

Frustration of access – how can we prevent it?

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Abstract

Following the breakdown of a marriage or relationship, the right of a child to visit the non-custodial parent is governed in Ireland by the Guardianship of Infants Act, 1964. This statute permits the court to make an order for access so that the non-custodial parent (usually the father) is given permission to visit the child on specific dates and times. In some instances, the custodial parent may attempt to frustrate access, either by not facilitating the visit by making the child unavailable at the agreed times, or by making false or malicious allegations against the other parent in an attempt to deny access to the child.

This paper explores the problem of frustration of access. It discusses the results of an interview based study undertaken by the author using qualitative research principles whereby the interviewees, being legal practitioners; separated, divorced and unmarried fathers and mothers were asked their opinion on this issue. It in particular, focuses on the impact of frustration of access on the non-custodial parent. This paper concludes by examining the sanctions available where frustration of access occurs, and, in particular, will consider the feasibility of enforcement remedies available in both New Zealand and Australia. Both jurisdictions encourage a more sociological approach to sanctions as they promote the provision of counselling and compensatory time to the non custodial parent, instead of a more legalistic approach adopted in Ireland which is to re-enter the order before the Court.

Custody, Access, Frustration of Access, Sanctions.

Overview of paper:

Frustration of access is a term used to describe a situation where a parent, who is not residing on a full-time basis with a child, finds it increasingly difficult to maintain a relationship with the child. This is as a result of the residential (more commonly described as the custodial) parent failing to make the child available for agreed access visits, or by making false allegations against the non-residential parent in an attempt to deny a parent a right to see their child. In this paper, I will outline the relevant legislation in

Ireland as it relates to the issue of access. I will then discuss some of the results of an interview based study undertaken by me to examine if frustration of access actually does occur in Ireland. I will conclude by examining how other countries address this issue and will suggest what remedies might prove useful in an Irish context.

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What is access?

The principal Act governing all matters in relation to children is called the Guardianship of Infants Act, 1964.ⁱ In Ireland the parent who cares for the child on a day-to-day care under this Act is called the child's custodian. In addition under the Act, if parents cannot agree on access arrangements then the onus is on the courts to ensure that all details in relation to access times and dates are laid out clearly. If there is no agreement between the parents the non-custodial parent may then apply to the court for access. This parent will have an opportunity to spend time with the child either during the week or more commonly at weekends.ⁱⁱ If the non-custodial parent has been suspected of neglecting or hurting the child in any way, the court can limit the amount of access given, or direct that the access be supervised by a family member or a qualified person.

Law in Ireland as in all countries is gender neutral in that in practice women can be the parent seeking access while the father has day-to-day care of the child. However in reality fathers are more likely to be the non-custodial parent and may apply to the court to have access rights to the child. In those circumstances, a father will have to accept that it is likely that in the future he see his children on a more limited basis. It is important to note, however, that many parents agree access arrangements by consent but for the purpose of this paper I am concentrating on parents where such arrangements are not consensual as a result of an acrimonious relationship between them.

Interview based study results:

I conducted an interview based study of 40 people working in or affected by Family Law in Ireland comprised of solicitors, barristers, mediators, mothers and fathers, both separated and unmarried. In the study, a significant majority (73%) of mothers acknowledged that the children's fathers had obtained access to their children. Further, the majority of fathers who were interviewed in this study also stated that they had access to their children. Two of the fathers in the study were custodial parents in that the children were living with them on a full-time basis. Again their former partners, being the mothers of the children also had access rights which they had secured in court. This led me to the conclusion that where parents applied for access, for the most part the courts were willing to give some form of access.

While access in theory has been given to fathers, frustration of access had occurred for many fathers. In other words, one parent had prevented the child from attending the access visit, or had not made the child available for the visit. While over 60% of fathers interviewed stated that frustration of their access had occurred, over a quarter of the mothers (36%) admitted that they had refused the father access, but only when they believed the child was in danger. Both the custodial fathers I have referred to in the study had refused to let the children's mother have access to the child where they felt the mother was unfit to see the child as a result of an alcohol or drug addiction. This could suggest that the problem of frustration of access is gender neutral in that it appears that the parent who has custody, regardless of the sex of that parent, can determine if the child should see the other parent and if access times should be utilised.

The participants in the interview based study were asked what could be done if frustration of access continually took place. Some solicitors suggested that the case be sent back to court,ⁱⁱⁱ which is the most common practice in Ireland at present. Returning to court, however, is not only an expensive exercise but the court system often results in long delays in the case reaching court. This could mean that the father of the child might not see his child over a period of time which could result in the child becoming alienated from him and their relationship becoming fractured. A more positive suggestion by participants^{iv} was that independent access centres should be set up. This would ensure that the couples are not in direct contact with each other at the point of dropping off or collecting their children.

Another difficulty for the non-residential parent is when the other parent makes allegations of abuse against him or her.^v Kilkelly notes that in such circumstances "Irish law has made no provision, nor does it offer any guidance to the courts for dealing effectively and appropriately with allegations of sexual abuse raised in custody/access cases."^{vi} Although four fathers had been in this situation, none of the men faced a criminal conviction and none of the allegations was ever proven. One father spoke passionately about allegations being made against him in circumstances where there was no evidence to support the mother's claim. He stated: "*[I]ike I have been tarred and feathered by the courts' system on her say so and I have never been able to clear my name.*"

The difficulty is that if frustration of access occurs over a long period of time the child can become detached from the non-custodial parent. In a case brought to the European Court of Human Rights in 2005 called *Siemianowski v Poland*^{vii} a child lived with her mother following the divorce of her parents. Over a period of seven years the father brought a number of access

proceedings to the court to have contact with his daughter and during this period, the mother was fined on several occasions for not complying with the access orders. When the father called to see his daughter, he was frequently informed that she was out, busy, sleeping or not willing to see him, or alternatively nobody answered the door when he called. He did have some contact with her during this seven year period but when his daughter reached thirteen years of age, she was seen to be mature enough to make her own decision as to whether she wished to see her father or not.

A psychologist's report found that the child was not afraid of her father but was fearful that any contact between her parents and her mother's new partner would result in a quarrel. While the Polish Government fined the mother on a number of occasions for not complying with the court orders, she continued to breach the orders. No further sanctions, however, were imposed so she had no deterrent not to continue breaching these orders.

The father in this case brought his case to the European Court of Human Rights. He was successful under Article 6(1) which permits all citizens to have a fair and public hearing within a reasonable time,^{viii} in that the court held that the length of these proceedings exceeded what could be seen as a reasonable amount of time as they had gone on for seven years.

Remedies in other jurisdictions:

If parents are failing to ensure children get access to them where appropriate, then it is important to examine the remedies available to deter parents from engaging in this behaviour. From an Irish perspective, the Courts Act, 1986 makes it an offence to fail to comply with a custody or access order under the Guardianship of Infants Act, 1964. While a person can be fined or committed to prison, in reality committal applications are rarely granted as most judges would consider that it would not be in the best interests of a child that one of the its parents were to be imprisoned. Imprisonment in Ireland, as in most countries, is a remedy of last resort.

If parents are aware that the sanctions for frustrating access are not enforced there is little incentive to observe the law in this area. Countries such as New Zealand and Australia have developed quite novel remedies and deterrence methods for preventing frustration of access occurring in the first place. In New Zealand since the introduction of the Care of Children Act, 2004, the penalties for frustrating access have increased. The first option is that all parties attend counselling. If they fail to do this or if they fail to agree the details of the access arrangements at counselling, there are a number of other methods to use in an attempt to ensure that parents comply with the access order.

These other methods include the traditional ones such as varying or reviewing the original access order and imprisonment. They also include other remedies such as the awarding of compensatory time to the non-custodial parent where the other parent is seen as having breached the access order on a frequent basis. This, in effect, means that every time the custodial parent breaches the order by failing to have the child available for access visits, the court can gradually award extra access time to the other parent. This may be a deterrent for the other parent not to refuse access visits unless it is absolutely necessary to do so. In New Zealand the parent who has failed to comply with the access order can also enter into a bond as an assurance against breaching the order again.

Similar orders are available in Australia in that a range of options are available including directing the parents to attend a parenting programme, compensatory time for the non-custodial parent similar to New Zealand, together with the more traditional remedies of fines and imprisonment. However in 2006 the principal Act being the Family Law Act, 1975 was amended^x so that punishment for breach of an order was categorised depending on the severity of the breach. This meant that the “less serious” contraventions were punished by instructing the custodial parent to attend a post-separation parenting programme to explore the reasons for non-compliance and to award compensatory time to the non-custodial parent. The less serious contraventions also included a right to vary or suspend the first order or require the person in contravention to enter into a bond which can remain in force for up to two years. If a person enters a bond, they may also be required to attend family counselling or mediation or be of good behaviour.

The “more serious” offences are punishable by fine, imprisonment for up to twelve months or community service for up to two years. There is an obligation on Australian courts to make these orders unless the court is satisfied that it would not be in the best interests of the child concerned to make the order. Therefore, there is a presumption that any of these orders can be made against parents unless to do so would interfere with the child’s best interests.

The way forward?

While jurisdictions such as New Zealand and Australia are attempting to alleviate the problem of children being alienated from one parent by outlining a more specific approach to sanctions based on the severity of the offence, the sanctions from an Irish perspective are still quite limited, in that the only options available are a fine, imprisonment or to re-enter the case before the

courts. If a custodial parent is aware that even if he/she commits an offence by frustrating access, that parent will not be punished then there is little incentive to comply with court orders in the future. Imprisonment in my opinion should always be a last resort as it serves no real purpose in that if a mother, for example, goes to prison for not complying with a court order, it is the child who will really suffer as the child will then be alienated from its mother but at this point, may have no relationship with its father. Whilst the United Nations Convention on the Rights of the Child supports the concept that a child should have a relationship with both parents, it is only if such contact is in the best interests of the child. In particular, Article 9(3) of the Convention states that:

State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Further, the European Convention on Contact Concerning Children which opened for signatures in 2003 states in its preamble that the purpose of the Convention is to agree:

on the needs for children to have contact not only with both parents but also with certain other persons having family ties with children and the importance for parents and those other persons to remain in contact with children, subject to the best interests of the child.

It also states at Article 4(1) that: “[a] child and his or her parents shall have the right to obtain and maintain regular contact with each other.” These International Conventions are encouraging from the point of view of the non-custodial parent in that they promote the view that the child should continue to have contact with both parents. Ireland however, has not signed the European Convention on Contact Concerning Children and while it has signed the United Nations Convention on the Rights of the Child, so far Ireland has failed to ratify it. Even though the United Nations Convention may influence judges in their decisions, it is not legally binding.

From an Irish perspective, therefore, I believe that the first course of action that a court should take if they believe frustration of access has occurred is for the custodial parent to be fined for breaching the access order. If however this parent is consistently not complying with the access arrangements under the order, then in my opinion, the child could be transferred to the non-custodial parent, with strict conditions that a suitable residence is available

and that the child would not suffer significant trauma as a result of such a transfer taking place. This drastic action would only be recommended in very exceptional circumstances as the child may have a settled environment in the home and disruption of a routine might not be in the child's interest. However, it is submitted that the threat of a transfer of custody may be enough to deter access being restricted to the non-custodial parent.

If a system of fines is failing, then Irish law could follow New Zealand and Australian law where their legislation permits, in the event of frustration of access taking place, compensatory time to the non-custodial parent for contravention of the order. I believe that this is the most practical approach to dealing with this issue. If the custodial parent continues to refuse the child access to the other parent, then the non-custodial parent could be granted extra time each week with the child. This could ensure that the child gradually spends more time with the other parent without overly disrupting his or her routine. Another positive non-adversarial approach in Australian family law is the provision that the parent who breaches an order attend a post-separation parenting programme. This may help that parent to examine the reasons behind their non-compliance and help them address their own issues or fears. This may help parents to be confident enough to comply with the access arrangements in the future.

Another remedy available in both New Zealand and Australia is for the person in contravention of an order to enter into a bond. This approach could assist that person to make a commitment to comply with the access order and it furthermore places responsibility on that parent to ensure that compliance takes place, unless exceptional circumstances exist to justify non-compliance. Another option where an access order is being constantly breached is to direct that a community service order be made against the offending parent. The threat of a community service order may be enough to deter parents from non-compliance with orders in the future.

Australian family law also specifies that orders for contravention will not be made unless it is in the best interests of the child to make such an order. This could be a useful precedent for Irish law if further remedies were introduced in the future. Our system at present is not working as all too often the only remedy parents feel is available to them is to bring an application before the court to vary or discharge the order. If less adversarial means were available to parents, this could ensure that the court lists are freed up and lead to a less stressful route for all involved.

The difficulty is that if children are frequently not having access to their non-custodial parent, this may lead them to believe that this parent does not wish

to have access to them, and may result in resentment towards this person for a lifetime. The other difficulty which cannot be resolved by legislation is if the child refuses to see the parent. This is probably the most difficult issue to deal with, as while the non-custodial parent may have suspicions that a child is being encouraged by the other parent not to see them, when a child reaches an age and maturity to make their own decisions, then little can be done by the law to enforce access in these circumstances.

Conclusion:

In conclusion, the remedies available in Ireland at present are not appropriate to deal with the issue of frustration of access. As contemporary international law is now focused on the child rather than the parent, it is rarely in the child's interest to lose contact with either parent. Parents need to be encouraged to embrace access arrangements but in order to do this, they must also be made aware of the sanctions available if they fail to do so and more importantly, that these sanctions will be imposed for failure to comply with the order. ^x

- ⁱ Section 10(2)(a) of the Guardianship of Infants Act, 1964 provides that parents as guardians shall be entitled to custody.
- ⁱⁱ Section 9 of the Children Act, 1997 added a new section, s.11D to the Guardianship of Infants Act, 1964 which states that when making an application for guardianship, it is appropriate to examine if the child's best interests would be promoted by maintaining personal relations and direct contact with both parents on a regular basis. This is in line with Article 9(3) of the United Nations Convention on the Rights of the Child which promotes contact between parents and child.
- ⁱⁱⁱ Section 5 of the Courts Act, 1986 makes it an offence to fail to comply with a custody or access order made under the Guardianship of Infants Act, 1964. A person may be liable to a fine not exceeding £200 (€254) and/or imprisonment for a term not exceeding six months.
- ^{iv} 36% of participants suggested this.
- ^v Section 20 of the Child Care Act, 1991, as amended by the Children Act, 1997 provides that in proceedings regarding guardianship, custody and access where allegations of abuse have been made, the court has the power make a care or supervision order until the investigation has been completed into the allegations.
- ^{vi} U Kilkelly, *Children's Rights in Ireland: Law Policy and Practice* Tottel Publishing, Dublin, 2008, p.154.
- ^{vii} Application No. 45972 judgment of 6 September 2005.
- ^{viii} Article 6(1) of the European Convention on Human Rights states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
- ^{ix} The Act was amended by the Family Law Amendment (Shared Parental Responsibility) Act, 2006.

Bibliography

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x

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