Family Court of Australia

Elspeth & Peter; Mark & Peter; and John & Peter [2007] FamCA 655 (5 July 2007)

Last Updated: 5 July 2007

FAMILY COURT OF AUSTRALIA

ELSPETH & PETER; MARK & PETER; AND JOHN & PETER *[2007] FamCA 655*

FAMILY LAW - APPEAL – ENFORCEMENT – PARENTING ORDER – Contravention of orders that children spend time with their father – Children aged 12 and 8 refused to go with their father when he came to collect them for one week of the school holidays some three weeks after a contested hearing at which the mother opposed any contact regime being established – The trial judge considered the mother's failure to ensure the children went with their father was a serious breach and sentenced her to 4 months imprisonment suspended upon condition that she complied with future orders – The mother's 22 year old son and her son-in-law who were present at the attempted handover were each found to have aided or abetted the contravention and similar sentences were imposed

Held that whilst the trial judge took into account a number of irrelevant considerations, the mother's contravention was clearly proved and no reasonable excuse was proffered – Mother did not seek to rely on any defence concerning a potential misunderstanding of her positive obligations under the orders to encourage the children to go and spend time with their father (see *Stevenson and Hughes* (1993) FLC 92-363) – In relation to penalty, the mother's contravention as constituted by a lack of encouragement, ought not have been seen as showing a serious disregard for her obligations under the orders and being a first contravention, should have attracted only the penalties prescribed by subdivision E (s 70NEA - s 70NEG) of Division 13A of Part VII of the *Family Law Act 1975* (Cth)) – Appeal allowed in relation to penalty – Further submissions as to penalty sought

There were no findings by the trial judge of conduct on behalf of the adult son that would support a finding that he aided or abetted the mother's contravention. Further, there is no evidence that either the adult son or the son-in-law aided or abetted, by intentionally assisting or encouraging, the contravention – Appeal allowed and orders in relation to the adult son and the son-in-law set aside

COSTS – Mother was ordered to pay all costs of the Independent Children's Lawyer ('ICL') in relation to the contravention proceedings on an indemnity basis – As the ICL was not a party to those proceedings a costs order had to be made under s 117 – The ICL accepted that an appropriate order in the circumstances

was that the mother pay the ICL's costs as agreed or in default as assessed – Appeal allowed

Family Law Act 1975 (Cth)

B & W (No 1) [2003] FMCAfam 101
Brown & Brown [2005] FMCAfam 567
C & R [2003] FamCA 682
C & J [2001] FamCA 1486
Davis & Davis [2006] FMCAfam 49
H & V [2005] FMCAfam 519
Johnson and Johnson (No 3) (2000) 201 CLR 488; (2000) FLC 93-041; (2000) 26 Fam LR 627
NP & AP (No 2) [2006] FamCA 869
P & P [2001] FamCA 127
R & A [2001] FamCA 619
Stevenson and Hughes (1993) FLC 92-363; (1993) 16 Fam LR 433

APPELLANTS:	ELSPETH; MARK; JOHN			
RESPONDENT:	PETER			
INDEPENDENT CHILDREN'S LAWYER:	Mr Waterhouse			
FILE NUMBER:	HBF	150	of	2003
APPEAL NUMBERS:	SA	18, 22 & 23	of	2007
DATE DELIVERED:	5 July 2007			
PLACE DELIVERED:	Melbourne			
JUDGMENT OF:	Faulks DCJ, Kay & Penny JJ			
HEARING DATE:	4 June 2007			
LOWER COURT JURISDICTION:	Family Court of Australia			

LOWER COURT JUDGMENT DATE:	20 February 2007
LOWER COURT MNC:	[2007] FamCA 96

REPRESENTATION

COUNSEL FOR THE FIRST NAMED APPELLANT:	Mr Ackman QC and Ms Macmillan
SOLICITORS FOR THE FIRST NAMED APPELLANT:	Murray and Associates
COUNSEL FOR THE SECOND NAMED APPELLANT:	Mr Brett with Ms Higgins
SOLICITORS FOR THE SECOND NAMED APPELLANT:	Bishops Barristers & Solicitors
COUNSEL FOR THE THIRD NAMED APPELLANT:	Mr Crawford
SOLICITORS FOR THE THIRD NAMED APPELLANT:	Rae & Partners
COUNSEL FOR THE RESPONDENT:	Mr McGuire
SOLICITORS FOR THE RESPONDENT:	Temple-Smith Partners
COUNSEL INDEPENDENT CHILDREN'S LAWYER:	Mr Fitzgerald
SOLICITORS FOR INDEPENDENT CHILDREN'S LAWYER:	PL Corby & Co

ORDERS

1. That orders 1, 5, 6,7, 8 and 9 made by Benjamin J on 20 February 2007 be set aside.
2. That there is a determination that Elspeth has contravened an order of the Court made 21 December 2006 in that the children did not spend time with their father on and after 14 January 2007 in accordance with the Order 4(c) made that day.
3. That the mother pay the costs of the Independent Children's Lawyer in respect of the contravention proceedings as agreed or as assessed under the Family Law Rules

2004.
4. That within 14 days the mother file and serve any written submissions in relation to penalty and in relation to the costs of:
(a) the contravention proceedings; and
(b) the appeal.
5. That within 14 days the second and third appellants Mark and John each file and serve any written submissions relating to the costs of:
(a) the contravention proceedings; and
(b) the appeal.
6. That within 14 days of the receipt by him of any submissions referred to above the respondent father file and serve any submissions in response thereto.
7. That within 7 days of receipt of any submissions in response the mother and the second and third appellants Mark and John each file and serve any further submissions in reply.

IT IS NOTED IN CONNECTION WITH THESE ORDERS that the judgment of the Full Court delivered this day will for all publication and reporting purposes be referred to as *Elspeth & Peter; Mark & Peter; and John & Peter*.

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT HOBART

Appeal Number: SA 18, 22 & 23 of 2007
File Number: HBF150 of 2003

ELSPETH, MARK and JOHN

Appellants

And

PETER

Respondent

REASONS FOR JUDGMENT

1. These three appeals are against orders made by Benjamin J on 19 and 20 February 2007 arising out of a finding that Elspeth, the mother of **J** and **C** 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. There were also subsidiary grounds of appeal which complained of a failure by the trial judge not to disqualify himself on 19 February 2007 from hearing the contravention application and a complaint of bias.

BACKGROUND

2. Elspeth and Peter married in May 1977 and separated in February 2003. There were eight children born of their marriage, the youngest two being J born in January 1994 and C born in December 1998.

3. The parents were both members of the **Exclusive Brethren** faith and of the **Exclusive Brethren** community in Tasmania. The mother is a fourth generation member of the faith and the father had been introduced to the faith at an early age. The children were raised according to the tenets of the faith. In early 2003 the father left the community and ceased to conduct himself in accordance with the tenets of the faith.

4. On 21 December 2006 Benjamin J delivered judgment in proceedings between the father and the mother, in which each sought competing orders for parental responsibility concerning the three youngest children of the marriage J, C and their older sister **E** who was born in December 1990. The father's application that the children live with him was dismissed and orders were made (inter alia) that J and C spend time with their father as follows:

> 4. THAT the [sic] [C] and [J] spend time with the father as follows:
>
> (a) during Tasmanian school term from 10.00am Saturday until 3.00pm Sunday each alternate weekend commencing on the second weekend after the start of each school term;
>
> (b) the first week of each of the mid term school holiday periods commencing 10.00am Saturday and ending 10.00am the following Saturday;
>
> (c) from [sic] one week from 1 January in each year;
>
> (d) if Father's Day is not a time when the children would otherwise spend with the father, from 10.00am until 5.00pm on Father's Day.
>
> (e) If Mother's day is a weekend when the said children would spend time with the father by virtue of these orders then such time the children spend with the father that weekend will conclude at 5.00pm on the Saturday before Mother's day.
>
> (f) That handover and return of the children and each of them to [sic] take place at the residential address of the mother or such other place as is agreed between the parties in writing.

5. A further order was made that:

> 9. THAT both the father and the mother:
>
> (a) shall do all acts and things necessary to encourage the children to speak positively to and about the other parent;
>
> (b) shall discourage the children from speaking negatively to or about the other parent.

6. It is common ground that on 14 January 2007 the father attended at the mother's premises to

collect C and J. It was the father's evidence that when he arrived at the home at 10.00 am the children's suitcases and a communication book were waiting outside the door. When he knocked on the door the children both came to the door and immediately said "I'm not coming with you". The children failed to provide him with a reason for their refusal other than C said "it's all your fault".
7. Both Mark and John were present at the home. Several endeavours by the husband to persuade the children to come with him, including an intervention by the local police, proved to be fruitless and after about two hours the father left the premises.
8. In her affidavit in answer to contravention charges the mother said:

> 47. I deny any allegation that I said or did anything to discourage [J] and [C] from going with their father. I did my very best to facilitate the handover as I stated I would.

9. When cross-examined about what steps she took to encourage the children to go with their father the following questions and answers were put:

> MR McGUIRE: So I take it if I put to you that you might have said to the children words to the effect of, "Look, I know you don't want to go, but I'm your mother. I want you to go and I consider that you should go, and you're going"?---No.
> You wouldn't have said any words to that effect or in that tone of voice, would you?---No, I never said anything like that.
> Thank you very much?---It's all said in the Bible (indistinct) to encourage them.
> I'm just going to ask you – thanks for that. As you said during the trial, you could not encourage them to go. Is that right?---That's right.
> Because that would be in conflict with your – with the tenets of your religion – one of the tenets of your religion?---No, it's not in conflict with the tenets.
> Tell his Honour please why you couldn't encourage – why you wouldn't encourage (indistinct)?---Because it's their own wishes. I know that they don't want to go with their father because their fundamental belief in the Scriptures that they know he's (indistinct) (transcript 20 February 2007 at page 82)
> ...
> MR McGUIRE: ...What do you understand, if anything, to have been your responsibility under those orders, that's if any responsibility? What's your understanding?---It's my understanding that I was to facilitate the handover.
> Can I just have that again?---That I was to facilitate the handover.
> Was that the extent of what you understand to be your responsibility, to facilitate the handover?---Yes, and to not discourage them.
> Right, and to not discourage?---That's right.
> Is that why in your affidavit that was filed yesterday you used those terms, you used the term "facilitate" and "not discourage"?---That's correct.
> You agree with me that nowhere in your affidavit do you say that you attempted to encourage the children to go?---Correct. (transcript 20 February 2007 at page 87)
> ...
> ---because you've told us under your oath that you find it contrary to your religious beliefs to encourage them to go. So how did you encourage them to go?---Well, I endeavoured to facilitate the handover.
> I understand that. By taking them to the door?---Yes.

What I'm interested in specifically is when they said words to the effect of them not going, "We're not going". What was your response?---Well, I don't think I said anything.
I think you've already agreed with me that it's contrary to your beliefs that you are not proactive and saying things like, "I want you to go. You've got to go. I really want you to go." You wouldn't do that, would you?---No, I couldn't say that. (transcript 20 February 2007 at page 88-89)...
HIS HONOUR: What do you say he has done to his children?---He has deprived them of a normal household.
...
He has deprived them of a normal household which I take to be that he has left you?---That's right.
...
MR McGUIRE: Is it for that reason that you couldn't see yourself encouraging the children to go to their father? Is that one of the reasons that stops you?---That's right. (transcript 20 February 2007 at page 91)

RELEVANT PROVISIONS OF THE *FAMILY LAW ACT 1975* (CTH) VIS-à-VIS THE MOTHER

Section 70NAC Meaning of contravened an order

A person is taken for the purposes of this Division 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...

Section 70NAD Requirements taken to be included in certain orders
For the purposes of this Division:
...

(b) a parenting order that deals with whom a child is to spend time with is taken to include a requirement that people act in accordance with section 65N in relation to the order.

Section 65N General obligations created by parenting order that deals with whom a child spends time with

(1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to spend time with.

(2) A person must not:

(a) hinder or prevent a person and the child from spending time together in accordance with the order; or

(b) interfere with a person and the child benefiting from spending time with each other under the order.

> **Section 70NAE Meaning of *reasonable excuse for contravening* an order**
> (1) The circumstances in which a person may be taken to have had, for the purposes of this Division, a ***reasonable excuse for contravening*** an order under this Act affecting children include, but are not limited to, the circumstances set out in subsections (2), (4), (5), (6) and (7).
> (2) A person (the ***respondent***) is taken to have had a reasonable excuse for contravening an order under this Act affecting children if:

(a) the respondent contravened the order because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order on the person who was bound by it; and

(b) the court is satisfied that the respondent ought to be excused in respect of the contravention.

> ...
>
> (5) A person (the ***respondent***) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to spend time with in a way that resulted in a person and a child not spending time together as provided for in the order if:

(a) the respondent believed on reasonable grounds that not allowing the child and the person to spend time together was necessary to protect the health or safety of a person (including the respondent or the child); and

(b) the period during which, because of the contravention, the child and the person did not spend time together was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).

> **Section 70NAF Standard of proof**
>
> (1) Subject to subsection (3), the standard of proof to be applied in determining matters in proceedings under this Division is proof on the balance of probabilities.
> (2) Without limiting subsection (1), that subsection applies to the determination of whether a person who contravened an order under this Act affecting children had a reasonable excuse for the contravention.
>
> (3) The court may only make an order under:
> (a) paragraph 70NFB(2)(a), (d) or (e); or

(b) paragraph 70NFF(3)(a)

> if the court is satisfied beyond reasonable doubt that the grounds for making the order exist.

10. The provisions of Division 13A of Part VII of the Act entitled "**Consequences of failure to**

comply with orders, and other obligations, that affect children" go on to provide:

• the Court has power to vary a parenting order (s 70NBA);
• the power to vary an order is not dependent upon a contravention being established (see the note to s 70NCA);
• where a contravention has occurred, even if the Court is satisfied that a reasonable excuse for the current contravention exists, the Court must consider making an order that compensates for the time the child did not spend with the parent as a result of the contravention (s 70NDB);
• where the Court is satisfied that a contravention has occurred and there is no reasonable excuse for the contravention and that no court has previously either made an order imposing a sanction or taken an action in respect of a contravention of the order by the person or adjourned proceedings in respect of a contravention to allow the parties to apply for a further parenting order that discharges, varies or suspends the primary order, then unless the Court is satisfied that the person who contravened the primary order has behaved in a way that showed a serious disregard for his or her obligations under that order the sanctions the Court may impose are those contained in s 70NEB namely,

> (a) make an order directing:
> (i) the person who committed the current contravention; or
> (ii) that person and another specified person;
> to attend a post-separation parenting program;
> (b) if the current contravention is a contravention of a parenting order in relation to a child — make a further parenting order that compensates a person for time the person did not spend with the child (or time the child did not live with the person) as a result of the current contravention;
> (c) adjourn the proceedings to allow either or both of the parties to the primary order to apply for a further parenting order under Division 6 of Part VII that discharges, varies or suspends the primary order or revives some or all of an earlier parenting order;
> (d) make an order requiring the person who committed the current contravention to enter into a bond in accordance with section 70NEC;
> (e) if:

(i) the current contravention is a contravention of a parenting order in relation to a child; and

(ii) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and

(iii) the person referred to in subparagraph (ii) reasonably incurs expenses as a result of the contravention;

> make an order requiring the person who committed the current contravention to compensate the person referred to in subparagraph (ii) for some or all of the expenses referred to in subparagraph (iii);

> (f) make an order that the person who committed the current contravention pay some or all of the costs of another party, or other parties, to the proceedings under this Division...

11. Where on the first proven breach of an order the Court is satisfied that the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order the range of sanctions available to the Court are those set out in s 70NFB which provides as follows:

> (1) If this Subdivision applies, the court must, in relation to the person who committed the current contravention:

(a) make an order under paragraph (2)(g), unless the court is satisfied that it would not be in the best interests of the child concerned to make that order; and

(b) if the court makes an order under paragraph (2)(g) — consider making another order (or other orders) under subsection (2) that the court considers to be the most appropriate of the orders under subsection (2) in the circumstances; and

(c) if the court does not make an order under paragraph (2)(g) — make at least one order under subsection (2), being the order (or orders) that the court considers to be the most appropriate of the orders under subsection (2) in the circumstances.

> (2) The orders that are available to be made by the court are:

(a) if the court is empowered under section 70NFC to make a community service order—to make such an order; or

(b) to make an order requiring the person to enter into a bond in accordance with section 70NFE; or

(c) if the current contravention is a contravention of a parenting order in relation to a child—to make a further parenting order that compensates a person for time the person did not spend with the child (or the time the child did not live with the person) as a result of the current contravention, unless it would not be in the best interests of the child concerned to make that order; or

> (d) to fine the person not more than 60 penalty units; or

(e) subject to subsection (7), to impose a sentence of imprisonment on the person in accordance with section 70NFG; or

> (f) if:

(i) the current contravention is a contravention of a parenting order in relation to a child; and

(ii) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period); and

(iii) the person referred to in subparagraph (ii) reasonably incurs expenses as a result of the contravention;

to make an order requiring the person who committed the current contravention to compensate the person referred to in subparagraph (ii) for some or all of the expenses referred to in subparagraph (iii); or

(g) to make an order that the person who committed the current contravention pay all of the costs of another party, or other parties, to the proceedings under this Division; or

(h) to make an order that the person who committed the current contravention pay some of the costs of another party, or other parties, to the proceedings under this Division.

Note: The court may also vary the primary order under Subdivision B.

(3) If a court varies or discharges under section 70NFD a community service order made under paragraph (2)(a), the court may give any directions as to the effect of the variation or discharge that the court considers appropriate.

...

(6) An order under this section may be expressed to take effect immediately, at the end of a specified period or on the occurrence of a specified event.
(7) When a court makes an order under this section, the court may make any other orders that the court considers necessary to ensure compliance with the order that was contravened.

12. Section 70NFG(2) provides:

Sentences of imprisonment

(1) A sentence of imprisonment imposed on a person under paragraph 70NFB(2)(e) is to be expressed to be:

(a) for a specified period of 12 months or less; or

(b) for a period ending when the person:

(i) complies with the order concerned; or

(ii) has been imprisoned under the sentence for 12 months or such lesser period as is specified by the court;

whichever happens first.

(2) A court must not sentence a person to imprisonment under paragraph 70NFB(2)(e) unless the court is satisfied that, in all the circumstances of the case, it would not be appropriate for the court to deal with the contravention under any of the other

paragraphs of subsection 70NFB(2).
(3) If a court sentences a person to imprisonment under paragraph 70NFB(2)(e), the court must:

(a) state the reasons why it is satisfied as mentioned in subsection (2); and

(b) cause those reasons to be entered in the records of the court.

(4) The failure of a court to comply with subsection (3) does not invalidate a sentence.
(5) A court that sentences a person to imprisonment under paragraph 70NFB(2)(e) may:

(a) suspend the sentence upon the terms and conditions determined by the court; and

(b) terminate a suspension made under paragraph (a).

ISSUES AT TRIAL

13. The questions concerning the mother that faced the trial judge at the hearing of the contravention application were:

(a) whether on 14 January 2007 the mother had contravened the order made on 21 December 2006 that the children spend one week with their father;
(b) whether she did so without a reasonable excuse;
(c) whether in contravening the order the mother behaved in a way that showed a serious disregard for her obligations under the order; and
(d) what was the appropriate sanction for the contravention (if one was found to have occurred).

14. Ultimately the orders made by the trial judge on 20 February 2007 were as follows:

1. **THAT** there is a determination made 20 February 2007 that [Elspeth] has contravened an order of this court made 21 December 2006 and further that [John] and [Mark] have each aided and abetted the contravention of the said order.

IT IS ORDERED

2. (a) **THAT** by way of compensatory time that the children, [J] born 12 January 1994 and [C] born 29 December 1998 (“the children”) spend time with the father from 5.00pm on Sunday 8 April 2007 until 9.00am Sunday 15 April 2007.

(b) **THAT** the children are to be delivered by or on behalf of the mother to the father’s home and if on behalf of the mother, to be by one of the adult female siblings of the children (including [M]) or such other person as is agreed in writing between the parties **AND IT IS NOTED** that the mother may bring with her any of the adult

female daughters of the parties such as she considers appropriate.

(c) **THAT** the parenting orders of 21 December 2006 be varied to provide that the children are to be delivered to the father at his home...by the mother or on behalf of the mother and if on behalf of the mother, to be by one of the adult female siblings of the children (including [M]) or such other person as is agreed in writing between the parties **AND IT IS NOTED** that the mother may bring with her any of the adult female daughters of the parties such as she considers appropriate.

3. (a) **THAT** the father return the children to the mother's home at the conclusion of spending time with the children.

(b) **THAT** if there is a weekend when the father is to spend time with the children [E], [J] and [C], then [E] is to be delivered to the father's home by the mother in accordance with order 3(a) above and the father is to return [E] to an address nominated by the mother within ten kilometres of the father's home.

4. **THAT** pursuant to s.65DA(2) and s.62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders.

5. **THAT** the respondents pay all of the costs of the applicant and the Independent Children's Lawyer in respect of the contravention proceedings as agreed or as determined under the Rules of Court.

IT IS NOTED

6. **THAT** the respondents are jointly and severely liable for such costs and such costs are to be determined on an indemnity basis.

IT IS FURTHER ORDERED

7. (a) **THAT** [Elspeth], the first respondent, is sentenced to imprisonment for a period of four (4) months;

(b) **THAT** such sentence of imprisonment is suspended upon terms that [Elspeth] comply with the orders of the Court made 21 December 2006 (as varied by these orders) for a period of twelve months from 20 February 2007.

8. (a) **THAT** [John], the second respondent, is sentenced to imprisonment for a period of four (4) months;

(b) **THAT** such sentence of imprisonment is suspended upon terms that [John] shall not be present at any changeover of the time that the children spend with the father, such term to operate for a period of twelve months from 20 February 2007.

9. (a) **THAT** [Mark], the third respondent, is sentenced to imprisonment for a period of four (4) months;

(b) **THAT** such sentence of imprisonment is suspended upon terms that [Mark] shall not be present at any changeover of the time that the children spend with the father, such term to operate for a period of twelve months from 20 February 2007.

15. For the purposes of the mother's appeal, we are concerned with the determination made in paragraph 1 of the said orders, with Order 5 relating to the amount of costs ordered to be paid to the Independent Children's Lawyer, and with Order 7 that imposed and then suspended a sentence of imprisonment of four months upon the mother. The appeal against Orders 2 and 3 was not pressed.

THE JUDGE IS ASKED TO DISQUALIFY HIMSELF

Bias

16. On 19 February 2007 Mr Ackman QC on behalf of the wife moved on her application filed 31 January 2007 for a stay of orders made 21 December 2006 that the children E, C and J spend time with their father. When that application was refused except in relation to the time that E was to spend with the father, he made an application that the contravention proceedings be adjourned to await the outcome of an appeal against the substantive orders. When that application was refused he made an oral application that the trial judge disqualify himself from hearing the contravention application.
17. The mother filed a Notice of Appeal against the substantive orders on 17 January 2007. She also filed a Notice of Appeal against the refusal of the stay, the refusal of the adjournment of the contravention proceedings and the failure of the judge to disqualify himself, together with the appeal against the contravention findings and sentence.
18. She subsequently abandoned the substantive appeal, the appeal against the refusal of the stay and the refusal of the adjournment but sought to argue before us that the trial judge should have disqualified himself from hearing the contravention applications.
19. His Honour's reasons for refusing that application were as follows:

> 37. There is an application before me, an oral application, that I ought to disqualify myself from determining the contravention proceedings on a number of basis. [sic] The first of which is that I heard the primary proceedings and made a determination adverse to that of the wife and I made findings with which the wife disagrees.
> 38. Secondly was that I have but a few minutes ago determined the stay application and made observations about evidence subsequent to that time, although if my memory serves me well I made no particular findings but simply reflected on that evidence. I certainly took into account, but I do not know that I made any contentious findings in respect of such evidence.
> 39. The contravention application was listed for today to be dealt with by me after the determination of the stay application. The wife at that time was represented by counsel. She offered no objection at that time to the matter proceeding before me. Whichever judicial officer determines the contravention application, they will have before them my findings in relation to the first instance which still stand and will continue to stand until such time as the Full Court deals with them.

> 40. The independent children's lawyer properly set out the principles that I ought to take into account which are conveniently set out in *Johnson v Johnson number 3* (2000) FLC 93041 [sic]. I accept that I am obliged to be robust in terms of such application and understand my role.
> 41. The basis of the submission on behalf of the wife is that as I have made determinations on the hearing that would in essence influence me in the determination of the contravention. Whichever judicial officer hears this matter will not [sic] doubt have before them those determinations or is entitled to have before them those determinations.
> 42. I am not satisfied that an objective bystander would consider that in the circumstances there would have been pre-judgment by me in relation to this matter. As such, the application for me to disqualify myself is dismissed.

20. In support of his submission that the trial judge had erred in failing to disqualify himself Mr Ackman QC on behalf of the wife said that the learned trial judge's findings some two months before the contravention application went to the very heart of the matters that were to be determined by his Honour in hearing the contravention applications viz, whether:

> (a) the wife had made a reasonable attempt to comply with the order on 14 January 2007; and
> (b) the children's expressed wish not to go with the husband on 14 January 2007 was their independent view and free of the influence of the wife, her extended family or the community.

21. He submitted that the appropriate test as to whether or not the judge ought to have disqualified himself appeared in the passage of the High Court's judgment in *Johnson and Johnson (No 3)* (2000) 201 CLR 488; (2000) FLC 93-041; (2000) 26 Fam LR 627 at paragraph 11 where their Honours spoke of whether a fair minded lay person might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. He submitted that in light of the findings of the trial judge in his principal judgment that:

- the children had been actively discouraged from maintaining a relationship with their father;
- their mother and her family would not encourage the children to spend any time or communicate with the father; and
- that he was not satisfied that the views of the children were independent and free from the influence of their mother, the extended family or the community

an objective bystander would necessarily conclude that his Honour could not bring an open mind to determine the issues that were germane to the contravention application.
22. We do not agree with the submission that the matters that were relevant to be determined at the contravention application were those as outlined by Mr Ackman QC.
23. There was no dispute surrounding the agreed facts that the children did not spend time with their father on 14 January 2007 as a result of their expressing a persistent and unwavering view that they

did not want to go. What ultimately was in issue in the proceedings was whether the mother could rely upon the children's reluctance or unwillingness to go with their father as constituting a reasonable excuse for her failure to ensure that they spent the time with their father that the Court had ordered.

24. The statutory obligations have already been set out. It was implicit in counsels' submissions that in addition to the statutory obligations the matters expressed by the Full Court in *Stevenson and Hughes* (1993) FLC 92-363; (1993) 16 Fam LR 443 appropriately defined the mother's obligations. There the Full Court examined an obligation on a parent to take reasonable steps to ensure that an order made for a child to spend time with the other parent is effective. Nygh J said at 79,814; 447 citing a passage from *Stavros and Stavros* (1984) FLC 91-562; (1984) 9 Fam LR 1025:

> ... there is an obligation cast upon the custodial parent to take reasonable steps to make the child available for access. It is not open to the custodial parent to do no more than bring the child to the front entrance and invite it to walk of its own accord to the access parent at the garden gate, and to argue that if the child refuses, all her obligations are satisfied by merely standing, as I put it, with folded arms behind the child, doing nothing either to encourage the child to walk to the father or to discourage the child from remaining on the doorstep and, indeed, this situation is directly comparable to it. It is quite clear that such an approach is wrong and that the wife in this circumstance, clearly, was in breach of her obligations under the order.

Fogarty J said at 79,815; 450:

> Section 112AB(1) provides in effect that where a person is bound by an order such as an access order, a breach may occur where that person makes no reasonable attempt to comply with the order. That is a statutory statement of the obligation but thought that her Honour explained aspects of that in several passages of her judgment which I think should be reproduced. At p 8 of the appeal book her Honour said this: "There is also implicit in every order for access an obligation imposed upon the custodian to take reasonable steps to do what they can to ensure that the stipulated contact occurs". Then at pp 11 to 12 of the appeal book there is the following passage which, although lengthy, is worthy of being repeated and it is as follows:
>
> > "I have already made reference to the implied obligation of the custodian to take reasonable steps to ensure that the access stipulated in an order takes place. Words and actions have meaning in context and affect. It is not a sufficient discharge of custodian's obligations, express or implied, to point to words and actions and to say, in effect: 'You see I tried. But the child does not want to go,' and thereafter to figuratively fold their arms as if that were end [sic] of the matter.
> > Theirs is an active role with an obligation to positively encourage access. It is not a discharge of their duty to set up access to fail. That is to say, it is not sufficient to make a token effort at compliance by the utterance of a few phrases which, in the main, are designed to impart to the child not positive encouragement to go on access, but to convey the burden on both the child and the custodian of compliance with the obligation."

...

> It is important that in cases of this sort custodians appreciate that they are not entitled to treat the other party as an enemy who are [sic] to be thwarted wherever possible either by active steps or by passive resistance. That matter was emphasised as early as 1984 in *In the Marriage of Stavros* (1984) 9 Fam LR 1025; [1984] FLC 91-562, but I am afraid that the contrary attitude still appears to permeate the jurisdiction and the sooner that that misunderstanding is removed the better for everybody.

25. It was not urged upon us that the sentiments expressed in *Stevenson and Hughes* (supra) no longer apply to orders made under the *Family Law Act 1975* (Cth) ("the Act") as it presently stands. The obligation to ensure compliance with a parenting order carries with it more than merely an obligation to remain passive. It requires a positive application of parental authority. A parent cannot be said to deny a child medical or dental treatment or an education merely on the basis that such denial complies with a child's expressed wishes. A parent has an obligation to ensure, so far as possible, compliance with the orders of the Court where those orders reflect the Court's determination of what is in the best interests of the child.

26. In this particular case the trial judge had made it abundantly clear that discouraging the children from spending time with their father amounted to psychologically cruel, unacceptable and abusive behaviour towards these children. These comments clearly put the mother on notice that the Court took the position, when applying the principles of the Act, that it was important for these children to have an ongoing relationship with their father.

27. The sole issue to be determined in the contravention application *vis a vis* the mother was whether she was in breach of the orders by simply relying upon or complying with the children's stated wishes and not actively encouraging the children to go with their father on 14 January 2007. There was nothing in the judgment of 21 December 2006 that would indicate that the trial judge was incapable of determining those facts in an unprejudiced and unbiased manner. We see no error in relation to the trial judge's refusal to disqualify himself from the hearing of the proceedings.

WAS THE CONTRAVENTION PROVED?

28. Whilst the Amended Notice of Appeal raised many issues concerning the reasons for judgment delivered by the trial judge, at the hearing before us Mr Ackman QC submitted that the learned trial judge's finding that the wife had contravened the orders was tainted by a number of irrelevant considerations.

29. In his reasons for judgment the trial judge said that he was satisfied that the wife had contravened the orders and had not provided a reasonable excuse to contravene the orders. The trial judge indicated that he accepted the father's evidence in relation to the proceedings. He said of the wife:

> 11. The wife gave evidence in accordance with an affidavit sworn 16 February 2007. This affidavit had been prepared and (quite properly) was not filed until after a determination of a prima face case. The wife was cross-examined by counsel for the husband. In terms of her evidence I observed how she struggled to listen carefully and give her carefully worded answers. At some stages she prevaricated in respect of

> some questions. At some stages she seemed somewhat evasive in answers. I have serious misgivings about the evidence she gave today. It appeared that there was some use of semantics in terms of answers to questions where they were put in their true literal sense or a literal sense without endeavouring to address the question.

30. The trial judge then went on to make reference to:

- the manner in which the wife had financed the litigation;
- that the wife had contact with the leader of the **Exclusive Brethren** on 24 January 2007;
- that there was an absence of a photograph of the father in the children's home; and
- that the father had not been informed of the birth of a grandchild in January 2007.

31. There was little if any discussion in the trial judge's reasons for judgment about the mother's failure to encourage the children to spend time with their father. However that was not surprising seeing that it was not really a matter in contention.

32. It seems to us that there is substance in the submissions put on behalf of the mother that the trial judge made reference to matters which were not material to the issue whether or not she had contravened the order without reasonable excuse. It is hard to see how *ex post facto* events such as the visit by the leader of the **Exclusive Brethren** on 24 January 2007 or the failure to inform the father on 19 January 2007 of the birth of another grandchild could bear on the issue as to whether or not the orders had been contravened on 14 January 2007. Similarly the absence of a photograph of the father, in the home in circumstances where the family felt betrayed by his conduct in leaving the marriage and the faith in which they had been raised, was not all that surprising and appears to be an irrelevant consideration as to whether or not the mother had met her obligations under the orders to ensure, so far as she could reasonably be expected to, that the orders were complied with.

33. In the course of his reasons for judgment in the principal proceedings delivered in December 2006, the trial judge had cause to examine the teachings of the **Exclusive Brethren**. He noted the principle of separation from persons who were not members of the **Exclusive Brethren** fellowship and who therefore could not participate in the breaking of bread ceremony was a crucial feature of the **Exclusive Brethren**. Practising **Exclusive Brethren** are not able to, and do not, associate with non-**Exclusive Brethren** other than as may be required for work or for the provision of appropriate professional services. It was the belief of at least the children's maternal grandfather, "a very dour and determined man with fixed resolve and unbending views", that there was no benefit or value in a relationship between the father and the children. The only legitimate basis for a member of the **Exclusive Brethren** to have an ongoing contact with the father was to encourage him to repent.

34. The trial judge then went on to observe that until 2003 the father played a fundamental role in teaching the children the beliefs to which he now objects. The trial judge observed that the children were completely aligned with their mother's perspective and the major social and cultural inputs received by them throughout their lives continued to be in the context of the **Exclusive Brethren**.

35. Given some potentially mixed messages that arose out of the judgment delivered in December

2006, it may well have been open to the mother to rely on the defence outlined in s 70NAE(2)(a) that she did not, at the time of the contravention, understand the obligations imposed by the order. In the principal judgment at paragraph 240 the trial judge, when discussing the report of the Single Expert, said:

> In interviewing the mother, he said her beliefs are real and sincere. He questioned whether an order restraining her from not denigrating the children [sic] would be such that she would be able to comply with it. I disagree with him in that regard. I accept her evidence that she would comply with an order not to denigrate the father in front of the children. I agree with him, however, that she would not in any way encourage or support the time the children spent with their father.

36. He then said:

> 246. He was asked to comment on the remarks made by Ashe J in *Plows & Plows (1979) FLC 97-12* [sic] where His Honour says at page 78, 801:

"It is the very strength and sincerity of her beliefs which cast doubt on her ability to carry out a course of conduct which she would clearly consider to be deeply wrong. She would no doubt try to accept the Court's directions. But it would be impossible for a woman as plainly sincere as she seems to be not to betray her own feelings when she had day to day care and control of the children. Indeed it would be casting an almost intolerable burden upon her. Her whole life revolves around her Church and its members. One could hardly forbid her to have members of the Church visit her when she had the children; or never to discuss Church or religious affairs with other people in the children's presence. By her own choice the only people she associates with are members of her Church; and it would be extraordinary if those members, holding so strongly to their beliefs which to them are the most vital aspects of their life (and I do not denigrate them for it), would not in the presence of the children betray their sorrow and concern that the children cannot walk in their ways".

> 247. This was asked in relation to the question of whether the mother would find facilitating contact between the father and children intolerable and the need to find a dimension in her religion to allow her to autonomously practice her beliefs whilst also allowing the father to have some involvement in his children's lives. Mr Cunningham expressed a hope that this could occur. I accept that the mother would do her best to comply with orders of this Court, but that would need to be considered in the context of the children remaining in a community where they would likely be influenced against spending time with their father. The impact upon the mother in this case of the children spending time with the father would be as was described above in *Plows*.

37. Then:

> 289. In terms of the suggestion that the Court make an order that the mother positively encourage the time the children spend with their father, if that is the order that the court makes, I note that this would set

> the mother up to breach the orders, bearing in mind her strong convictions expressed in the evidence she has given.
> ...
> 297. The impact on that exclusive approach on these children is reflected in their ability to continue a strong relationship with their father and other important people in his life such as the father's new partner and their paternal grandmother. I do not use nor adopt the terms, intolerant, elitist or arrogant. What I do find is that the mother, and those who are supporting her, lack insight as to the needs of these three children in having a relationship with their father. I find that the mother, her family and her community have actively discouraged the children from maintaining a relationship with the father. I find that if orders are made that it is likely that the mother and her family will cease to actively discourage the children from spending time with the father, but will not promote such time. The approach by the mother, the family and the **Exclusive Brethren** community to the time the children spend with the father was as described in the father's material in support of his contravention application, which evidence of the father I accept. I have taken all of these findings into account in determining what is in the best interests of these children.
> ...
> 300. I find that the mother and her family will not encourage the children to spend any time with or communicate with the father. I accept her evidence that she will comply with orders made by this Court and that she accepts that, notwithstanding her religious beliefs, she understands that she is bound by civil law, and will obey civil law.
> ...
> 346. The mother stated that she could not encourage the children to maintain a close relationship with the father, as this was contrary to her beliefs. She conceded, however, that if a court order was made for the children to spend time with the father, she would respect it and encourage the children to go in so far as she was able, but noted that she would not discourage the children if they chose not to go. I also note the mother's evidence that she has told the children that their father loves them and that she has not demonised him to the children.
> ...
> 396. The mother gave evidence that she could not positively encourage the children to spend time with the father. I do not propose to make such an order. Instead, I will make an order that both parties be restrained from speaking negatively to the children about either parent.

38. As an addendum to his reasons for judgment after the trial judge had delivered them, his Honour addressed all those assembled to hear his reasons saying (inter alia):

> These orders are not an "invitation" or "a request". They are orders of the court exercising the laws of Australia. The orders are directed towards [Peter] and [Elspeth] and I expect them to be obeyed in substance and in spirit.

39. As we have already indicated a reading of the trial judge's reasons for judgment might well have left the mother wondering precisely what it was that was obliged of her to ensure the operation of the orders that the children spend time with their father. The reasons did not spell out, in the strong language used by the Full Court in *Stevenson and Hughes* (supra), the obligations on a reluctant parent to encourage the children to go, but the mother did not however rely upon any potential misunderstanding of her obligations as a defence to the charges that were brought.
40. Any potential misunderstanding as to the mother's obligations might have been remedied if the Family Court of Australia perhaps more effectively complied with its obligations under s 65DA of the Act which provides that when a court makes a parenting order it is the duty of the court to include in the order particulars of the obligations that the order creates, and the consequences that may follow if a person contravenes the order.
41. The current document routinely attached to parenting orders, and which was attached to the orders made by Benjamin J on 21 December 2007, under the heading **Your Legal Obligations,** states:

- You must do everything a parenting order says. This includes taking all reasonable steps to follow the order. There are agencies in the community that can help you and your family adjust to and comply with the order...

42. It may well be advisable that this *pro forma* be made more explicit to encompass the sentiments expressed in the judgments in *Stevenson and Hughes* (supra) as set out above.
43. All that having been said, it seems to us in the circumstances that in the contravention proceedings, there really was no issue before the trial judge about whether or not there had been a contravention. There was no serious attempt to raise a defence of reasonable excuse beyond simply relying upon the children's expressed wishes.
44. Even though it is clear that the trial judge took into account a number of apparently irrelevant considerations, it seems clear to us on the material that the mother's contravention was clearly proved and no reasonable excuse that could be relied upon in the circumstances was proffered. Accordingly the appeal, in so far as it relates to the findings against the mother must fail.

PENALTY

45. The mother's appeal, in so far as it deals with the issues of penalty, raises a number of matters for consideration. As this was the first time it was alleged that the mother had been in contravention of the orders, the Court was obliged to determine whether to approach the contravention via subdivision E (s 70NEA - s 70NEG) or subdivision F (s70NFA - s70NFJ) of Division 13A of Part VII of the Act.
46. In order to take the matter away from subdivision E the Court needed to be satisfied that the mother had behaved in a way that showed a serious disregard for her obligations under the primary order. The legislation does not spell out what considerations might move the Court to find such circumstances.
47. The matter is further confused by the provisions of s 70NAF which provide that the standard of proof in proceedings under the relevant division is proof on the balance of probabilities but then goes on to provide that an order can only be made for community service, a fine or imprisonment if the Court is satisfied beyond reasonable doubt that the grounds for making the order exist.

48. The section is both confusing and ambiguous and raises issues of interpretation which will exercise this court on another occasion. However in this matter these considerations are not relevant because for whatever reason the trial judge indicated from the beginning of his judgment that his findings and determinations were made beyond reasonable doubt.

WAS THIS A CASE INVOLVING "A SERIOUS DISREGARD"?

49. It was submitted on behalf of the wife that that latter finding was in error in that:

- there was insufficient evidence to support the finding;
- the evidence did not support the finding;
- weight or excessive weight was given to irrelevant and or prejudicial evidence; and
- there were insufficient reasons given for the finding made.

50. In the course of his reasons for judgment the trial judge said as follows:

> 31. Given what I have said it probably comes as no surprise I am not satisfied that there was a reasonable excuse for contravention established. I am satisfied that this should be dealt with under section 70NFA which is a contravention without reasonable excuse being a more serious contravention.

No further explanation as to what satisfied the trial judge that it was appropriate to deal with the contravention under subdivision F rather that subdivision E appears from a careful reading of his Honour's reasons for judgment. Given the consequences that potentially flow from treating the matter under subdivision F rather than subdivision E, we think it was incumbent upon the trial judge to spell out clearly what considerations enlivened the extra powers available under that section.
51. The trial judge was dealing with a very difficult problem. The wife and the children were being required, by operation of his Honour's orders, to act contrary to the beliefs that had been inculcated into them for the entirety of their lives. It is hardly surprising that there would be difficulties in ensuring that orders that ran contrary to those beliefs were smoothly implemented.
52. The trial judge had provided a warning in his post-judgment remarks on 21 December 2006 to all those gathered to hear his reasons for judgment saying:

> ...If there is a breach of an order it can precipitate a change in the person with whom the children live. Courts exercising jurisdiction under the *Family Law Act* have the power to imprison people who contravene Court orders. If a person abuses a child, whether physically or psychologically, it seems to me that prison is a proper consideration particularly when it also involves contravention of a court order to prevent such misbehaviour. Similarly, the Court has power to impose hefty fines to create economic burdens on people who breach orders.

53. Even though the various degrees of culpability for contravening children's orders involving the concept of "serious disregard" were first introduced into the Act in 2000, there is as yet surprisingly little jurisprudence on what might be seen as constituting such circumstances.

54. The Further Revised Explanatory Memorandum that accompanied the *Family Law Amendment Bill* 2000 (Cth) stated:

> 43 ...What amounts to a serious disregard will depend on the circumstances of the case and the terms of the parenting order but, by way of example, could include the kidnapping of a child or harassment despite repeated warnings.

55. The Revised Explanatory Memorandum that accompanied the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005 (Cth) stated:

> 307. What amounts to a serious disregard will depend on the circumstances of the case but, by way of example, could include the removal of a child to another place despite orders of the court or harassment despite repeated warnings and the terms of the parenting order.

56. In *C & J* [2001] FamCA 1486 (unreported) Forbes JR said:

> 5. ...Serious disregard is, as [Counsel for the wife] says, something less than a contumacious breach and something more than the simple finding of a contravention. In other words, it is a description of a degree of intent that lies somewhere between those two matters. I accept his submissions on that. For a contumacious breach it is necessary to show a direct wilfulness to contravene the order. A contumacious breach is a subject well known in the history of contempt. I have no doubt that that is a term that would have been used if it was intended that the disregard be pitched at such a level.
> 6. But if it is not that, then of course it must be something more than simply the necessary intention that comes from the contravention, as to which we found. It must be something more than something which has not arisen casually, or unintentionally, or inadvertently; essentially a factor which would persuade us that there was the contravention in the first instance."

57. In *P & P* [2001] FamCA 127 Dawe J found that the wife had on various occasions from March to July 2000 contravened a contact order without reasonable excuse. Her Honour said:

> 23. The question of whether there has been a serious disregard, in my mind, has to be seen as a question of proportion and a question of degree. This is not a case where there has been one minor occurrence or misunderstanding over a brief or short time. This is not a case where allegations arose concerning sexual abuse of the children and the wife immediately instituted proceedings to suspend, vary or discharge the contact order. This is a case where no proceedings had been issued up until the time of the hearing before me and indeed until I delivered my

> judgment on 19 December 2000. (I am told from the bar table that the proceedings have now been issued but they have not yet reached the Court file).
> 24. Therefore, I find that this is a case where the wife has behaved in a way which shows a serious disregard for the primary Court orders of Burr J.

58. In *C & R* [2003] FamCA 682 Hannon J dealt with a contravention where the mother had not acted promptly in making arrangements with a contact centre and this delayed the implementation of contact orders for about three weeks. His Honour said:

> 21. Section 70NF does not define "serious disregard" but in his second reading speech on 22 September 1999 the Attorney-General, said that the third stage is applicable to cases where there has been a second or subsequent contravention of the Order or where the Court regards the first contravention as being particularly serious. Further, the Explanatory Memorandum for the Family Law Amendment Act 143 of 2000 states that *"what amounts to a serious disregard within the meaning of the Section 70NF(2) will depend on the circumstances of the case but by way of example could include the kidnapping of a child or harassment despite repeated warnings and the terms of the parenting Order. In such cases the Court will deal with the matter under stage 3 of the parenting compliance regime which requires the Court to take actions ranging from community service Orders to fines and imprisonment"*.
> 22. The Court is entitled to have regard to the Explanatory Memorandum in interpreting the Act and it could not be said that the contravention proved against the mother in the present case comes within the meaning of "serious disregard" according to the magnitude of the examples contained in that memorandum.
> 23. This is reflected in the relative orders that may be made for a first stage contravention and a second stage contravention. The Orders provided for in Section 70NG(1) are of a remedial nature whereas those provided for a third stage contravention in Section 70NJ(3) are of a punitive nature. It seems to me that when the Court is considering whether Section 70NF(2) is applicable, namely, that it is satisfied that the person who contravened the primary order has behaved in a way that showed a serious disregard for his or her obligations under that order the Court should have regard to the penalties.
> 24. I do not regard the mother's contravention in the present case as coming within the meaning of "serious disregard" within the meaning of the section, particularly as I did not disregard her evidence and that of Ms [J] of the attempts that she made to contact [the director of the contact centre]"

59. In *R & A* [2001] FamCA 619 Ramsden JR discussed when a case could fall within the stricter regime of sanctions saying:

40. Clearly, it is not possible to prescribe just what behaviour will or will not be capable of being found indicative of a serious disregard on the part of the contravener for his or her obligations under the relevant order. Some assistance, however, may be derived form the judgment of Olsson J. in the case of KORBER and ANOTHER v BAILEY [1994] 63 SASR 426.
41. In that matter the learned judge in the course of delivering judgment in an appeal against a magistrate's failure to revoke two suspended sentences on applications to enforce breached bonds, and against the suspension of the sentence the magistrate then imposed in respect of the breaching offence, said as follows, at page 430:

> "There will be cases, perhaps many cases, in which successive suspensions are both justified and desirable. However, as a matter of logic, an offender who has not profited from earlier leniency necessarily bears a heavy onus of demonstrating justification of successive suspensions. The task of doing so is rendered even more difficult when later offending... follows a situation in which pre-existing bonds supporting earlier suspensions have plainly been breached. It must be a rare case indeed, in which a further suspension can be justified, because the breaches will normally indicate A SERIOUS DISREGARD by an offender of ANY INTENTION TO HONOUR OBLIGATIONS which necessarily form the condition for leniency" (emphasis added)."

42. While acknowledging that section 70NF(2) only applies in respect of a finding of *"serious disregard"* where there has been no previous contravention of the primary order, I consider that His Honour's remarks are instructive and serve to illustrate the degree of wilfulness which would need to be found before the court should have recourse to its powers of *"last resort"* under the provisions of section 70NJ in respect of a "first offence".

60. In *NP & AP (No 2)* [2006] FamCA 869 Mullane J determined that 26 proved contraventions of contact orders demonstrated a serious disregard of the primary caregiver's obligations saying:

> 10. The finding that I make is that there has been no prior order imposing a sanction or action in respect of a contravention and there has been no adjournment of the type referred to, but your conduct in relation each of the 26 contraventions showed a serious disregard of your obligations under the primary order.
> 11. Why do I say it is a serious disregard? Well, there are two reasons for that. One is that I find that you had no intention of supporting the orders, but you were intent on finding an excuse not to implement them. So that all of the contraventions were intentional and, indeed, from the very first occasion of contact after the consent order of 23 October 2005 you contravened the order and did that on 25 occasions. Then when there were already contravention proceedings commenced against you, you consented to the orders of 4 April, but continued your obsessive conduct seeking excuses to refuse contact, at an even more frenzied

> pace, and contravened the order only 2 weeks later.
> 12. The second reason I regard it as a serious disregard is because these orders were made for the benefit of a two year old child and your conduct has been seriously prejudicial to him. That child is powerless in this process. You disregarded that and took control of the situation for your own means, for your purposes in terms of your conflict with the father and your hostility towards him. And in the process of desperately trying to find an excuse to frustrate the contact, and indeed, you tried to rely on numerous excuses, you did various damaging things to this child.

61. The theme that emerges from an examination of several of decisions by Federal Magistrates is that "serious disregard" tends to be found in cases of deliberate, pre-meditated non-compliance with the orders; and continued and protracted breach.
62. In *B & W (No 1)* [2003] FMCAfam 101 (unreported) Ryan FM considered whether a mother showed serious disregard for her obligations when she contravened a residence order by not returning her child. Ryan FM said:

> 49. ...The following factors contribute to my comfortable satisfaction that this matter should be dealt with as a stage 3 contravention. I am satisfied that the respondent deliberately intended prior to the end of contact that she would not return the children on 11 January 2003 and would keep them until 13 January 2003. Consequently her actions were considered and not impulsive. On 12 January 2003 when the applicant attended her home she had the opportunity to return the children to him without any difficulty to her. When she called the children into the front yard she involved them as direct observers of her refusal to return them to their father. Next, the respondent invited JM's assistance to maintain her refusal to comply with the orders on 12 January 2003 with reckless disregard to the likelihood that he would use considerable physical force to the applicant in the presence of the children. She knew some force was likely. At the end of the assault and before she went to Queensland she had the opportunity, absent JM's overt and direct influence, to return the children to the applicant or his nominee and did not do so. Finally, the respondent kept the children until 1 March 2003. The continuing nature of the breach is a serious issue.
> 50. For all of these reasons and in spite of the submissions to the contrary made by [the mother's solicitor], I am satisfied that the respondent has behaved in a way which shows a serious disregard for her obligations under the primary order. Because of the objective seriousness of the breach, I am satisfied that this matter cannot be dealt with appropriately under subdivision B...

63. In *H & V* [2005] FMCAfam 519 Brown FM dealt with a father who contravened a residence order when he did not return the children to their mother. Brown FM accepted the submission that the father had shown serious disregard for his obligations under the residence order in light of:

> 64. ...the length of time the children were out of [the mother's] care

> [almost 7 weeks]; the fact that they were recovered only after the intervention of the police and a recovery order had been made; the fact that [the father] took the children interstate far away from where they habitually lived; and the fact that [the father] was present when the order contravened was made and is well conversant with court procedure and the importance of adherence to orders of the court.

64. In *Brown & Brown* [2005] FMCAfam 567 Connolly FM dealt with a mother who contravened orders by failing to give contact on two occasions. His Honour viewed the circumstances of the breach and the mother's conduct at the attempted changeover as constituting a serious disregard of her obligations saying:

> 18. ...The respondent's behaviour in failing to facilitate the contact between the husband and the children on 16 July 2005 displayed an absolute disregard of the relationship that these children have with their father and her oral evidence given yesterday indicated that she still has that disregard. If the wife's behaviour were to continue in this vein then there is no doubt that the children's relationship with their father will be destroyed"

65. In *Davis & Davis* [2006] FMCAfam 49 Riethmuller FM was satisfied that a mother behaved in a way that showed a serious disregard of her obligations under an order for contact. His Honour said:

> 21. In this matter, the mother has not previously been found to have contravened a court order. However, I am satisfied that in this case the mother has behaved in a way that showed a serious disregard of her obligations under the primary order. I come to this conclusion as a result of the nature of the circumstances attendant upon a number of the contraventions that were the subject of the proceedings, in particular:

(a) her conduct in attending upon a shop...rather than attending for contact handover;

(b) her comments during the course of the hearing that she 'refuses to be a sheep following a court order';

(c) her continued resistance of and attempts to ensure that the father did not obtain a seven-day period of contact as specifically ordered by Brown J: see *[D & D]* [2005] FamCA 141;

(d) her lack of explanation with respect to count 8, despite the fact that she was clearly available later that day; and

(e) her lack of any explanation (that has any degree of credibility about it) for the events that occurred with respect to count 1, particularly given that count 1 related to the very first contact period that was ordered by her Honour.

(f) I also have regard to her demeanour and conduct during the course of the proceedings.

66. What seems to be the common thread is 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.

67. In this case, even though the contravention occurred only three weeks after the delivery of the reasons for judgment, it seems to us that on the hearing of a complaint alleging the first breach of the orders, when it became apparent that the orders were not going to be smoothly brought into effect, a rethink of some of the mechanics of the orders was appropriate. It was also appropriate to seek assurances that the orders would be obeyed by the principal player, namely the mother and to seek to remove possible impediments to the orders being complied with such as limiting the persons who might be present at changeover.

68. Eventually much of that course was adopted in that the mechanics of the orders were revamped so that changeover was ordered to take place away from the mother's home and in the absence of any of the male members of the **Exclusive Brethren**. Perhaps a clearer reference to the passages we have already set out above from *Stevenson and Hughes* (supra) could have been given to the mother and inquiries made as to whether she would then be prepared to enter into a bond to ensure compliance with the orders.

69. The imposition of the term of imprisonment is really a course of last resort. It is clear that provisions of Division 13A are primarily aimed at seeking compliance with court orders. It seems appropriate that before a term of imprisonment is imposed the Court should seriously consider whether there are other options available. Indeed the legislation itself provides in s 70NFG(2) that:

> A court must not sentence a person to imprisonment...unless the court is satisfied that, in all the circumstances of the case, it would not be appropriate for the court to deal with a contravention under any of the other paragraphs of sub-section 70NFB(2).

CONCLUSION

70. We conclude that it is appropriate that the appeal be allowed in so far as it relates to the penalty imposed upon the mother. We are not satisfied that the trial judge appropriately explained why it was that he considered the contravention to be of such a serious nature that it needed to be dealt with under subdivision F of Division 13A of Part VII of the Act. Nor are we satisfied, given the difficulties that the trial judge had envisaged in his reasons for the principal judgment, that the first contravention of the orders constituted by the lack of encouragement provided by the mother to the children who were objecting to going with their father, was such that it did show a serious disregard to the mother's obligations pursuant to the orders.

71. In all of the circumstances it is appropriate that this contravention be dealt with pursuant to the provisions of subdivision E. The Court is satisfied that the mother committed a contravention of the primary order in that the children did not spend time with their father from 14 January 2007 and that the mother did not have a reasonable excuse for the contravention. We are satisfied that no court had previously made an order imposing a sanction or taking an action in respect of the contravention by the mother of the primary order.

72. At the hearing of the appeal Mr Ackman QC indicated that he wished to lead further evidence on the question of penalty and of any costs that ought to flow as a result of the outcome of the appeal. We think it is appropriate that he be given that opportunity and would make directions that within 14 days of the delivery of these reasons for judgment the further evidence sought to be relied upon and any submissions in relation to the appropriate penalty should be made.

APPEAL SA22 OF 2007 BY MARK

73. In his orders of 20 February 2007 the trial judge determined that not only had the mother contravened the order of 21 December 2006 but that the parties' 22 year old son Mark had aided and abetted the contravention of the said order.
74. The trial judge went on to order that each of the respondents to the application (the mother, Mark and John) were jointly and severally liable to pay all of the costs of the applicant and the Independent Children's Lawyer in respect of the contravention proceedings as agreed or as determined by the Rules of Court which costs were to be determined on an indemnity basis.
75. His Honour further went on to order that Mark be sentenced to imprisonment for a period of four months suspended upon terms that he shall not be present at any changeover of the time that the children spend with the father for a period of twelve months from 20 February 2007.
76. The father had given evidence in his affidavit that after the children had told him they were not coming with him Mark had come to the door. When he asked Mark for help in bringing the children to the car Mark responded by saying "If you can't then how can I?" The father asserted that Mark was arrogant and scornful of him and said "What are you going to do now? Would you force them to come with you?" He further deposed that when he asked for an opportunity to talk with the children Mark moved away and before shutting the door said that if the father touched the door handle "You will suffer the consequences".
77. The father further deposed that he left the home after his first attempts to persuade the children to come with him at about 10.00am and returned at around 11.00am. He said that after knocking on the door Mark came to the door and asked for details about the father's own church program.
78. In cross-examination the following evidence was given:

> MR MURRAY [for the respondents]: At one point did you ask [Mark] whether he could help by bringing the children out?---That's right because at prior times he had been quite helpful in the two times when his Honour had suggested that – between the October and November court case where he had to give those affidavits. I understood [Mark] ---
> I want to put to you that at the stage he said he had done all he could or something like that?---When [Mark] came out I addressed him and I said, "G'day mate, how are you," he asked me, "What is this mate business," that's just a father son friendship we had had, I didn't realise that I was being offensive. I wasn't trying to be offensive. I asked him if he could help because I knew he had helped twice before and he confirmed this to me in conversation with him prior to this day and that that time he said, "Well, if you can't how can I," which was a change of attitude which surprised me.
> What I'm putting to you is that he had also said that he had done all he could, he had tried all he could to get you to go?---That's not what he said at that time. What he said at that time---
> Did he say that at any time during those two hours?---I don't recall it, I don't think he did. At that time he said "If you can't how can I." (transcript, 19 February 2007 at pages 55-56)

79. It was Mark's evidence that on the morning of 14 January 2007 he had a brief conversation with J and C who expressed to him a concern that if they went with their father they would miss out on other church meetings held throughout the day. He told them that they were allowed to go with their

father and that, if they wanted there was no reason why they could not ask him to drop them off at the church meeting. He further deposed that he expected the children to go and was surprised when they did not.

80. Eventually he went to the front door where his father asked him if he could help the situation by bringing the children outside and that he had told his father that he had done his best. He said that there had been further conversation with his father in which he asked him whether he could see that the children did not want to go. The father replied by saying “it was too bad because there was a court order in place”.

81. In cross-examination Mark said that he told the children they were allowed to go but did no more. He decided to try to keep out of it as much as he could. He acknowledged that when his father said to him words to effect of “You’re kidding. You’re not above the law” he responded by saying “Which law? God’s law?” He said he was surprised that the father heard the comment and that the children would not have heard it. He acknowledged that he asked his father whether he was going to force the children to come with him.

82. In his reasons for judgment the trial judge indicated that he accepted the father’s evidence in relation to the proceedings generally. He said of Mark:

> 28. [Mark] gave evidence and he was also careful in giving his evidence. I have great sympathy for a person such as him who has to give evidence in a case in fights between parents [sic]. It is an impossible situation for him to find himself and he is someone who struggles, with how he has to deal with this.
> 29. I find that prior to 14 January 2007 [Mark] had at some levels provided assistance for these children to spend some time with their father. On 14 January 2007, for whatever reason, he fell in with the approach of [John]. He used expressions which I find took place in the presence of the children, "Which law? God's law,". The implication was that there was a higher authority and perhaps an authority which would avoid the obligation of the wife and those around her to ensure that these children spent time with their father. The question, "Are you going to force them," could only cause fear in these children.
> 30. Where there is a conflict between the evidence of the father and the witnesses and the respondents, I accept the father's evidence.

83. His Honour noted that the presence of both John and Mark at the time of changeover was not necessary and said:

> 25. ...The respondents have taken steps to prevent [the children having a relationship with their father] and prevent the children spending time with the husband...

His Honour did not explain what those steps were.

84. It was submitted on behalf of Mark that in order to establish that he has aided or abetted the mother in her contravention of an order it is necessary for the trial judge to have been satisfied of the following:

- that the mother contravened the order;
- that the appellant was present when she contravened the order;
- that the appellant knew all of the essential facts which must be established in order to show that the mother contravened the order;
- that with that knowledge, he intentionally assisted or encouraged the mother in her contravention of the order; and that
- in the case of abetting, the mother was, in fact, encouraged by the appellant's conduct.

In support of those propositions Mark's counsel referred to *Giorgianni v R* (1985) 156 CLR 413; (1985) 58 ALR 641 and *Stokes v Difford v R* (1990) 51 A Crim R 25 at 37-38.
85. The father's counsel did not seek to submit the law was to the contrary and submitted that the evidence disclosed that Mark:

- was aware of the order;
- made no reasonable attempt to assist or encourage compliance with the order;
- acted without reasonable excuse in non-compliance with the order;
- on the evidence knew that the principal was obliged by the order; and
- acted so as to encourage and/or assist the principal in the non-compliance of the order.

86. There was nothing in the orders of 21 December 2006 that placed any onus at all upon Mark to assist or encourage compliance with the order. He was not bound by the order although he was required by operation of s 70NAC, as was any other person, not to intentionally prevent compliance with the order by the person who was bound by it, namely the mother, nor aid or abet a contravention of the order by the person who was bound by it, namely the mother.
87. The conduct of the mother in contravening the order was her failure to encourage the children to attend with their father as was required. There were no findings by the trial judge that Mark in any way aided or abetted the mother in her failure to encourage the children. He was entitled to be in his own home albeit that it was unusual for him to be there at 10 o'clock on a Sunday morning. He was entitled, as the orders then stood, to be an observer at the changeover of the children. It is quite understandable that he was an interested observer. His mother and siblings were partaking in an exercise that they found very stressful. It was not at all unreasonable for him to be present as an interested observer to offer what comfort or assistance might be appropriate.
88. Absent any findings by the trial judge of conduct that could possibly amount to aiding or abetting the mother in her contravention of the orders, the finding that Mark had committed an offence is not sustainable. The orders made by the trial judge that affect Mark ought be set aside.
89. The general principle of the criminal law is that a person is liable as an accessory if the principal offence was committed and the person, knowing the essential circumstances of that offence, intentionally assisted or encouraged the commission of that offence (*Halsbury's Laws of Australia* [130-7245]).
90. The offence the mother committed was constituted by her failure to take reasonable steps to encourage the children to spend time with their father for the week commencing 14 January 2007. There was no evidence that would have enabled the trial judge to conclude either on the balance of probabilities, or if necessary beyond reasonable doubt, that Mark assisted or encouraged the mother not to take those steps. It was not to the point that he was sympathetic to the view that the children

should spend no time with their father. There needed to be some acceptable evidence that he took some overt action to assist or encourage the mother in committing her offence before he could be found responsible for aiding or abetting her in contravening the orders of 21 December 2006. There was no such evidence.
91. As will be discussed hereunder, similar observations apply to the role of John.

APPEAL SA23 OF 2007 BY JOHN

92. The father's evidence concerning John was that after he had asked Mark to assist him by bringing the children to the car, John came to the door, stood in the doorway with his arms folded saying:

> We have facilitated the court order – there are the bags. There is the communication book. It is up to the children.

John when asked to encourage the children to come with the father refused.
93. When the mother came to the door carrying a photo of her late mother saying "She suffered, I've suffered, now you're making the children suffer", John intervened by saying "[Elspeth] is crying. The children are crying".
94. John gave evidence of the events of the morning of 14 January 2007. His evidence in chief was basically that he was an observer rather than a participant. At one point in the proceedings he said that when the father started shouting that he had a right to collect his children and he could force them to go and he would force them to go, he said to the father that he could not force them.
95. He agreed in cross-examination that it would be a good thing if the children spent time with their father and encouraged him to repent. He disagreed that if the child J wanted to have contact with his father he would be spoken to in the sense of attempting to correct the child's view through teachings of the **Exclusive Brethren**.
96. He acknowledged that he could not encourage the children to spend time with their father but he would facilitate it.
97. He suggested that the reason that he was at the mother's home at 10 o'clock on 14 January 2007 was to be in his own wife's company. She was expecting a child in the next few days and it was appropriate for her to spend time at her mother's home. Otherwise he gave as the main reason "because I know the aggressive nature of [Peter]".
98. He acknowledged that he had stood in the doorway with his arms folded and that he had said to J before 10 o'clock that he was welcome to go with his father and no-one would stop him.
99. He did not know if his presence near the front door with his arms folded might have been an indication to the children that he was not supportive of them going with their father.
100. The trial judge said of John that his presence at the time of changeover was not necessary. The trial judge did not accept John's evidence explaining his reason for being at the home at the time. The trial judge then went on to say:

> 24. [John] gave evidence in accordance with his affidavit and he was cross-examined in respect of some things that his father-in-law had said where, in essence, he agreed, and I quote from the affidavit of [Mr R. C.] filed 20 March 2006 where he said in paragraph 15(b), I refer to paragraph 46:

"I agree that a child under the age of 20 years would not normally be 'withdrawn from' because that child sought some contact with an ex-communicated parent; however, any such child would be spoken to in a sense of attempting to correct through teaching the views of that child. Any such child would not be encouraged to have a relationship with that parent. If any such child was not responsive to such teaching and continued to want to pursue a personal relationship with the said parent then the child would be in serious conflict with **the brethren** [sic] faith and the community would have to determine how to deal with that."

101. It was submitted, and we think correctly, that the trial judge fell into error when he said that John had agreed with the sentiments in the paragraph cited. As the transcript discloses, John distanced himself from the proposition that the child would be spoken to in an attempt to correct his view.
102. His Honour then went on immediately after that paragraph to make the observation already referred to that the respondents collectively had taken steps to prevent the children's relationship with the father and to prevent the children spending time with the father. The trial judge commented that such behaviour was extraordinary and poor. His Honour did not however detail what were the steps that were taken by John to prevent the relationship between the father and the children on or about 14 January.
103. Rather extraordinarily the trial judge inferred that when John said to J that "[h]e was welcome to go with his father. No-one can stop him" what John really meant was that "You do not have to go" and "I do not want you to go". We find it difficult, even in the context of this case, to see how such an implication was reasonably open to the trial judge or to see what conduct of John's could be said to have aided or abetted the mother in her failing to encourage the children to spend time with the father.
104. As we have already indicated, there was no separate obligation imposed by order on John to encourage the children to spend time with their father. That obligation was the mother's. To find the contravention against John it must be shown not that he did not encourage the children but that he aided and (or "or") abetted the mother in her failure not to encourage the children to spend time with the father. The evidence fell far short of enabling such a finding either on the balance of probabilities or beyond reasonable doubt.
105. Similar considerations to those already expressed about Mark apply to John although his presence in the home is a little less comfortably explained. He was under no obligation by the orders to encourage the children to attend. He was obliged, as was Mark and all other persons, not to intentionally prevent compliance with the orders by the mother or aid or abet a contravention of the orders by the mother. Whilst his presence in the household may have been seen as an encouragement to the mother to remain strong in her own views, we were unable to see on any view of the evidence that it was reasonably open for the trial judge to determine that John had aided or abetted the mother in her breach of the orders. We are particularly concerned by the failure of the trial judge to have spelt out precisely what it was that would have amounted to such aiding and abetting.
106. In all of the circumstances the orders in so far as they relate to John cannot stand.

THE COSTS APPEAL

107. The order that the mother be responsible to pay all the costs of the Independent Children's Lawyer in respect of the contravention proceedings to be determined on an indemnity basis appear to be made under the provisions of s 70NFB which provides:

> (1). If this Subdivision applies, the court must, in relation to the person who committed the current contravention:

(a) make an order under paragraph 2(g), unless the court is satisfied that it would not be in the best interests of the child concerned to make that order.

...

(2) (g) to make an order that the person who committed the current contravention pay all of the costs of another party, or other parties, to the proceedings under this Division.

108. Two matters need to be noted. As we are no longer making an order under s 70NFB the order referred to above cannot stand. The equivalent provision under s 70NEB relating to costs is subsection 1(f) which provides that the court may make an order that the person who committed the current contravention pay some or all of the costs of another party, or other parties, to the proceedings under this Division.
109. Secondly, it is acknowledged by the Independent Children's Lawyer that the Independent Children's Lawyer was not a party to the contravention proceedings and that any costs order affecting the Independent Children's Lawyer would necessarily have had to be made under the general powers contained in s 117 of the Act. They are not confined to making a costs order against parties to the proceedings. Indeed, s 117(3) provides:

> To avoid doubt, in proceedings in which an independent children's lawyer for a child has been appointed, the court may make an order under subsection (2) as to costs or security for costs, whether by way of interlocutory order or otherwise, to the effect that each party to the proceedings bears, in such proportion as the court considers just, the costs of the independent children's lawyer in respect of the proceedings.

110. The Independent Children's Lawyer acknowledges that an appropriate order to be made in the circumstances is an order that the respondent pay the Independent Children's Lawyer's costs as agreed and in default of agreement as assessed in accordance with the Family Law Rules 2004.
111. In the circumstances we propose to allow the appeal and to set aside orders 1, 5, 6, 7, 8 and 9 and in lieu thereof make orders as follows:

> 1. That there is a determination that Elspeth has contravened an order of the court made 21 December 2006 in that the children did not spend time with their father on and after 14 January 2007 in accordance with the order 4(c) made that day.
> 2. That the mother pay the costs of the Independent Children's Lawyer in respect of the contravention proceedings as agreed or as assessed under the Family Law Rules 2004.
> 3. That within 14 days the mother file and serve any written submissions in relation to penalty and in relation to the costs of:
> i. the contravention proceedings; and
> ii. the appeal.
> 4. That within 14 days the appellants John and Mark each file and serve any written

submissions relating to the costs of:
i. the contravention proceedings; and
ii. the appeal.
5. That within 14 days of the receipt by him of any submissions referred to above the respondent father file and serve any submissions in response thereto.
6. That within 7 days of receipt of any submissions in response the mother and the appellants John and Mark each file any further submissions in reply.

I certify that the preceding one hundred and eleven (111) paragraphs are a true copy of the reasons for judgment of this Honourable Full Court

Associate:

Date: