



# Contravening Parenting Orders

This fact sheet summarises the Ask LOIS webinar on this topic, presented by Charissa Sun, Solicitor, WLSNSW on 25 August 2013. This webinar can be downloaded for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).

## This fact sheet covers:

- What is a contravention?
- What to do when an order is contravened?
- What happens when a contravention matter goes to court
- What is a “reasonable attempt” to comply with the order?
- What is a “reasonable excuse” for not complying with the order?
- What is the penalty for contravening an order?

## What is a contravention?

- **Contravention** is a legal term meaning failure to comply with a court order
- May also be referred to as a breach, non-compliance or contempt of court
  
- In the **family law jurisdiction**, a contravention refers to a **failure to comply with a parenting order**
- A **parenting order** is a court order that sets out parenting arrangements for a child. They typically address the allocation of parental responsibility, whom the child lives with and whom the child spends time with.
- The meaning of parenting orders can be found in the [Family Law Act 1975 \(NSW\) s 64B](#)
  
- **Applicant** – the person who applies for the contravention order
- **Respondent** – the person who is alleged to have breached the order

## Contravening a Parenting Order

There are 2 ways in which a parenting order can be contravened, as set out in the [Family Law Act 1975 \(NSW\) s 70NAC](#):

1. A contravention occurs when there has been an **intentional failure** to comply with the order
2. A contravention occurs when there has been **no reasonable attempt** to comply with the order
  - This requires that the person take **‘reasonable steps’** to comply with the order
  - What the court deems as ‘reasonable’ will depend on the facts and circumstances of the case

### **Ackersley & Rialto [2009] FamCA 817**

- This case offers an example of how the court interprets and applies the law in deciding whether a ‘reasonable attempt’ has been made
  - The parties were separated with two children
  - The court made interim orders that the children live with their mother and spend every Tuesday and every second weekend with their father
  - On two occasions the children expressed that they did not want to go with their father. The facts on each of these occasions were very similar, so we will outline just one
  - On the second occasion, the children left school where their father was supposed to collect them, and went to their mother’s house
  - When the father found the children missing, he contacted the mother, who then found them at her house. The children told their mother that they did not want to go with their father. She told the children that what they were doing was unfair, and they should go with their father
  - During this conversation the father arrived, but the mother asked him not to enter her house
  - The children told the father through the door that they didn’t want to go with him, and he left
  - The father alleged that the mother had contravened the parenting orders on both occasions
- **The court held:** While the mother had not intentionally failed to comply with the court orders, she had failed to make reasonable attempts to comply, and had therefore contravened the order



- The court found that the mother could have done more, saying that she showed a **lack of 'forceful response'**
- The court said it was the mother's **responsibility** to: ensure that the children carried out what the court had found to be in their best interests when making the orders, not to be critical of those orders (either directly or by inference), and to discipline the children *'in the same way as any other parent would discipline a child by removing privileges if the child was defiant'*

### Contravention – What to do?

- If your client comes to you saying they are thinking of contravening a parenting order, or they are alleging a contravention: **tell them to get advice from a family law solicitor**
- Contravention often indicates that parties are having difficulty with the parenting orders in place, and they may need to be varied. This requires legal advice because contravention is a very complex and technical area of the law, involving specific rules that are applied in a fact-dependant manner.
- **FREE LEGAL ADVICE** may be available through:
  - LawAccess
    - 1300 888 529
    - <http://www.lawaccess.nsw.gov.au>
  - Visiting your local Legal Aid office
    - <http://www.legalaid.nsw.gov.au/get-legal-help/find-a-service>
  - Your local Community Legal Centre (CLC)
    - [http://www.clcnsw.org.au/postcode\\_search.php](http://www.clcnsw.org.au/postcode_search.php)

### What are the options when orders are not workable?

There are 3 options available to parties:

#### 1. Informal Agreement

- Parties can speak and come to a new informal agreement that works for them

#### 2. Family Dispute Resolution (FDR)

- The large majority of contravention matters are resolved through FDR
- Through FDR, the parents can come up with a new agreement enshrined in a parenting plan. If the parties reach a new agreement it can override the entire earlier made consent or court orders or it can sit alongside it by just overriding certain terms within the orders
- Remember that the later-made plan overrides previously made court orders or consent orders, so if your client is on the whole happy with the court orders and only wants to change a specific order, make sure they get legal advice in drafting a new parenting plan. This will help avoid the unwanted outcome overriding the entire court orders with a new parenting plan, which will be unenforceable. This is especially important where existing orders are in favour of your client.
- For more information on FDR, see the Ask LOIS webinar on Mediation in Family Law, available at <http://www.asklois.org.au/webinars/past-webinars>

#### 3. Go to Court

- If FDR is unsuccessful or deemed inappropriate, parties can go to court

### Court – Contravention Hearing

If the contravention matter goes to court, the onus is on the applicant to prove contravention. There are 4 possible outcomes if parties go to court:

#### 1. No Breach

- The applicant has not been able to prove, **on a balance of probabilities**, that the respondent intentionally failed to comply with the order, or made no reasonable attempt to comply with the order.

#### 2. Breach with Reasonable Excuse

- The court may find that the respondent has breached the parenting order, but that they had a reasonable excuse for the contravention. This is set out in the Family Law Act 1975 (NSW) s70NAE
- A reasonable excuse can be established where:

[www.asklois.org.au](http://www.asklois.org.au)

© Women's Legal Services NSW 2013

This factsheet is not intended to take the place of legal advice given by a qualified legal practitioner familiar with the individual case or subject matter. No responsibility is taken for any loss suffered as a result of the information presented



1. The respondent **did not understand the obligations** imposed by the parenting order AND
  2. The respondent **believed on reasonable grounds** that:
    - The contravention was necessary to protect the **health and safety** of a particular person (including the respondent or the child)
    - The period during which the child was kept from the applicant was **not longer than necessary** to protect the health and safety of that person
- NOTE: The legislation is very specific regarding what is a reasonable excuse. You *can* withhold a child if you can prove, **on the balance of probabilities**, that you believed it reasonably necessary to protect the health and safety of the child. However, you *cannot* withhold the child even if you had a reasonable belief that it was not in the child's best interests to spend time with the other parent

### 3. Breach – Less serious contravention

- For the court to find a less serious contravention:
  1. There must have been no previous court proceedings where a contravention of the same order was proved AND
  2. The court must be satisfied that the respondent has not behaved in a way that shows a serious disregard for his/her obligations under the contravened order

### 4. Breach – More serious contravention

- For the court to find a more serious contravention:
  1. There has been previous court proceedings where a contravention of the same order was proved OR
  2. The court is satisfied that the respondent has behaved in a way that shows a serious disregard for his/her obligations under the contravened order

## Consequences

- The court has a range of powers to deal with inexcusable contraventions
- For **more serious** contraventions the court may order:
  - A community service order
  - A fine
  - A sentence of imprisonment
  - A bond
  - A cost order
- For **less serious** contraventions the court may order:
  - Both parents to attend a post separation parenting programme to better understand the obligations created by parenting orders
  - A bond
  - A cost order
- In deciding whether or not there is a reasonable excuse for contravention, the court must consider making an **order** compensating the applicant **for lost time**
- Regardless of whether a contravention is established, the Court has the power to **vary a parenting order**

## Resources

### Legal Aid NSW resource kit for parents

- 'My ex-partner isn't following the court orders about our children... What can I do?':  
<http://www.legalaid.nsw.gov.au/get-legal-help/factsheets-and-resources/my-ex-partner-isnt-following-the-court-orders-about-our-children-what-can-i-do>

### Family Law Courts

- Complying with orders about children:  
<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Court+Orders/Complying+with+orders+about+children/>