. This was in early May and was launched by Harriet Harman MP. It is supported by a number of mediation and professional bodies and has been given funding for a year by Her Majesty’s Court Service. This is a service for couples seeking mediation in respect of any family dispute, not only disputes relating to children, but it does show the commitment to this approach to resolving disputes. However, cynics might point out that some of the government’s enthusiasm for mediation might stem from the possibility of reducing public funding.

However, in fairness, the website of the Department of Constitutional Affairs¹⁶ contains references to two pieces of research on residence and contact. These were commissioned by the Department and are obviously lengthy and will be referred to only briefly. The first study is in two parts. *Residence and Contact*

¹⁵ Further details can be found at the website supporting the helpline, www.familymediationhelpline.co.uk

¹⁶ See note 1 above

*Disputes in Court: Volume 1*¹⁷ examines how contact and residence cases are brought to court and how the court processes them. The main finding was that over 60% of the sample cases began with an application for residence and this may seem surprising given the public concern over contact. Also one in four cases involved allegations of domestic violence. This is mentioned in the context of the figures on custody mentioned above. The conclusion included the assertion that the process is not a simple matter of the courts issuing orders and parents complying. There is a complex picture of competing values and ideas about child rearing. The second volume¹⁸ had as its aims to discover why parents go to court, what their expectations were, whether these were met and so forth. One of the main findings was that parents often channelled their hostility into what the research calls a **parenting contest** (sic) because the courts would not listen to complaints about the way that they had been treated or their former partner had behaved since separation. The study also found that contact fathers complained about lack of enforcement. Parents also felt that needed more support. If the order was not adhered to, they felt their only recourse was to return to their solicitor and/or to court and thus re-engage the cycle of hostility. Of course, this short summary has just extracted the conclusions from the executive summary that have some relevance to this report and the above few lines must be read in that context. However, there does seem to further support for the view that enforcement by the court may not produce any effective solution.

The second study is *Making contact happen or making contact work? The process and outcomes of in-court conciliation*¹⁹. The aim of the study was to identify the overall effectiveness of in-court conciliation services in contact cases as well as the relative effectiveness of three differing models. Broadly the study found that agreement rates were high (76% full or partial agreement), but only 62% were happy with the agreements reached and only half were satisfied with the process overall. There was then research into the outcomes six months later. Most of the agreements were intact or had been extended and there were other positive outcomes. However, there were some significant problems. Only a third of cases were closed after one conciliation session and satisfaction rates, although increased, were still low. The report ends with a recommendation that in-court conciliation is not suitable for all cases and is not likely to be sufficient by itself in many cases. Once again, this paragraph is an extremely short report on a complex study, but it does lend some further perspective to the issue of enforcement of court orders involving children.

The conclusions seem to be that there is no satisfactory solution to enforcement but that the current judicial methods are clearly not satisfactory and apparently

¹⁷ Smart C., May V., Wade A. and Furniss C., (2003) London: Department for Constitutional Affairs, also to be found at www.dca.gov.uk/research/2003/6-03es/htm

¹⁸ Smart et al – with Sharma K. and Strelitz J., *Residence and Contact Disputes in Court Volume 2*, London: Department of Constitutional Affairs. Again this can be accessed through the DCA website, www.dca.gov.uk/research.

¹⁹ Trinder L., Connolly J., Kellest J., Notley C. and Swift L. – of University of East Anglia, London: Department of Constitutional Affairs. See website reference at note 18 above

seldom used.

Most of the attention has been paid to issues of residence, and particularly, contact. However, it would be wrong to leave an examination of private law without briefly mentioning abduction cases²⁰, both non-international cases (i.e. abduction to another part of the United Kingdom or the Isle of Man) and international cases (removal from England and Wales to any other jurisdiction).

If there is a “domestic” abduction, the provisions of the *Family Law Act 1986* allow for mutual enforcement of orders should a child be removed from one part of the United Kingdom to another. This Act essentially does two things. First it provides for common rules of jurisdiction across the United Kingdom and the Isle of Man (“UK”). Secondly it provides a regime for the recognition and enforcement of orders across the UK.

The jurisdictional aspect provides for rules that ensure that only one court in the UK has jurisdiction to make “Part 1” orders in respect of a child²¹. Only one court means only one court in respect of any given application. The jurisdictional rules are set out in sections 2, 2A, 3 and 41.

Under section 25, any Part 1 order made by a court in any part of the UK and in force in respect of a child under the age of 16 is to be recognised in any other part of the UK. However, recognition in itself does not allow for enforcement. The order must be registered in another part of the UK by application to the court in which the order was made (section 27). Once an order is registered, the court in which it is registered has the same powers of enforcement as it would have had if it had made the original order (section 29(1)). However, there is then yet another stage. An application for enforcement must be made (section 29(1)). The three tier system means that enforcement can be slow and the provisions are rarely invoked²².

In international cases, whilst cases of actual abduction or retention are dealt with by the Hague Convention, or by another possible means if the other jurisdiction is not a signatory to the Convention, there are measures to attempt to prevent the removal of a child. Some of these have already been examined – all residence and contact orders state broadly that a child should not be removed from the jurisdiction. However, there are also criminal sanctions. These are contained in the *Child Abduction Act 1984*. Under section 1(1) it is an offence for a parent to take his own child out of the jurisdiction without the requisite consents or leave of

²⁰ Abduction is given its normal meaning of taking a child out of a jurisdiction. If it were within the jurisdiction of England and Wales, then the civil means discussed in detail above would apply, or criminal law might be invoked, particularly if the abductor has no legal relationship to the child.

²¹ See Section 1(1)(a) and (d) for England and Wales. These are essentially section 8 orders and orders under the inherent jurisdiction of the High Court having a similar effect.

²² In 2001 there were just 27 registrations, the majority being English orders registered in Scotland

the court. It is also an offence to attempt to take a child out of the jurisdiction. In these circumstances, the police can arrest on reasonable suspicion and, if they decide to act can invoke the "All Ports Warning System". Details of the child at risk are circulated through the police national computer broadcast facility to immigration officers at all ports and airports. It is not necessary to have a court order, but it is good evidence of the seriousness of the request. A child remains on the warning list for four weeks. This is not strictly enforcement of an order, as the provisions in the Act apply regardless of whether or not there is a court order in force.

In urgent cases and because an order is preferable, it is possible to make a child a ward of court (see page 14 below). However, jurisdiction would normally only be assumed if there were no other proceedings current. Again a child would be ordered not be taken out of the jurisdiction and the police can invoke the All Ports Warning System. This would be the case as well if a residence order were in force and a person was suspected of taking a child out of the jurisdiction. A prohibited steps order can also prohibit someone from taking a child out of the jurisdiction and, again, in a suitable case the warning system can be invoked.

Thus it can be seen that the law is diffuse and complex, with a number of courts who have jurisdiction and a mix of orders to secure compliance, particular and specific enforcement of those orders and criminal offences not dependent on breach of an order.

Public Law

The *Children Act 1989* also consolidates the law regarding public orders for children. Broadly, there are three primary orders, care orders, supervision orders and emergency protection orders. These will be outlined extremely briefly. They are concerned with protection of children.

Care and supervision orders are authorised by section 31. A care order gives parental responsibility to a local authority which also arranges for the residence of the child. It is to be noted that whilst a care order is in force, similar restrictions as to changing a child's name and taking a child out of the jurisdiction apply as for residence orders. A supervision order is, according to section 35, to place a duty on the supervisor to "advise, assist and befriend the supervised child". Interim care orders can be made under section 38. Where an interim care order is made, a child may be kept in the house where he or she is living and the court can make an order excluding anyone whose removal would mean the child would cease to suffer or cease to be likely to suffer significant harm. This can be seen as an order that at least encourages compliance with the aim of the interim care order.

Emergency protection orders (section 44), involve the removal of a child to a safe

place, or prevent a child being removed from a safe place, such as a hospital. The main criterion for the order is that the child would suffer significant harm if not removed. Anyone can apply, but it is usually a local authority. Section 44A has a similar provision regarding exclusion of a person as in the case of interim care orders. Other orders regarding compliance with emergency protection orders can be made under section 46, removal and accommodation of children by police in cases of emergency and section 48, orders requiring persons to disclose information as to a child's whereabouts.

The real teeth of enforcement are in section 49, which renders the abduction of children a criminal offence if they are in care, the subject of an emergency protection order or in police protection. The possible sentences are imprisonment or a fine. Under section 50, the court can make recovery orders in respect of children who come into the same categories as section 49, requiring any person who is in a position to do so to produce the child in question.

Inherent Jurisdiction of the Court

This has already been mentioned in one or two places. The two types of jurisdiction that are often cited are wardship and one-off decisions. Wardship originates from common law and is an order which in effect gives the court parental responsibility. The High Court has exclusive jurisdiction. It can be used to protect children where no other order exists, for instance a child who it is feared will be removed from the jurisdiction to be forced into an arranged marriage. This is obviously an example of a coercive rather than an enforcement order. If such an order is made then an all ports warning can be issued. However, wardship should not be used when other orders will suffice (and, as previously mentioned, all section 8 orders forbid the removal of a child from the jurisdiction without consent) and, in particular, section 100 of the *Children Act* places restrictions on the use of wardship jurisdiction for placing children in care, instead of using the Act. However, the designated family judge for Chester did state that wardship is used to enhance protection in Hague Convention cases. The one-off decisions are now more or less superseded by the specific issues orders in section 8 of the *Children Act* and are rarely used.

Part 2

England and Wales did submit an answer to the questionnaire. Whilst this adopted what might be described as a minimalist approach, in truth there is little updating to be effected. However, it might be useful to flesh out the questionnaire a little by explaining who the central authority and the person who initiates enforcement are. As with domestic orders, it is felt that there are few problems with enforcement as such.

In addition to the above, there will be a brief description of the role of the first

Head of International Family Law and an examination of the first case on *Brussels II Revised* to come before the Court of Appeal.

Central Authority

The Central Authority for England and Wales in respect of the Hague Convention is the International Child Abduction and Contact Unit (“ICACU”), which is found in the Office of the Official Solicitor and Public Trustee. The Office also administers the Reciprocal Enforcement Maintenance Order Unit. The Official Solicitor²³ acts in legal proceedings for those unable to represent themselves, particularly the mentally disabled and children and is an officer of the court. The Public Trustee²⁴ acts as executor or administrator of deceased persons’ estates or as trustee of wills or settlements, when nominated to do so and he accepts the nomination. The two offices have been combined since April 1st 2001, since the appointment of the same person to the two offices. It is entirely in keeping with the thinking and policy of English government that the central authority should be housed in an already established office, which in turn has two entirely different functions bolted together. In fairness, when the Hague Convention came into force, the Unit was within the office of the Official Solicitor, who has the role of representing children.

The ICACU is also the Central Authority for *Brussels II Revised* and the European Convention on Custody. In the Judicial Statistics 2005²⁵ the role of the ICACU is described as “to ensure that an aggrieved parent may, with minimal delay, make application to enforce orders in the child’s home country, and where the claim is made out secure the return of the child or to pursue access rights.” The interesting part of the statement is “with minimal delay”. This will be revisited in the case considered below. Further information on the ICACU can be found on its website²⁶.

Enforcement

The answer in the questionnaire as to who the enforcing officer is was “Tipstaff”. The tipstaff is the enforcement officer of the Supreme Court. His main responsibility is for the delivery of persons to the court, prison or elsewhere as ordered by a judge of the Supreme Court. Therefore, once again, the requirements of the Hague Convention have been absorbed into existing structures. Of course, in practice, it is not tipstaff himself but assistants, including the police and bailiffs, who actually do the delivering.

²³ A statutory appointment under section 90 of the Supreme Court Act 1981.

²⁴ Also a statutory appointment under the Public Trustee Act 1906

²⁵ See note 1– at page 122

²⁶ www.officialsolicitor.gov.uk/icacu/icacu/htm

Statistics for returns

The ICACU has kindly provided very full statistics for 2004 and 2005. These deal not only with the bald figures relating to return orders, as the answers to the questionnaire do, but provide a plethora of information concerning countries of origin of the children, cases pending, cases relating to children from the jurisdiction in other jurisdictions, access and registration of access applications and so forth. A short summary of the most relevant statistics relating to return cases of children brought to the jurisdiction is set out below and the full statistics are appended to this report.

	2004	2005
Active cases dealt with	144	170
Return orders made	68	83
Return orders refused	10	7
Voluntary returns	15	30
Cases withdrawn	20	26
Cases rejected by Central Auth.	8	3
Access ordered or agreed	15	9
Child traced to another country	5	8
Child not traced	3	0

The 2005 figures do not add up (170 cases, 166 total from the sub-categories), but the figures have been correctly transposed.

The Head of International Family Law

As mentioned previously, Lord Justice Thorpe was appointed to this new post. The post was created by the Lord Chief Justice and the Lord Chancellor in January 2005. In an article written by himself²⁷, Lord Justice Thorpe describes the importance of the role, both within the European Union and outside, with particular references to the Hague Convention and *Brussels II Revised* and the European Judicial Network. He then gives a snapshot of his work by recounting

²⁷ *The Work of the Head of International Family Law*, Law Week Limited, www.familylawweek.co.uk 15th May 2006

his activities in February 2006. The scope of this study does not permit a full précis, but the five page article is well worth reading. If it cannot be accessed, an electronic or paper copy can be provided.

Vigreux v Michel and another

This case²⁸ was heard by the Court of Appeal on 18th May 2006 and is the first case concerning *Brussels II Revised* to reach the court. The child in question was born in August 2001 to French parents who had had a long relationship but were not married. They separated in 2001 and a French court made an order for joint parental responsibility, residence to the mother and contact to the father. The parties could not leave France without the other's consent and neither could leave France with the boy without the other's express consent. The father went to England and during an agreed period of staying access in Paris in August 2005 the father and son carried out a pre-planned escape to England. The mother applied to the French Central Authority. Proceedings were issued in England on 23rd September 2005 under the Hague Convention, *Brussels II Revised* and the inherent jurisdiction. The case was not heard until 13th and 14th February 2006. Compliance with the time limits of *Brussels II Revised* required completion of the matter by about 3rd November 2005. The judge dismissed the summons, holding that the boy's objection to being returned had been made out and the judge exercised a discretion, balancing the strength of the boy's objections and other welfare regulations against the policy of the Hague Convention. The mother appealed.

The Court of Appeal (Thorpe and Wall LJ) allowed the appeal. The judge should only have weighed the nature and strength of the boy's objections against the policy of *Brussels II Revised*. The essential welfare investigations and decisions had to be taken in France. The judge had focused on the Convention rather than the Regulation and had not referred to the requirement for maximum expedition or to the extent to which article 11(3) had been breached. Their Lordships viewed the strengthening of the Convention by the Regulation as threefold: protective measures to nullify a defence under article 13(b) of the Convention; the return of the case to the requesting state in the event of a refusal by the requested state; and the automatic enforcement of return orders throughout the region. Their Lordships then gave procedural guidance to ensure that cases were seen to be brought both under the Convention and Regulation and were dealt with expeditiously, even if it inevitably meant jumping the queue. Their Lordships also stated that the English transcript must be sent without delay to the Central Authority if the stringent obligations regarding translation of documents were to be met.

This case is extremely significant in that the Court of Appeal made it clear in no uncertain terms that England had signed up to *Brussels II Revised* well aware of the policy behind it and the consequences and the court will allow no derogation

²⁸ [2006] EWCA Civ 630, [2006] Fam Law 728

from the stringent provisions in the Regulation, both legal and procedural, however much these may depart from normal and previous practices.

Empirical Study

The best places to start nationally are the Department of Constitutional Affairs, the government department responsible for running the legal system and Lord Justice Thorpe. He is the first Head of International Family Law, a post created in January 2005. The first female Law Lord, Baroness Hale of Richmond, is a family law specialist and former academic. The Head of the Family Division of the High Court might also be contacted, as should the International Child Abduction and Contact Unit in the Office of the Official Solicitor and Public Trustee.

His Honour Judge Barnet and District Judge O'Leary, at Chester Combined Court Centre, are both willing to be interviewed. It is suggested that there should be a geographical cross-section of interviewees. Judges at all levels; family proceedings magistrates, district judges, circuit judges and High Court judges might be approached. Some solicitors and barristers should be interviewed. There is a Family Law Bar Association and the best place to start with solicitors might be local branches of Resolution. Some officers of CAFCASS, the court child welfare service could also be interviewed. As far as public law is concerned, legal officers of local authorities can be approached. There are other child protection agencies as well.