

CONTRAVENTION OF ORDERS

The question often arises as to whether there are any obligations on a primary carer parent, under a Court Order, to encourage a child to see the other parent?

The area is problematic and usually case specific, but the general answer is “Yes”.

The law provides that there is a positive obligation on primary carer parents to encourage and facilitate the children “spending time” with the other parent in accordance with the Court Order. Should the parent fail to do so they risk being in contravention of the Order and can be subjected to a range of possible punishments, depending on the seriousness of the contravention (unless they have a “reasonable excuse”).

A recent case brings sharply into focus this all too common situation.

THE LAW:

- A person has contravened an Order if they have intentionally failed, or made no reasonable attempt, to comply.
- A person will have a “reasonable excuse” for not complying with the Orders if:
 - The Court is satisfied that they did not understand their obligations and should be excused; or
 - They believed on reasonable grounds that their actions were necessary to protect their health or safety or that of the child, and the contravention occurred for no longer than was necessary.
- All Parenting Orders have a Court Fact Sheet attached explaining the parent’s obligations.

THE FACTS:

- The parties had 3 children – 2 girls aged 12 and 13 and a boy aged 10.
- The parties had agreed on parenting arrangements for the children and entered into Consent Orders.
- The Orders provided for the children to “live with” the Mother and to spend regular “time with” the Father and to communicate with him by telephone every night.
- The Father filed a Contravention Application alleging that the Mother had contravened the Orders on 20 different occasions in 2010 by failing to facilitate the children spending time with him or receiving his telephone calls.
- The Mother’s behaviour included:
 - telling the children that going to their Father’s home was “optional” and they could decide for themselves if they wanted to go;
 - going to the children’s school most mornings and afternoons, even if the children were living with the Father on those days;

- speaking to the children at school before they got on the bus to their Father's and saying to them "you don't have to go to your Father's" and "it's up to you whether you want to go"; and
- not letting the children speak to the Father if he phoned a few minutes after the specified time.
- The Mother said that she encouraged the children to go to their Father's but at the same time said that she had safety concerns about the children and that they were depressed and the girls in particular were afraid to spend time with their Father.

COURT FINDINGS:

- There was no evidence to support the Mother's alleged safety concerns and she did not genuinely hold those concerns.
- The Mother was completely undermining the basis of the Orders by attending at the children's school on days when they were supposed to live with their Father. She was effectively "enticing" the children to abandon the time set out in the Orders.
- The Mother handed her parental responsibility to the children. This placed the children under emotional pressure to make a choice between their parents in favour of the Mother.
- The Mother fell well short of her obligations to ensure the children "spend time with" the Father pursuant to the Orders and made no attempt at all to comply with the Orders for telephone contact.

COURT ORDER:

- The Mother was found guilty of 19 of the 20 alleged contraventions.
- The Father was awarded makeup time for the time he had missed with the children.
- The Court issued a Recovery Order so the Australian Federal Police could recover the children and deliver them to the Father if the Mother did not make them available pursuant to the Orders.
- If the Recovery Order has to be used, then the children would "live with" the Father until new Orders were made.
- The time for telephone contact was extended to a 4 hour (instead of 1 hour) window.
- The Mother was restrained from going to the school on days the children were supposed to be with their Father.
- The Mother is yet to be sentenced for her contraventions but may receive a fine, community service order or sentence of imprisonment.