

We've been warned(!)

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1. The breach of an order should never be taken lightly. To turn a blind eye to a serious breach of a child arrangements order is to usurp the constitutional authority and legitimacy of the Family Court.
2. It also undermines and fragments public confidence in the system and erodes a prior reasoned decision as to what is in a child's best interests.
3. I am not therefore advocating in this article in any way that there has been a watering down of the warnings included in Child Arrangements Orders. In fact, to the contrary, what I say is that the warning notices have been updated very helpfully indeed; we must ensure they find themselves into all orders moving forward.
4. It is vitally important that we record in any order the correct warning notices. For some time and as a consequence of what I would say was a defective warning notice in the standard orders, we have found ourselves as practitioners in difficulty.
5. That, I suggest, is because as a practitioner I have found myself having to advise a person facing an enforcement application, that even though the warning notice says they might be sent to prison, in the absence of an accompanying Penal Notice, there is no prospect of that ever happening. (Unless of course they were to go on to breach an order after a later penal notice is added). That has served to undermine the gravitas and authority of the warning notice and of the court.
6. Put simply, the court has for some time warned people that they may be sent to prison when they cannot be, in the absence of a separate Penal Notice.
7. I hope therefore to highlight that the recent change in the wording of warning notices that are to be included in a Child Arrangements Orders and the reasons why they must be followed.
8. The previous warning notice endorsed within the precedents read as follows;

“WARNING NOTICE If you do not do what the child arrangements order says you may be made to do unpaid work or pay financial compensation. *You may also be held to be in contempt and imprisoned or fined, or your assets may be seized.*”

9. We will still find this warning in many orders that have been made in recent years and I still find them in more recent orders even post the change to the standard wording. Moving forward that has to change and the notices have to come in line with the updated standard orders. It is the latter part of the old warning notice *“You may also be held to be in contempt and imprisoned or fined, or your assets may be seized.”* that is not and has never been, consistent with the legal framework.
10. Enforcement applications can be complex and in parts the law has not been clear as to the appropriate requirements of a warning notice. The basic principles are as follows;
 - a. It is not discretionary; a court must attach a warning notice to a Child Arrangements Order. (S.11I CA 1989) “...warning of the consequences of failing to comply with the child arrangements order...”
 - b. The only remedy through an enforcement application is either a) s.11L (unpaid work) or s.11O (compensation for financial loss).
 - c. If committal is sought for contempt, then a separate application must be made and the original order must carry a Penal Notice, at the court’s direction, placed “prominently on the front of the order” (Part. 37.2)
 - d. For the court to find that there has been a breach it must be satisfied ‘Beyond reasonable doubt’ that a person has ‘failed to comply with a provision of the order’ (s.11J (2) CA 1989)
 - e. The court may not make an enforcement order if;
 - i. it is satisfied that a person has a “reasonable excuse” and the standard of proof is the “balance of probabilities” (s.11J (3) & (4) CA 1989)
 - ii. By virtue of s.11J(8) additional restrictions on the making of an enforcement order apply;
 1. The court may not make an order unless the person has been “given a copy of or otherwise informed of” a s.11I warning. (s.11K(1)b CA 1989)
 2. “Before making any enforcement order the court must satisfy itself that provision for the person to work under an unpaid work

requirement imposed by an enforcement order can be made in the local justice area” (s.11L (2) CA 1989)

3. “Before making an enforcement order The court must obtain and consider information about the person and the likely effect of the enforcement order on him” (s.11 (3) CA 1989) to include conflict with religious beliefs, work patterns, education patterns).

11. A warning notice and a penal notice are separate and distinct creatures.
12. As above, it is a statutory requirement that every CAO must contain a warning notice. It does not require a court direction.
13. As above, no order shall contain a Penal Notice unless directed by the court and no CAO can be enforced by way of committal for contempt unless it contains a Penal Notice.
14. The error therefore has arisen as a warning notice has historically contained additional wordings beyond the statutory scheme which has warned also of a *possibility* of being sent to prison.
15. Thankfully the standard orders have now been correctly updated.
16. The current warning notice now simply reads;

“WARNING NOTICE: This order includes a child arrangements order (the part of the order setting out the living arrangement for a child and the time to be spent or contact with another person). If you do not do what the child arrangements order says you may be made to do unpaid work (“an enforcement order”) or pay financial compensation.

17. Within the Family Court Practice, **FPR [2.246[1]]** the following is recorded; *“it is respectfully suggested that the mandatory warning relates only to sanctions introduced to CA 1989 as 11L or 11O and that the court can and should **only** add a penal notice about contempt of court in those cases where committal to prison is a real possibility.”*
18. I agree and so too now have those that draft the standard orders.
19. Only where the court goes on to positively add a penal notice should the following be included within an order;

IMPORTANT WARNING (PENAL NOTICE)

If you [NAME] of [ADDRESS] disobey [this order] / [paragraph[s] *[insert paragraph number(s)]* of this order] you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

20. What is the significance?
21. All warnings should be clear and concise and should have the appropriate 'teeth' when breached.
22. This important change will ensure that as professionals we are stopped from being in a position of having to advise a client facing an enforcement application that they in fact could not be sent to prison (because there is no Penal Notice), despite the warning notice suggesting that they could.
23. It will also prevent a scenario of having to advise a client who has already been through the system and often at great expense, that the order they thought they could enforce with a punishment of potential imprisonment, in fact could never have resulted in such a sanction.
24. Placing professionals in that position has at times undermined the seriousness of court orders and the consequential reputation of the Family Justice System.
25. It also highlights the importance a positive consideration upon the making of any CAO as to whether the circumstances of that particular case warrant the imposition of a penal notice and that potential consequences that might follow. We as professionals, have to be alive to that during the course of proceedings and illicit evidence to support the addition of a penal notice, if justified.
26. Therefore, we have been warned, it is time to ensure that all warning notices moving forward are correct, accurate and the consequences that they suggest may flow from a breach, are in fact, the correct consequences in law.

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