

ENFORCEMENT OF FAMILY LAW ORDERS

Enforcement of orders in the context of family law is often difficult, especially when dealing with children. It involves much more than simply dealing with a party's legal rights because families are constantly changing as children (and their parents) grow and their needs differ. It frequently occurs that existing orders do not reflect these changes and so these orders are not complied with. I shall briefly set out the legislative framework:

Division 13A of Part VII of the *Family Law Act 1975* (Cth) ("the Act") sets out the legislative pathway to follow in considering an application for contravention orders under the Act. Subdivisions C through to F set out the orders available in instances where:

- (1) the contravention has been alleged but not established (subdivision C);
- (2) the contravention is established but reasonable excuse for the contravention is found (subdivision D);
- (3) the contravention is found to have occurred without reasonable excuse and the contravention is less serious in nature (subdivision E); and
- (4) the contravention is found to have occurred without reasonable excuse and the contravention is more serious in nature (subdivision F).

In contravention proceedings it is important to appreciate the difference between **non-compliance with an order** and non-compliance which constitutes **contravention of an order**.

The applicant bears the onus of proof in establishing that the non-compliance with the order constitutes a contravention, as defined in section 70NAC:

A person is taken for the purposes of Division 13A to have contravened an order under this Act affecting children **if and only if**:

- (a) where the person is bound by the order – he or she has:
 - (i) intentionally failed to comply with the order; or
 - (ii) made no reasonable attempt to comply with the order.

See *Behn v Ziomek* [2015] FamCA 1185 (7/12/15).

The Act sets out the meaning of a “reasonable excuse for contravening an order.” In summary, these are:

- that the person did not understand the obligations imposed by the order and the Court is satisfied that the person ought to be excused in respect to the contravention (S70NAE(2));
- that the person believed on reasonable grounds that his/her actions were necessary to protect the health or safety of a person (which includes that person and a child) and the period during which the contravention continues was no longer than was necessary to protect the health and safety of that person (S70NAE(4) and following).

This is the rather dry legislative framework for establishing a contravention of an order. Let me give an example:

An order is made that a child spend time with a non-resident parent after school on a Tuesday until 8:00pm that night to allow the child to have the evening meal with that parent. The order was made when both parents lived in Bendigo. The non-resident parent moves to Melbourne and then complains that the other parent is not facilitating the child spending time pursuant to the order. Although the parent with whom the child resides has not complied with the order, it is unlikely that a Court would find that he/she has contravened the order because he/she has a reasonable excuse for not complying with the order.

The remaining parts of Division 13A deal with the topics suggested by their headings:

Subdivision B – Court’s power to vary parenting order;

Subdivision C – Contravention alleged but not established;

Subdivision D – Contravention established but reasonable excuse for contravention;

Subdivision E – Contravention without reasonable excuse (less serious contravention);

Subdivision F – Contravention without reasonable excuse (more serious contravention).

The subdivisions deal, amongst other things, with costs, with make-up time and with the Court’s powers to deal with a person who has not complied with an order.

However, I need to say something about the provisions within subdivision B which allow a Court to vary a primary parenting order. Prior to the 2006 amendments to the Act, contravention applications came before the Court without a concurrent application to vary an order which was the cause of difficulty or uncertainty. The Explanatory Memorandum to S70NBA makes it clear that the Court always has the power to vary the order whether it is a matter where a contravention is not established or where there is a serious contravention and the Court is making orders imposing criminal type penalties. The Explanatory Memorandum suggested that this flexibility should assist in resolving many contravention applications without the need for separate variation applications to be lodged.

Nevertheless, where there was an existing final order of the Court, it would still be necessary to show changed circumstances consistent with the authority of *Rice and Asplund* (1979) FLC 90-275. See also *Sandler v Kerrington* [2007] FamCA 479.

I turn now to deal with some of the practical considerations involved in enforcement proceedings.

Firstly, how serious is the alleged contravention and is the client prepared to spend some thousands of dollars in order to institute proceedings? Has a solicitor’s letter been sent to the other party to warn of the consequences of breaching the orders?

Secondly, what is the client trying to achieve by bringing enforcement proceedings? Is he/she trying to ensure compliance in the future with the orders? Are they trying to punish the other party? Are they trying to seek some sort of 'compensation' for past breaches (such as 'make-up' time)? The answer to this question may influence the type of application to be made to the Court.

Thirdly, care needs to be taken with the drafting of enforcement proceedings. A contravention application needs to refer specifically to the alleged contravention: for example;

On 17 March 2017 the Wife failed, without reasonable excuse, to deliver the child X to the Husband's premises for the purpose of spending time with the Husband, in breach of paragraph 4 of the Court's orders dated 17 March 2016.

In this scenario, the Husband would need to adduce evidence in support of this allegation (ie that he was present at his premises on 17 March 2017 and the child was not delivered). If further breaches are alleged then they need to be the subject of specific allegations with evidence in support of each allegation. It is not permissible to have an omnibus allegation to the effect that the Wife regularly fails to deliver the child to the Husband's premises in order for the child to spend time with the Husband.

If, in the above case, the Husband did not want the Wife to be punished for a failure to comply with the order but rather wants to be compensated for time not spent with the child as a result of the Wife's failure to comply, then he could issue an Application in a Case (see Rule 21.02 and the notes thereto of the *Family Law Rules 2004 (Cth)* ("the Rules").

Fourthly, contravention applications should be served personally (see Rule 7.03 of the Rules) although it may be that in the Federal Circuit Court, personal service is not necessary where there is a notice of address for service of the person to be served or a lawyer accepts service on behalf of that person (see Rule 6.06 *Federal Circuit Court Rules 2001 (Cth)*). Generally speaking, I think personal service of a contravention application is to be preferred.

Fifthly, if your client is responding to a contravention application, consider whether or not to file affidavit material. Given the nature of contravention applications, a party is not obliged to go on oath and potentially incriminate themselves.

I appreciate that I haven't dealt with the enforcement of property orders but there are simply too many variables to deal meaningfully with this area within the time available. In my experience, enforcement proceedings arise more frequently in parenting matters and hence my concentration on this area.

PRESENTED BY DAVID STAINDL

17 MARCH 2017