

Sanctions: Commitment to Prison / Disqualification from holding or obtaining a Driving Licence (Scotland)

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[1991/48](#) Section 39A, 40 and 40B of the Child Support Act 1991

[1992/1989](#) Regulations 33 to 35, and schedules 3 - 4 of the Child Support (Collection and Enforcement) Regulations 1992

Disqualification from Driving or Commitment to Prison?

When we are applying for sanctions both disqualification and commitment orders are sought within the summary application issued to court. The CMG can make a recommendation which action we consider is most appropriate (e.g. disqualification or commitment). However it is at the sheriff's discretion which (if any) order they grant. It is not open to the court to grant both.

What is disqualification from holding or obtaining a driving licence?

Disqualification means that the non-resident parent will:

- be unable to obtain a new driving licence (if they do not already have one); or
- will be required to surrender any licence they already hold

for a period decided by the sheriff, up to a maximum of two years.

If we decide to pursue this action, an application must be made to the sheriff court. Where the court orders that the non-resident parent is to be disqualified from holding or obtaining a driving licence, the non-resident parent will be required to surrender any current driving licence to the court, who will then send it to the DVLA. If the non-resident parent does not bring the licence to the hearing, the DVLA may instruct the Police to remove the non-resident parent's licence and send it back to them. However, if the licence is not returned to the DVLA, it will still be invalidated on their computer system, so that were e.g. the Police check a driver's licence it will be identified that the driver is subject to a disqualification order.

If, following the granting of the disqualification order, the non-resident parent still fails to pay the arrears, they will remain disqualified for the full sentence imposed. Once the order has expired the CMG can apply to the court to consider either: a further period of disqualification (each disqualification order may be granted for a period of

up to the maximum of two years) or Commitment to prison. Refer to the guidance on Full / Partial Payment for advice on cases where payments are made after the order has been imposed.

What is Commitment to prison?

Any application made for commitment to prison or disqualification from driving is made to the sheriff court in the area in which the non-resident parent must have been resident for the past three months.

As with disqualification, an application seeking both orders must be made to the sheriff court. It is then at the discretion of the sheriff which order (if any) is granted, although representations can be made as to which the CMG considers to be most appropriate.

Where the court orders that the non-resident parent is to be committed, sheriff officers will take the non-resident parent to prison. The maximum term of imprisonment is 6 weeks (42 days).

Where commitment action has been taken / expired and there is a remaining debt outstanding a further commitment / disqualification order cannot be made. In these circumstances other enforcement action should be considered and, if appropriate, taken. Refer to the guidance on Full / Partial Payment for advice on cases where payments are made after the sentence has been imposed.

When can an application for a warrant of commitment or an order for disqualification from holding or obtaining a driving licence be considered?

An application for disqualification or commitment can be considered where Liability Order(s) have been granted and there is still debt outstanding against it and we have already attempted or considered all other diligence actions within Scottish civil enforcement.

If a disqualification order has expired and there is a remaining debt outstanding, a further commitment / disqualification application may be made.

Where commitment action has been taken / expired and there is remaining debt outstanding a further commitment / disqualification application cannot be made. In these circumstances other enforcement action should be considered and, if appropriate, taken.

REMEMBER:

These sanctions should only be considered where the non-resident parent will not, rather than cannot, pay their arrears. The court will only consider granting a Disqualification Order or committing the non-resident parent to prison if they are found guilty of wilful refusal / culpable neglect; and

If commitment / disqualification action fails to recover the debt, other enforcement action can be considered if the non-resident parent has a change of circumstances. For example: if they receive a lump sum (for example: through an inheritance) meaning a Deduction Order may be possible.

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Deciding whether to take commitment to prison or disqualification from holding or obtaining a driving licence action

If there is still a debt outstanding on a liability order(s), without an acceptable agreement in place and when it can be demonstrated that enforcement actions (diligences) up to this point have been attempted and deemed as either inappropriate or ineffective, commitment / disqualification action can be considered. The following points all need to be taken into account in deciding whether action of this type is appropriate.

Does the non-resident parent have means to pay

The commitment / disqualification powers are intended as sanctions against those who will not, rather than cannot, pay their child maintenance arrears and the legal provision contained in Section 39A of the Child Support Act 1991 require the sheriff to inquire into the non-resident parent's means. This has a dual purpose. It allows the sheriff to:

- determine the financial position of the non-resident parent, to establish at the time that the debt accrued and currently whether wilful refusal / culpable neglect has been demonstrated (see guidance below for further advice on these terms);
- where a suspended sentence is to be given, set conditions for payment of the child maintenance arrears as considered appropriate.

Before proceeding with commitment / disqualification action, you must therefore consider whether the non-resident parent has / had the means to pay their arrears at the time that they accrued and currently. If so, this information must be included with the application as evidence to be placed before the sheriff. If not, the application is unlikely to be successful and you should not proceed. The case should be monitored and where there is a relevant financial change of circumstances, commitment / disqualification should be re-considered.

Can we prove wilful refusal / culpable neglect

The powers for Commitment to prison and disqualification from holding or obtaining a driving licence powers are intended to be sanctions against those who will not pay rather than those who cannot pay child maintenance arrears.

Section 40 and 40B of the Child Support Act 1991 state 'If, but only if, the court is of the opinion that there has been wilful refusal or culpable neglect on the part of the liable person it may....', which makes it clear that parliament intended commitment / disqualification as civil sanctions to be absolutely of the last resort. Additionally, case law has determined that imprisonment for non-payment of civil debts is to be exercised sparingly.

Note: the onus is on the CMG to prove to the sheriff that the non-resident parent has demonstrated wilful refusal / culpable neglect.

Where you are unable to provide any evidence that the non-resident parent has shown wilful refusal / culpable neglect, commitment / disqualification action is likely to be unsuccessful and your decision should be that the case is not appropriate (at this time) for commitment / disqualification.

Wilful Refusal: Wilful Refusal is the legal term used when a person deliberately fails to meet a known obligation, for example when the non-resident parent 'states' that they are never going to pay their child support arrears.

Culpable Neglect: Culpable Neglect is the legal term used when a person deliberately fails to meet a known obligation, for example when a non-resident parent organises their affairs in such a way that it is impossible to collect the unpaid child support maintenance by other lawful means.

Is the minimum threshold satisfied or is it an exceptional case?

Commitment / disqualification action should normally only be taken on cases with more than £1000 of debt outstanding. If you think action of this type should be considered in a case where the debt is below this threshold: for example high profile or complaint cases where there is:

A prolonged or repeated pattern of non-compliance; or

- media interest, meaning that sanctions may be in the interest of promoting financial responsibility to the public; or
- the Independent Case Examiner (ICE) or the Parliamentary and Health Service Ombudsman (PHSO) has recommended this action is considered; or
- the child support maintenance liability has ended and no further arrears will accrue and the outstanding arrears fall just short of the de minimi limit of £1000.

You should consider all the circumstances of the case and discuss with your line manager whether the case is suitable for action of this type. If further advice is needed, your line manager should consider consulting the Advice and Guidance Team.

Additional relevant considerations

There are an additional number of issues that should be taken into account when you are deciding whether commitment / disqualification action is appropriate. These points should be considered before you decide whether or not to proceed:

- will the action have a positive / negative impact on the welfare of any child that it potentially affects? refer to the Discretionary Decision Making Guidance for further advice on this point
- is the debt accurate
- have all other enforcement options been considered / exhausted? For example: has arrestment action been taken / considered
- is there any information / evidence held to suggest that taking action of this type could have an unduly negative impact on the health or welfare of the non-resident parent and / or their family? For example: is the non-resident parent or a member of their family known to be suffering from any serious medical condition / terminal illness
- is there ongoing section 14A of the Child Support Act 1991 proceedings or is conversion action being taken i.e. an interim maintenance assessment is being revised to a full maintenance assessment
- is it appropriate to await the outcome of any subsequent Liability Order applications? This would allow one disqualification / commitment application be to made in relation to multiple liability orders and where necessary, may enable the minimum threshold to be met
- is the non-resident parent under 18 years old and classed as a child (Child Support Act 1991 section 55[1]). If so, commitment to prison would not be appropriate, but a driving licence sanction may still be considered
- the case should be as up to date as possible, to allow the sheriff to consider what payment conditions to be set based on the non-resident parent's current child maintenance liability

Contacting the Parent With Care

Where the above points have all been considered and you consider that commitment / disqualification action is appropriate, you must contact the parent with care before proceeding, to ask if they agree to this action being taken.

If the parent with care does not want the action to proceed e.g. because they may consider that the proceedings may affect the welfare of the child, you should not continue with the application, unless exceptional circumstances apply. For example: the debt is all due to the Secretary of State and the parent with care is unable to provide any information / evidence to indicate that the action would have a negative impact on the welfare of the child it potentially affects.

Action is Not Appropriate

If you decide that commitment / disqualification is not appropriate, the reasons for your decision must be fully documented, with reference to any relevant evidence. Refer to the guidance on Discretionary Decision Making for further advice.

Action is Appropriate

If you decide it is appropriate to proceed with commitment / disqualification action, an application will need to be made to the sheriff's court in the sheriffdom where the non-resident parent resides.

The application can include representations to the sheriff as to whether the CMG thinks that commitment or disqualification is the most appropriate sanction. However, it is at the sheriff's discretion as to:

- which order is considered appropriate, and
- whether to postpone the issue of the warrant of commitment or disqualification order, and set conditions for payment of the child maintenance arrears

For an application to be made, a complete case file should be submitted to our external solicitors, who will request any additional information needed and proceed with the action on our behalf. Solicitors will take all necessary action for documents to be served / hearing arrangements to be made, and will keep CMG colleagues fully informed of progress on the case.

Disqualification / Commitment Hearings in Scotland

When an application for disqualification / commitment has been made, there will be several types of hearing:

- a procedural hearing; which may be followed by further pre-proof hearings
- a proof hearing
- a peremptory diet
- a warrant for apprehension hearing

Pre-proof procedural hearings

Pre-Proof Procedural Hearings were introduced to try to stop wasted days in court diaries, when cases were listed for a hearing, only for one / both of the parties not to be in a position to proceed on the hearing date.

At a Pre-Proof Procedural Hearing, both parties come before the sheriff and, following a discussion, a decision will be made on whether the action is ready to proceed to a Proof Hearing.

Proof hearing

A proof hearing is where evidence is heard and the sheriff usually (but not always) gives their judgement on the matter before them.

The CMG's case will be presented in court by our contracted solicitors, who will inform us of the outcome.

NOTE: for disqualification / commitment applications, solicitors may also be required to provide:

- an Expert Witness from Enforcement (see the section below on Expert Witnesses); or
- witnesses to speak on matter relating to the maintenance calculation.

Solicitors will advise if they think this is necessary.

Expert witness

The CMG may be required to provide an Expert Witness from Enforcement to attend the proof hearing with solicitors.

The Expert Witness will be required to speak about the action that has been taken to try and recover the debt, before the disqualification / commitment application was made.

Expert Witnesses will be required to preview the case before the proof hearing and take any necessary documents / case-papers with them to the hearing.

The next action will depend on whether or not the non-resident parent attended the hearing.

Non-resident parent fails to attend the hearing

It is a legal requirement that the non-resident parent appears before the sheriff and that the action cannot proceed in the absence of the non-resident parent.

If the non-resident parent fails to attend a hearing without good reason, the contracted solicitor will ask the sheriff to grant a warrant of apprehension. It is at the discretion of the sheriff to grant a warrant for apprehension. In the first instance, the sheriff may prefer to assign a peremptory diet.

Any warrant to apprehend is executed by sheriff officers, who will try to apprehend the non-resident parent and take them to court where they will be required to explain why they failed to attend the hearing.

Commitment / Disqualification: Hearing Outcomes

If the sheriff is satisfied that the non-resident parent has shown either wilful refusal or culpable neglect, the sheriff has the option to:

- make an order for commitment and send the non-resident parent to prison immediately for a maximum of 42 days (six weeks) for non payment of child maintenance, or
- make an order for commitment and fix a term of imprisonment, but not issue a Warrant to Imprison unless the non-resident parent fails to comply with certain conditions imposed by the sheriff (i.e. a suspended prison sentence), or
- disqualify (disqualification order) the non-resident parent from holding or obtaining a driving licence for up to a maximum of two years, or
- make a disqualification order but suspend its operation unless the non-resident parent fails to comply with certain conditions (i.e. a suspended licence ban);
- sisted or continue the hearing, or
- find against the CMG and dismiss the application.

NOTE: the period of the prison sentence or the disqualification order can be amended by the sheriff to reflect any partial payment made by the non-resident parent for the liable period.

Further information on these outcomes is provided below.

Commitment to prison

The court can either:

- commit the non-resident parent to prison immediately, or
- issue a suspended warrant of commitment

If the non-resident parent is committed to prison immediately, the court will issue the Form of Warrant of Commitment to them in court and arrange for them to be taken to prison for a term up to a maximum of 42 days.

If the court issues a suspended warrant, this means they sentence the non-resident parent to a term of imprisonment, but postpone issuing the warrant (i.e. actually sending the non-resident parent to prison) providing they meet certain conditions.

Note: case law provides that the upper limit of the period of suspension should rarely exceed two years.

These conditions are usually that the non-resident parent pays a set amount to their arrears to the CMG. The conditions will be set out in an Order to Pay. NOTE: A suspended warrant can only involve financial conditions regarding the payment of arrears. For example: it cannot involve a condition that the non-resident parent supplies information for a DMD conversion. DN: please note that we are confirming whether this is the case with Judicial Review / Legal colleagues. This guidance may require amendment following receipt of their advice.

IMPORTANT NOTE: the fact that a suspended sentence with an order to pay is in force does not prevent the CMG taking other enforcement action if new information is received, or the non-resident parent's circumstances change. For example: if the non-resident parent inherits a property, a inhibition instruction can be made, even if the non-resident parent is complying with the Order to Pay. DN: additional information is to be included re: the circumstances in which concurrent enforcement action would be appropriate. Any cases in the interim where this is being considered should be referred to the Advice and Guidance Team. Information also to be included re: relevance of end dates on a suspended sentence and reviewing the Order to Pay.

Disqualification from holding or obtaining a driving licence

The sheriff can either:

- suspend the non-resident parent from holding / obtaining a driving licence immediately, or
- issue a suspended order of disqualification

If the sheriff disqualifies the non-resident parent immediately, they will endorse the 'Form of Order of Disqualification from holding or obtaining a Driving Licence'. The non-resident parent will be required to surrender any current driving licence to the sheriff, who will then send it to DVLA.

If the non-resident parent does not bring the licence to the hearing, DVLA will cancel the non-resident parent's licence electronically, which will be noted as such on DVLA systems. The maximum period of disqualification is two years.

If the sheriff issues a suspended order, this means they set a term of disqualification, but postpone issuing the order (i.e. actually disqualifying the non-resident parent from driving) providing they meet certain conditions.

These conditions are usually that the non-resident parent pays a set amount to their debt via the CMG or the sheriff. The terms will be set out in a Order to Pay.

If the debt is not fully paid then a further period of disqualification or alternatively commitment may be sought.

IMPORTANT NOTE: the fact that a suspended order with payment conditions is in force does not prevent the CMG taking other enforcement action if new information is received, or the non-resident parent's circumstances change. For example: inheriting money held in a joint bank account then a bank arrestment may be appropriate even if the non-resident parent is complying with the payment conditions set by the sheriff.

Continuations and sists

Sheriff finds against CMG (application rejected)

If the sheriff finds against the CMG, the non-resident parent would not be imprisoned or disqualified from holding / obtaining a driving licence.

Immediate consideration should be given to whether an appeal should be made. This can only be considered if the sheriff erred in law when making their decision. Refer to guidance below on Appeals for further advice.

If it is decided that an appeal is not appropriate, no further action should be taken in relation to the application for sanctions but other enforcement action can be considered.

Appeals

Any appeal must be made within 14 days of the court's decision, and it is therefore essential that whether or not an appeal is appropriate is considered as a matter of urgency.

If you decide an appeal is appropriate, solicitors should be instructed to this effect immediately.

Payment Received in Sanction Cases

It is **ESSENTIAL** in all sanctions cases that you actively monitor any payments received and notify the court immediately if this occurs. Any payments received may require the non-resident parent to be released with immediate effect.

Full payment

Full payment would ensure that the non-resident parent is released from prison, or if the driving licence has been removed, would ensure that a hearing date is arranged as soon as possible.

Note: the non-resident parent will have to apply to DVLA to have their licence reinstated and will incur a fee for this.

Either the non-resident parent or the CMG can apply to the court to arrange for the commitment sentence / disqualification order to be revoked.

A cash payment would need to be made at the prison for immediate release of the non-resident parent. The prison would notify the court of any such payment and the court would subsequently notify the CMG.

Partial payment

Partial payment would reduce the sentence / disqualification order in direct proportion to the amount paid.

If the case is sisted for payment instalments, solicitors will periodically check that the non-resident parent is complying with the payments. If the non-resident parent has defaulted the solicitors will arrange to recall the sist and have the case dismissed or alternatively a court hearing date.

The Child Support (Collection and Enforcement) Regulations 1992 provide that where part-payment is of such an amount as would have already been served, the period of imprisonment shall be reduced to the period already served plus one day.

Suspended Sentences: Request Sentence to be Executed

If the sheriff imposes a suspended sentence for disqualification and the non-resident parent fails to keep to the conditions (i.e. fails to make all or part of a payment instalment), a formal request should be made to the court seeking that the sheriff lifts the suspended sentence. Any request of this type must be made through contracted solicitors, who will inform you of the outcome.

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