

FEDERAL CIRCUIT COURT OF AUSTRALIA

WANDS & VINE

[2015] FCCA 221

Catchwords:

FAMILY LAW – Children – parenting orders – contravention of parenting orders – orders – where mother has previously contravened parenting orders – whether make up time should be allowed – whether injunction should be ordered against the mother in respect of the child's school.

Legislation:

Family Law Act 1975 (Cth), s.70NEC

Cases cited:

Vine & Wands [2013] FCCA 2284

Applicant:	MR WANDS
Respondent:	MS VINE
File Number:	SYC 638 of 2011
Judgment of:	Judge Scarlett
Hearing date:	3 February 2015
Date of Last Submission:	3 February 2015
Delivered at:	Sydney
Delivered on:	3 February 2015

REPRESENTATION

Solicitor for the Applicant: Mr Ulbrick
Solicitor for the Respondent: Ms Li
Solicitors for the Respondent: Bainbridge Legal

ORDERS

- (1) The Respondent Mother did on 24 May 2014 without reasonable excuse contravene Order (5)(e) made on 17 December 2013 in that she failed to allow the Father to spend time with the child [X].
- (2) In respect of the above contravention the Mother is required to enter into a bond under the provisions of section 70NEC of the *Family Law Act 1975* without surety or security for a period of eighteen (18) months on the condition that she abide by all current parenting Orders.
- (3) By way of make-up time the Applicant Father is to spend time with the child [X] at [N] in the State of New South Wales from immediately after school on Friday 6 March until 1:00pm on Sunday 8 March 2015 with the return of the child to the care of the Mother to be at McDonald's Family Restaurant at [N].
- (4) The Respondent Mother is to pay the Father's costs fixed in the sum of \$550.00 for which she is allowed three months to pay.

IT IS NOTED that publication of this judgment under the pseudonym *Wands & Vine* is approved pursuant to s.121(9)(g) of the *Family Law Act 1975* (Cth).

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYC 638 of 2011

MR WANDS

Applicant

And

MS VINE

Respondent

REASONS FOR JUDGMENT

Application

1. This is an application to deal with the Respondent Mother for contravention of a parenting order, which was one of a series of orders made on 17th December 2013 after a Defendant Hearing.
2. The order provided that the Father would spend time with the child [X] on the Father's birthday for a period of a number of hours on [date omitted] 2014. That time did not take place. The Mother, with the benefit of legal advice, has conceded that contravention and no reasonable excuse has been established, although I have heard submissions in mitigation from the Mother's solicitor.
3. Mr Ulbrick, solicitor who appears for the Father, has submitted a minute of order sought by the Father in respect of the contravention that has been established.
4. The orders that are sought can be summarised as follows:
 - a) That the Mother enter into a bond under the provisions of section 70NEC of the Family Law Act for a period of two years with a

surety or, in the alternative, that under the provisions of section 70NFC of the Act that she enter into a community service order.

- b) That the Mother pay the Applicant Father's costs of these proceedings.
 - c) That by way of make-up time the Father spend time with the child at [N] from after school on Friday 6th March until 1:00pm on Sunday 8th March.
 - d) That the Mother be restrained by injunction from signing any documents or taking any steps to enrol the child in any primary school except [C] School, which is the school he is currently attending; and
 - e) That leave be granted to serve a copy of these orders on the principal of [C] School.
5. The proceedings were commenced by the Father acting for himself. There were originally eight contraventions alleged. The Court was informed at the time that all eight of those contraventions were to be defended.
6. When the matter came before the Court for hearing today the situation had changed in that the Father had instructed Mr Ulbrick, solicitor, to appear for him. Mr Ulbrick is a solicitor who has a significant degree of experience in matters under the Family Law Act. Mr Ulbrick had very carefully and, I might say, helpfully prepared a case outline in which he set out the matters upon which the Father sought to proceed, a chronology and a brief rundown on the relevant law. What was a significant change is that notwithstanding the eight original counts in the original application the Father, with the advice of his solicitor, elected to proceed on only four of them.
7. Ms Li, solicitor, appeared for the Mother. She obtained instructions from the Mother to concede a contravention in respect of Order 5(e), which related to a claim that the Mother did not facilitate the Father's time with the child from 10:00am until 6:00pm on the Father's birthday being 24th May 2014.

8. The other matters remained in issue. Over the lunch adjournment the parties' solicitors were to have some discussion about the particular paragraphs of the Father's affidavit that were to be relied on, but when the matter came back to Court Mr Ulbrick told the Court that in the light of the Mother's admission of a contravention of the order relating to 24th May, which he correctly identified as being the most serious of the four counts, the Father elected not to press the other three.
9. That being the case the Court was in a position to proceed to make orders arising from that contravention. It was not sought to lead any evidence to show that the Mother had a reasonable excuse, although I did hear submissions which went significantly towards mitigation of the particular claim. Nevertheless, the fact is that this was a Court order made after a lengthy hearing, which should have been complied with.
10. The situation as far as the Mother was concerned, as Mr Ulbrick pointed out, was that the Mother had previously been found to have contravened parenting orders made by this Court and had previously been placed on a bond under the provisions of section 70NEC.
11. The orders of the Court made on 17th December 2013 did include orders in respect of allegations of contraventions. Two contraventions were established without reasonable excuse in respect of orders that had been made until further order during the earlier proceedings. One on 17th December 2012 and one on 8th June 2011. In respect of one contravention the Mother was ordered to attend a post-separation parenting course under the provisions of section 70NEB of the Family Law Act.
12. In respect of the other the Mother was required to enter into a bond under the provisions of section 70NEC of the Act without surety or security for a period of 12 months on the condition that she abide by all current parenting orders.
13. As that bond commenced on the date the orders were made, namely, 17th December 2013, it was still in force at the date of the contravention which is currently being dealt with.

14. Ms Li addressed the orders sought by the Father. She submitted that reimposition of a further bond would only invite further litigation by the Father, noting the degree of conflict between the parents over the years. She submitted that a community service order in the circumstances would not be appropriate.
15. She dealt with the question of costs. Mr Ulbrick for the Father seeks an order for costs in what he described as a nominal amount, namely, \$550.00.
16. Ms Li submitted that in the light of the fact that eight contraventions were originally alleged, but that eventually the Father only sought to press one of them, that this should have a significant effect on any costs order. Some of the counts, she submitted, related to claims that were frivolous. That, of course, may well be so, but the Father, once he had the benefit of legal advice, reduced the number of counts that he was pressing from eight down to four and it is fair to say that those four counts there were originally sought to be pressed this morning could not in any one case be described as frivolous.
17. The frivolous claims, if such they were, had been speedily discarded after the Father had obtained the advice and sensibly followed the advice of his solicitor. Ms Li submitted that, in any case, the parties should either pay their own costs or perhaps, in light of the fact that only one contravention had, in fact, been found, that the Father should pay the Mother's costs. I do not accept that submission.
18. The Father seeks an injunction restraining the Mother from signing any documents or taking any steps to enrol the child in any primary school except [C] School in the [N] area and sought leave to serve a copy of those orders on the principal of the primary school.
19. The fact situation is that the Mother has recently moved to [N] as a result of being permitted to relocate the child's residence to [N] after the period of time by the orders that had been made on 17th December 2013. The child [X], who was born on [omitted] 2009, is old enough to attend school and the Mother has enrolled him at [C] School.
20. Mr Ulbrick submitted that the Father was concerned that the Mother would act precipitately or irresponsibly or frivolously in withdrawing

the child from the school, having previously decided that she would enrol him in another primary school in the area and then changing her mind and enrolling him at [C]. He seeks an order for the duration of the child's primary education to restrain the mother from withdrawing the child from that school.

21. I have considered all of those matters. I indicated to the parties' solicitors that my initial view was that a community service order would be too draconian an order to impose, notwithstanding the circumstances and notwithstanding the fact that the Mother cannot claim the benefit of having no prior history of contravening the orders. I am still of the view that the circumstances do not warrant the imposition of a community service order.
22. I am of the view that this is a matter in which an order for costs is appropriate. One of the very reasons under section 117, subsection (2)(a) of the Family Law Act for imposing an order for costs is failure by a party to comply with a court order, and indeed, the various sections relating to contravention proceedings specifically envisage the sanction of a costs order. The amount of \$550.00 was, in my view, aptly described by Mr Ulbrick as a nominal amount.
23. Indeed, it is. An examination of the Court scale under Part 1 of the Rules would have allowed, on a party-and-party basis, an imposition of a costs order well in excess of \$2,500.00. In those circumstances, the amount of costs sought is nominal, and I have already decided that this is a matter that is appropriate for an order for costs. I accept the fact that the Mother has been a student and that has been reliant, for financial support, upon her partner.
24. I take into account, in the Mother's favour, the fact that she did concede the particular contravention. It is usually far more sensible to admit responsibility in respect of a count than proceed with an unsuccessful defence. Ms Li tells me that the Mother has been most concerned about these proceedings, as well she might be. The fact that the Court has previously found contraventions of interim orders made by this court is a matter of concern, and indeed, it is not uncommon, in my experience in the criminal law, where people have been found to have been in breach of good behaviour bonds for them to be immediately sent to prison.

25. In my view, there does need to be a sanction to mark the seriousness of this. It needs to be proportional to the circumstances. It needs to take into account the Mother's particular situation, and it does need to acknowledge her sensible approach to making the admission that she did.
26. I have given consideration to all of these matters, and I propose to make the following orders. Stand up, please, Ms Vine. I make the following orders.
27. Please note that I have not made the injunctive order sought in respect of the child's school. In my view, that order is outside the scope of the matters with which the court was required to deal. This was not a case where it was alleged that the Mother had contravened any order in respect of the child's education, and I did not consider that it was appropriate, in the circumstances, to impose an injunction as sought by the father.
28. The purpose of the orders that have been made today is to provide an appropriate response to the circumstances, including marking the Court's displeasure at the breach of the particular order, but it is not, in my view, appropriate to make a further parenting order unrelated to the substance of the application. I require a transcript of my reasons for this decision on a next-day basis.

I certify that the preceding twenty-eight (28) paragraphs are a true copy of the reasons for judgment of Judge Scarlett

Associate:

Date: 3 February 2015