

# A POST-COVID HYPOTHETICAL

TOPIC *Contraventions*

# FAMILY LAW CPD BREAKFAST

SPEAKERS **Vanessa Bacchetti & Amrita Malik**

## VANESSA BACCHETTI

T 9225 7777

### PRACTICE AREAS

Family Law

- Care & Protection
- Child Disputes
- Children's Court
- Family Provision
- Guardianship & Administration
- Parenting Orders
- Powers of Attorney
- Property Disputes

Alternative Dispute Resolution (ADR)

Equity & Trusts



Vanessa accepts briefs to appear in and advise on matters involving all aspects of family law.

Hailing from South West Victoria, Vanessa worked as a solicitor advocate in Geelong. During their time in practice, Vanessa provided advice and representation to clients in a broad range of family law, family violence and child protection matters.

Immediately prior to coming to the Bar, Vanessa worked at the Federal Circuit and Family Court of Australia for various Justices, Judges, Senior Judicial Registrars and Judicial Registrars. Previously, Vanessa was the Associate to her Honour Judge Jones at the (then) Federal Circuit Court of Australia. Being a broad jurisdiction, Vanessa's experience and interests are equally as diverse. Her Honour mentored Vanessa in family law, migration law, employment law and human rights law.

Vanessa read with Jeffrey Stanley and their Senior Mentor is Minal Vohra SC.

She is the President of Pride in Law, Victoria, and is a part of the Bar's LGBTIQ Working Group. Vanessa is a member of the Family Law Bar Association and Women's Bar Association.

## AMRITA MALIK

T 9225 7777

E [amrita.malik@vicbar.com.au](mailto:amrita.malik@vicbar.com.au)

### PRACTICE AREAS

Family Law

- Care & Protection
- Child Disputes
- Children's Court
- Family Provision
- Guardianship & Administration
- Parenting Orders
- Powers of Attorney
- Property Disputes

Alternative Dispute Resolution (ADR)



Amrita has practised exclusively in Family Law since her admission in 2009.

She comes to the Bar with experience in a wide range of family law matters, including property settlements involving complex financial structures, significant assets and cross-jurisdiction forum disputes, spousal maintenance, all parenting matters and child support.

Prior to coming to the Bar, Amrita worked in top tier Family Law firms in both Melbourne and Adelaide and she accepts briefs in both registries, in local and regional circuits, and nationwide.

While working as a Solicitor, Amrita appeared as a solicitor advocate in the Federal Circuit Court of Australia, the Family Court of Australia and in private mediations. She also regularly provided advice in relation to Financial Agreements and Binding Child Support Agreements.

Amrita understands the area of Family Law is a clash of two opposing concepts – emotion and the law - and she combines empathy with a pragmatic approach to achieving the best possible outcome for each client, in their unique set of circumstances.

Amrita is reading with Belle Lane and her senior mentor is Martin Bartfeld QC AM.

## **Non-compliance with parenting orders (sigh) – what next?**

*In response to a Post-Covid Hypothetical*

Foley's List Breakfast

15 September 2022

By Vanessa Bacchetti and Amrita Malik

### **Introduction**

Since the Court merger on 1 September 2021, Contravention Applications have been dealt with in a National Contravention List in the Federal Circuit and Family Court of Australia.

With a new Case Management pathway pursuant to the National Contravention List – Practice Direction (“Practice Direction”) comes new challenges for practitioners. There is also a renewed focus on early resolution, with the Court being asked to proactively take steps to facilitate the resolution of any underlying issue which led to the alleged breach, and will consider referral to Dispute Resolution before any hearing in appropriate cases.<sup>1</sup>

This paper aims to provide a summary of the law relating to Contravention Applications, and provides practical guidance for practitioners post-merger.

### **The big picture of the contravention regime**

From the outset, it is important to note that Division 13A of the *Family Law Act 1975* (Cth) (“FLA”) which governs the process for dealing with a party’s failure to comply with parenting orders, can be viewed as a 3-stage regime:

1. Stage one: s 65DA FLA. This is the basis of the brochure “*Parenting orders – obligations, consequences and who can help*” and is there to help educate parents so as to avoid enforcement proceedings altogether.

---

<sup>1</sup> Central Practice Direction – National Contravention List, 1.4(e)-(f); Central Practice Direction: Family Law Case Management.

2. Stage two: In the event Division 13A of the FLA is enlivened by filing a Contravention Application, to assist the parties to get the parenting arrangement back on track. Orders can be made that are diversionary in nature and less punitive; parenting courses and compensation time are contemplated (refer to “*What powers does the court have upon making findings*” below).
3. Stage three: Where Division 13A of the FLA is enlivened by filing a Contravention Application and fines, bonds and imprisonment are contemplated as consequences (refer to “*What powers does the court have upon making findings*”, below).

### **What are Contravention Applications?**

Contravention Applications are applications made under Division 13A of the FL. The regime is somewhat complex, and is divided into various subdivisions, organised generally from lesser to greater seriousness. Of significance to practitioners is that the simplified outline of the division specifically notes that the Court always has power to vary the original parenting order.<sup>2</sup>

A person contravenes an order if they have either intentionally failed to comply with the parenting order or if they have made no reasonable attempt to comply with the parenting order<sup>3</sup> without reasonable excuse.

Contravention proceedings are quasi-criminal in nature:

- The Application itself requires the applicant to set out each “*count*”, being similar in drafting style to criminal charges;
- The Respondent is not required to file an affidavit, thereby retaining a “right” to silence;
- Where the Court is considering making more serious orders, the standard of proof is beyond reasonable doubt.<sup>4</sup> This will be revisited below.

---

<sup>2</sup> *Family Law Act 1975* (Cth) (“FLA”), s 70NAA(2).

<sup>3</sup> FLA s 70NAC. It also includes where a person has intentionally prevented another’s compliance or has aided or abetted another’s contravention.

<sup>4</sup> *Ibid*, s 70NAF(3).

Practitioners must keep the nature of contravention proceedings front of mind when advising clients as to the appropriate course of action.

### **What is a “reasonable excuse”?**

The Respondent may assert that they had a “reasonable excuse” for contravening the orders, and the onus is on the Respondent to establish same on the balance of probabilities.<sup>5</sup>

“Reasonable excuse” is defined in s 70NAE of the FLA.

1. For *any order affecting children*, a person is taken to have a reasonable excuse:
  - because, or substantially because, they did not understand their obligations under the order; and
  - the Court is satisfied that they ought be excused in respect of the contravention.<sup>6</sup>

The FLA does not provide guidance as to whether the person ought be excused. In *Ongal v Materns* (2015) FamCAFC 68, the Full Court considered this provision as follows:

*The legislation is silent on the matters a court should consider in deciding whether someone ought to be excused from a contravention pursuant to s 70NAE(2)(b) for misunderstanding an order. The discretion is therefore of considerable breadth and, to adopt the expression used in Stanford v Stanford (2012) 247 CLR 108 at [36], “it is not possible to chart its metes and bounds.”<sup>7</sup>*

The Full Court ultimately excused the father for the following reasons:<sup>8</sup>

- He first endeavoured to follow the proper court processes to deal with the issues;

---

<sup>5</sup> Ibid, s 70NAE(2).

<sup>6</sup> Ibid, s 70NAE(2).

<sup>7</sup> *Ongal v Materns* (2015) FamCAFC 68 at [38].

<sup>8</sup> Ibid at [44].

- Although his actions constituted a breach, they gave effect to the “*spirit*” of the orders;
  - The orders had been operation for many years with only two findings of contravention; one of which was unrelated.
2. For *live-with orders, spend-time orders, communicate-with orders and hindering or preventing the exercise of parental responsibility*, a person is taken to have a reasonable excuse:<sup>9</sup>
- They believed on reasonable grounds that their action was necessary to protect the health or safety of a person (including themselves or the child); and
  - The period of contravention was not longer than necessary to protect the health or safety of that person.

The writers note that these are inclusive definitions; not exhaustive or exclusive. Thus there may be circumstances falling outside s 70NAE that nonetheless constitute a reasonable excuse.

What is known from decisions pre-dating s 70NAE is that the subjective view of the contravener that complying with the order would be against the child’s best interests does not, of itself, constitute a reasonable excuse.<sup>10</sup>

### **Standard of proof**

The standard of proof in contravention proceedings is generally the balance of probabilities, however as noted above, where the Court is imposing particular, more serious sanctions, the standard of proof is beyond reasonable doubt.

Those particular serious sanctions are as follows:

- Where:
  - a less serious breach is involved and subdivision E applies (outlined below);

---

<sup>9</sup> FLA, ss 70NAE(4)-(7).

<sup>10</sup> *In the marriage of Gaunt* (1978) FLC 90-468 at 77, 398; *In the marriage of O’Brien* (1992) 16 Fam LR 723.

- the contravener was ordered to entered into a Bond under s 70NEC; and
- the contravener fails to do so without reasonable excuse;
- 1. Fine of not more than 10 penalty units;<sup>11</sup> and
- 2. Enforcement of the bond.<sup>12</sup>
- Where there is a more serious breach involved and subdivision F applies:<sup>13</sup>
  - 3. A community service order under s 70NFC;
  - 4. Bond under s NFE;
  - 5. Fine of not more than 60 penalty units;
- Where the contravener fails to comply with a community service order or bond without reasonable excuse:
  - 6. Enforcement of the community service order or bond.<sup>14</sup>

But what exactly needs to be established beyond reasonable doubt? The Full Court in *Dobbs and Brayson* (2007) FLC ¶93-346 identified four categories of fact to which the issue of which standard of proof relates:

1. whether the contravention occurred;
2. whether a reasonable excuse for the contravention existed;
3. whether a contravention without reasonable excuse was more or less serious; and
4. what order should be made.

The FLA clearly states that the fact of whether there was a reasonable excuse for the contravention requires proof on the balance of probabilities. Where applicable, the requirement to establish facts beyond reasonable doubt therefore applies to considerations 1, 3 and 4.

This gives rise to a practical issue of retrospectivity - in running proceedings, how can one be know what standard of proof applies until an order has been made? It is

---

<sup>11</sup> FLA s NAF(3)(aa); s 70NEB(1)(da)

<sup>12</sup> *Ibid*, s NAF(3)(ab); s 70NECA.

<sup>13</sup> *Ibid*, s NAF(3)(a); ss 70NFB(2)(a), (b), (d).

<sup>14</sup> *Ibid*, s NAF(3)(b); s 70NFF.

respectfully suggested that any applicant seeking a community service order, fine or sentence of imprisonment, or arguably any order under Subdivision F, attempt to meet the higher standard of proof for considerations 1, 3 and 4 in *Dodds* in presenting their case.

### **Procedurally, what happens in Contravention proceedings?**

A Contravention Application and supporting affidavit<sup>15</sup> are first filed by the applicant. The drafting of the Application is important. Each “*count*” in a Contravention Application must set out clearly:

- the Order alleged to have been breached;
- the particulars of the date, time and place of the alleged breach;<sup>16</sup> and
- the actions that the applicant alleges constitutes the breach.

An error in drafting is not *necessarily* fatal to a Contravention Application, albeit undesirable. In recent months, the Court appears to be allowing applicants opportunities to either:

- Strike out the deficient count and proceed with the remainder of the counts;
- Withdraw and re-file the Contravention Application; or
- File and serve an Amended Contravention Application within a specified period.

The application will be considered by a Contravention Registrar within 14 days of lodgement. If non-compliant, the Registrar may decline to accept filing.

The first Court event is a directions hearing in the National Contravention List, as near as practicable to 14 days after the date of filing. At this hearing, the Court reviews the counts to ascertain whether the counts have been properly articulated. The Court may also identify what outcome the Applicant is seeking. The Court may ask the Respondent whether they concede any of the contraventions or whether they assert a reasonable excuse (noting the Respondent need not participate or make

---

<sup>15</sup> *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (“the Rules”), r 11.64(2).

<sup>16</sup> NB the date refers to the date the Order ought to have been complied with (and was not) - not the date the respondent refused to comply.

submissions with respect to the application). If the Respondent is alleging reasonable excuse, the Court may make orders for them to file an affidavit. The Court may also consider whether parties should attend Family Dispute Resolution or attend interviews with a Court Child Expert, with an adjournment for further directions.

Once the Contravention Registrar determined the application requires a final hearing, it is listed for hearing and determination as follows:<sup>17</sup>

- If there is a final hearing in substantive proceedings listed within 12 weeks, it will be listed to the docketed Judge for final hearing. If an earlier hearing is sought, the applicant must show cause.
- Otherwise, the matter is listed for hearing before a Senior Judicial Registrar or a Judge.

### **What powers does the Court have upon making findings?**

There are four categories of findings under Division 13A, which each give rise to different orders – save that the Court retains the power to make an order varying the primary order, regardless of its findings with respect to the contravention.<sup>18</sup>

#### *1. Contravention alleged but not established.*

The Court may make a costs order against the applicant for some or all of the respondent's costs.<sup>19</sup> In making any costs order, the Court must consider whether previous contravention proceedings had been brought by the applicant against the respondent.<sup>20</sup>

#### *2. Contravention established but reasonable excuse for contravention*

Where live-with or spend-time has been affected, the Court may order make-up time.<sup>21</sup> The Full Court in *Childers & Leslie* (2008) FLC ¶93-356 noted that compensatory time is *not* to be ordered by way of retribution without regard as to the child's best interests.

---

<sup>17</sup> Central Practice Direction – National Contravention List, 3.4.

<sup>18</sup> FLA s 70NBA(1). NB sub-s (2) – particular considerations apply if Subdivision F applies.

<sup>19</sup> FLA s 70NCB(1).

<sup>20</sup> Ibid, 70NCB(2).

<sup>21</sup> Ibid, s 70NDB.



If the Court does not order make-up time, the Court may make a costs order against the Applicant.<sup>22</sup>

3. *Contravention proved without reasonable excuse (less serious)*

The question of severity refers to *whether the contravener has behaved in a way that showed a serious disregard for the primary order*. If the answer is in the affirmative, it is “*more serious*” and sub-division F (below) applies.<sup>23</sup>

For less serious contraventions, the Court has the following orders available to it (in summary):

- Post-separation parenting program attendance;
- Make-up time;
- Adjourning proceedings to allow parties to apply to vary the primary order;
- Bond of up to two years (e.g. good behaviour bond);
- Costs order;
- Compensatory order.

4. *Contravention proved without reasonable excuse (more serious)*

Where the Court finds that the contravener has behaved in a way that showed a serious disregard for the primary order under s 70NFA, the Court must make an order available under s 70NFB.

The contravener may be ordered to pay all of the applicant's costs, and Court will consider the following orders (in summary):

- Community services order, if available under s 70NFC (*beyond reasonable doubt*);
- Bond under s 70NFE (*beyond reasonable doubt*);
- Make-up time;
- Compensatory order;

---

<sup>22</sup> Ibid, s 70NDC.

<sup>23</sup> Ibid, ss 70NEA(4); 70NFA.

- Fine of not more than 60 penalty units (see *Crimes Act 1914* (Cth) – 1 penalty unit is currently \$170) (*beyond reasonable doubt*).

If the Court does not make a costs order, it must make one of the above listed orders.

### **What constitutes a “serious disregard for the primary order”?**

This question was considered by the Full Court in *Elsbeth & Peter; Mark & Peter; and John & Peter* [2007] FamCA 655. Following a detailed consideration of cases on point in lower courts, the Full Court considered that “*serious disregard*” tends to be found in cases of *deliberate, pre-meditated non-compliance with the orders; and continued and protracted breach*.<sup>24</sup> The Full Court further considered that:

*... the more serious sanctions should only be invoked if there is a persistent disregard of an obligation or a clearly wilful and deliberate attempt to resist carrying out an order. Mere passivity on a first breach does not appear to be sufficient to attract the more stringent sanctions set out under subdivision F.*<sup>25</sup>

### **What is the difference between a Contravention Application and an Enforcement Application with respect to parenting orders?**

As mentioned above, Contravention Applications are governed by Part 13A of the FLA. Enforcement Applications with respect to parenting orders appear to be a creature of the Court’s Rules (*Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (“the Rules”)*). Part 13A appears to supersede Part XIII of the FLA with respect to parenting orders, noting that s 105 of the FLA makes clear that the Court retains the power to enforce any Order made under the Act.

In practical terms, the key difference is really in the outcome sought. Generally speaking, there are significant punitive measures available to the Court in making Orders under Part 13A as outlined. Generally, Enforcement Applications are best used where the issuing party does not want the other to face punishment, aside from make-up time and costs. Practitioners should query in taking instructions whether

---

<sup>24</sup> *Elsbeth & Peter; Mark & Peter; and John & Peter* [2007] FamCA 655 at [61].

<sup>25</sup> *Ibid*, at [65].

(despite inevitably being instructed that the client wants the other side to be punished) it is in the child's best interests for that parent to be punished as suggested, and the realistic outcome of Contravention proceedings (noting the Court's focus on facilitating the resolution of any underlying issue which led to the alleged breach).

Procedurally, both applications require the filing of an affidavit;<sup>26</sup> for enforcement applications, a copy of the order the Court is asked to enforce must be attached, and for contravention applications, details of whether the respondent has previously been found by a court to have contravened the primary order.

### Case summaries

*Elsbeth & Peter; Mark & Peter; and John & Peter* [2007] FamCA 655 (Full Court - Faulks DCJ, Kay & Penny JJ)

- The three appeals arose out of a finding that the mother had failed to comply without reasonable excuse with an order that the children spend time with their father, and that their brother Mark and their brother-in-law John had aided and abetted the mother in her contravention of the orders.
- The Trial Judge dealt with the contraventions under Subdivision F, however it was the first time the mother had been found in contravention of the orders.
- The Full Court considered the meaning of "*serious disregard*" (extracted above).
- Appeal allowed. In all of the circumstances, it was appropriate that the contravention be dealt with under Subdivision E.

*McClintock & Levier* [2009] FamCAFC 62 (Full Court - Finn, Coleman & Cronin JJ)

- The mother had breached orders for the child to spend time with the father, with the mother admitting she had contravened the orders without reasonable excuse. Subsequent to three of the six breaches, she moved interstate with the child. Ultimately, a recovery order was issued.

---

<sup>26</sup> *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, r 11.64(2).

- Trial Judge sentenced the mother to imprisonment for six months and the mother had served 16 days before the sentence was stayed.
- The appeal considered whether the trial judge erred in having regard to 'general deterrence' or 'punishment' when sentencing the mother.
- The appeal was allowed and court re-exercised discretion.

*Childers & Leslie* [2008] FamCAFC 5 (Full Court - Warnick J)

- The mother withheld the child and argued she had a reasonable excuse as the child was unwell, and the child wanted to be at home and cared for by the mother. The mother provided a medical certificate to the father, but subsequently arranged for the maternal grandparents to care for the child while she was at work.
- On appeal, the mother was found to have contravened without reasonable excuse.
- The father had not sought any punitive orders save for make-up time. Make-up time was not granted, as the Court was not satisfied it was in the child's best interests.

*Bradbury & Lander* [2019] FamCA 22 (Gill J)

- The Father filed a Contravention Application on 22 June 2018 alleging that the Mother had, on eighteen occasions, breached non-denigration orders by Consent dated 24 April 2017.
- The alleged contraventions concerned the Mother's social media posts and emails; some of which specifically identified the father and some of which did not.
- His Honour specifically noted that the Mother had tertiary qualifications and was a person of intelligence. At [69] his Honour considered:

*In dealing with this matter, it is important to note that the Mother, who has tertiary qualifications, is a person of intelligence. I have no hesitation in*

*finding that the Mother understood that her communications on each of these occasions had the effect of blackening the Father's name.*

- The Court found that the mother had not established reasonable excuse for the proven contraventions. The proceedings were adjourned for the determination of the consequences.

## **Conclusion**

Given the Court's renewed emphasis on resolving the issue that gave rise to the contravention, practitioners must consider the likely outcome a contravention application and what the client genuinely wants to achieve. It may be that filing a Contravention Application simply fuels the fire. Where substantive proceedings are on foot, it may be wise to simply address the alleged breaches in substantive proceedings given orders likely to be made in the preliminary stages of contravention proceedings. Where serious or persistent, deliberate breaches are involved, it may be the client's best alternative. Much will turn on taking detailed instructions.

Careful consideration must be given to all of the client's options before filing a Contravention Application, particularly noting the possible cost consequences for applicants where contraventions are not made out.

The emphasis, as always, remains on what arrangements are in the child's best interests. If orders are no longer in the child's best interests due to a significant change in circumstance, it would be preferable to file an Initiating Application seeking to vary the orders before any allegations of breach are even made.