



# Family Court of Australia

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## Peter & Elspeth (Contravention) [2007] FamCA 96 (20 February 2007)

Last Updated: 25 February 2007

**FAMILY COURT OF AUSTRALIA**

**PETER & ELSPETH (CONTRAVENTION)**

[\[2007\] FamCA 96](#)

FAMILY LAW – Contravention – Suspended sentence

<b>APPLICANT:</b>	PETER
<b>RESPONDENT:</b>	ELSPETH
<b>INDEPENDENT CHILDREN'S LAWYER:</b>	MR FITZGERALD and MR WATERHOUSE
<b>FILE NUMBER:</b>	HBF            150            of            2003
<b>DATE DELIVERED:</b>	20 February 2007
<b>PLACE DELIVERED:</b>	Launceston
<b>JUDGMENT OF:</b>	Benjamin J
<b>HEARING DATE:</b>	20 February 2007

## REPRESENTATION

COUNSEL FOR THE APPLICANT:

Mr McGuire

COUNSEL FOR THE RESPONDENT:

Mr Murray

## ORDERS

### IT IS NOTED

1. **THAT** there is a determination made 20 February 2007 that E [“the mother”] has contravened an order of this court made 21 December 2006 and further that Mr S and G 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 January 1994 and C born 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 in P 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 L, J and C, then L 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 L 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 severally liable for such costs and such costs are to be determined on an indemnity basis.

### **IT IS FURTHER ORDERED**

7. (a) **THAT** the mother, 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 the mother 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** Mr S, 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 Mr S 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** G, 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 G 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.

### **IT IS DIRECTED**

10. **THAT** a copy of the reasons for these orders be taken out and placed on the Court file.

### **IT IS CERTIFIED**

11. **THAT** pursuant to Rule 19.50 of the *Family Law Rules* 2004 it was reasonable to engage counsel to attend

FAMILY COURT OF AUSTRALIA AT LAUNCESTON

FILE NUMBER: HBF 150 of 2003

## PETER

Applicant

And

## ELSPETH

Respondent

## REASONS FOR JUDGMENT

1. These are proceedings brought by the father under division 13A of Part VII of the Family Law Act against his former wife Elspeth, his son-in-law Mr S and his adult son G.
2. The allegations are that the mother did on or about 14 January 2007 contravene order 4(c) made by this court on 21 December 2006 in that she failed to hand the children, J, born January 1994, and C, born December 1998, to the applicant. I might add at this stage, it was put to me as a particular that this was in that she did not reasonably attempt to comply with the order. It was specified as being a claim under section 70NAC(a)(ii).
3. In relation to each of the other respondents, they are not parties to the orders and that the allegation with regard to them is under section 70NAC(b)(ii) in that it is alleged that they aided and/or abetted a contravention of the order as set out by me above.
4. It is worthwhile the court reminding itself of the history of how the orders came into place. These orders were made by this court on 21 December 2006. A draft of the proposed orders was made available to counsel shortly before judgment was delivered and when judgment was delivered and orders made, an explanation was given which explanation is annexed to the reasons.
5. All three respondents were in court at the time the orders were made and explanation given. Part of the explanation says at paragraph 15:

*“15. I have all of you here, Ms M, Mr and Mrs C, W, M, T, G, ME, Mr A and Mr S to tell you that if you aid and abet a breach of these orders you may be liable to suffer the same consequences as if the father or the mother did it. If there is a breach of an order it can precipitate a change in the person with whom the children live. The courts exercising jurisdiction under the Family Law Act have power to imprison people who contravene court orders. If a person abuses a child either physically or psychologically, it seems to me that prison is a proper consideration, particularly when it 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. The laws regarding contravention of orders are tough. I have attached a copy of these comments to the judgment in this case so that any judicial officer, if it is not me, will understand who is here and the warnings I have given so that there will be no ability for any of you to say you did not know”.*

6. I informed everyone in court on that date that these are orders. They are not an invitation. They are not a request. They are orders of a court exercising the laws of Australia. I indicated that I

expected those orders to be obeyed in substance and in spirit. The evidence before me is that all of the respondents were present in court when those orders were made, and I am satisfied beyond reasonable doubt that they knew the nature and effect of those orders and they knew and were aware of the consequences if they breached those orders.

7. There was no issue as to personal service of the application and the affidavit. There is an issue as to what happened on 14 January 2007, not in terms of whether the children spent time with the applicant in accordance with the order, but there is an issue as to what the circumstances at such time did not happen.

8. I will be going through these reasons discussing the evidence, but so there can be no doubt, the findings of fact I am making are findings beyond reasonable doubt. Secondly, I make a finding that the primary order was made on 21 December 2006 which was after the commencement of division 13A of the Family Law Act. Secondly, for the reasons I will enunciate in a moment, the court is satisfied that the wife has contravened the orders as I have set out earlier. Thirdly, I find that the wife and the other respondents have not proved that they had reasonable excuse to contravene those orders.

9. Further, I find or the court is satisfied beyond reasonable doubt that the wife and the other respondents have behaved in a manner that has shown a serious disregard of her obligations under the primary orders. I find that both Mr S and G have aided and abetted in the contravention of those orders by the wife.

10. The applicant in these proceedings gave evidence in accordance with his two affidavits, filed 15 January 2007 and 7 February 2007. The father was cross-examined at some length and I am satisfied that his evidence was truthful and accurate and I accept his evidence in relation to these proceedings. He conceded appropriately where he had insufficient or incomplete recall and as always in evidence, it can never be perfect, but he is a witness, as I said, of truth. He attended at the home and endeavoured for some two hours to put in place the arrangements for the orders that I had made some two or three weeks beforehand. I indicated that I was satisfied after hearing his evidence, of a prima facie case against the wife and the second and third respondents.

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 facie 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.

12. The wife has spent funds in relation to these proceedings such as, as I understand it, she has needed to do three things. Firstly, to sell her previous home and purchase another home in which she raised some \$60,000, out of which I am able to infer she would have spent money on the sale and purchase and also on some renovations, although her evidence was that this was facilitated by her father.

13. She borrowed money from family and friends, talked about a loan of some \$50,000. After some difficult cross-examination it was finally established that this was a bank account in which members of the  **Exclusive Brethren** , including her family and people who were not members of her family, paid in money. As I said this was about \$50,000, and that is not an inconsiderable sum of money.

14. The wife said that she accepts the authority of the court but does so in circumstances that if it conflicts with her beliefs she will comply with God, what she regards as God's law rather than the

civil law.

15. The wife gave evidence that she had had contact with a person called BH (a leader of the

← **Exclusive Brethren** →) who visited Launceston on

24 January 2007, but she denies that she had any discussions with him in respect of these proceedings, in fact, denies she had discussions with anybody in relation to these orders. I do not accept her evidence in that regard.

16. She says that she was disappointed with the result. When courts impose decisions on people it is because they cannot find their own conclusions, and when courts impose decisions, it more often than not upsets both parties rather than simply one.

17. It was put to her that she was influenced by the male members of the ← **Exclusive Brethren** → and she said this was untrue.

18. At one stage during the evidence she was asked whether there was a photograph of the father in the children's home. This was met with some laughter. It struck me then how sad it was that this house was so poisonous of the father that the children could not even have a photograph of their father sitting in their home so they knew who he was.

19. That is in essence, the sense of this contravention. It is not that the wife did not do the mechanical things to send the children, these were done. There is no doubt that there was a suitcase and there was a pillow or two pillows and the children were asked to leave and asked to go. This needs to be put in a sense where they were told by Mr S "He [J] was welcome to go with his father. No-one can stop him." What does that mean? I find that it means that, "You do not have to go" and "I do not want you to go".

20. Another example of how difficult it is for these children to see their father was that the applicant became a grandfather on 19 January 2007. No-one thought to notify him. That is extraordinary.

21. The applicant, to his credit, was aware that the children would be going to church at 10 o'clock on 14 January 2007 and he endeavoured to make changes so that the children would not be put in a position where they had to make a choice between going to him and going to church. That invitation was not taken up.

22. Both Mr S and G were present at the time of changeover, and their presence was not necessary.

23. It was put that Mr S was there because his wife was pregnant and she needed his support. Yet his wife was brought to the home of the wife from her home, this can only lead to the conclusion that this was part of the pressure that was put on these children not to spend time with the husband and so that there would be overt expressions of compliance but no real compliance. Both G and Mr S ought to have been at church. They were not. They were there in the most extraordinary circumstances. Mr S said he was there because the father was aggressive, and yet throughout the trial there was no suggestion of that, no suggestion in his affidavits. I do not accept their evidence explaining their reasons.

24. Mr S 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 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**  faith and the community would have to determine how to deal with that.”

25. In the light of that approach, in the light of that evidence, the respondents cannot wash their hands and say, "Why don't these children go?" These children are entitled, as I have said before, to have a relationship with their father. The respondents have taken steps to prevent that relationship and prevent the children spending time with the husband, this behaviour is extraordinary and poor.

26. The evidence of Mr S was "careful". He prevaricated, he was evasive. There was no reason for him to be at the wife's home apart from encouraging these children not to visit with their father. I have already spoken about his discussion with J which his evidence was he raised, where he said, and I again quote, "He was welcome to go with his father. No-one can stop him," and I infer that the implication was that if he did not want to go they would be supported.

27. Constable F gave evidence, which was quite interesting particularly in relation to the children. These were not children who were crying or bitterly upset about seeing their father, these were children who were quite calm, gave no reason why they were not going to see him except they did not want to go. I infer from that evidence that these were not the views of these children but those who surrounded them, including the respondents.

28. G 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. 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 G 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 Mr S. 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.

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.

32. I find that there has been a contravention of orders of this court by the wife and that the second and third respondents aided and abetted in terms of the contravention. As a consequence submissions have been made to me in relation to the various matters that arise by virtue of that determination.

33. The first is in relation to make-up time between the children and their father. It is submitted that that make-up time ought to be from the Easter Sunday evening, which I understand is 8 April 2007, until the following week at the same time, on the submission of the father. The independent children's lawyer who only participated in that aspect of these proceedings joined in that application.

34. The wife made submissions that if I determined to make such an order it should finish on either Saturday night or Sunday morning so that the children could observe their religious beliefs on that day. I will make orders for make up time.

35. The second issue in respect of the parenting was the question of changeover. Clearly the current arrangement did not work. It was suggested that it take place at some neutral venue in D or at a contact changeover centre.

36. I suspect whatever arrangement I put in place will need to be available for a considerable period of time. I have concerns about the contact centre being used for that period of time.
37. I also have some confidence in terms of the ability of the children to cope. The evidence of Constable F earlier today as to their quiet demeanour when he spoke to them, notwithstanding the whirlwind of events that was going on in their vicinity, was such that I am confident that a contact centre would not be needed in this case, also, as I said, it is not a long-term approach.
38. I certainly would not use an organisation like McDonalds or a police station. I think that would certainly not be in the best interest of the children.
39. What I propose to do in relation to that is order that the wife deliver the children to the father's home and she can bring with her a female member of her family and not a male. I will make an order that she be restrained from bringing a male member of the family to such changeover.
40. It was also submitted that there should be some reportable counselling. I see no significant value in that. There are no proceedings now pending between the parties apart from the review of my decision. If that is overturned at some stage, then if there is another hearing there will have to be further reports gathered, but I see no point at this particular time.
41. I see some value in a parenting post-separation program for both parents, if for no other reason than so that the parties can try and put in place a changeover and "spend time with" regime which is gentle to these children and they can manage their own difficulties without imposing those on the children. I see no downside to the children as far as that is concerned. Those are the orders I will put in place in respect of that.
42. In terms of costs, clearly the parliament wanted a statement made with regard to contravention, and that is part of the state is that parties who contravene orders ought to pay the costs of the other party.
43. In this case the wife and the two respondents are people of very modest means, but there is no reason why they cannot bear costs of both the applicant and the independent children's lawyer, all of the costs of the applicant and the independent children's lawyer in accordance with the section, and I do not see any evidence before me that that would be contrary to the interests of the children. In fact, it may encourage compliance with orders in the future.
44. The final and perhaps most difficult aspect of this case is how I deal with the contraventions themselves. The orders available for me in that regard are set out in section 70NFD(2)(r)(a). I am empowered to make a community service order in respect of the wife, the wife and/or the second and third respondent. As I noted earlier, those arrangements are not in place between the Commonwealth and the states at the present time, however, it would not have been an order that I would have considered appropriate in this case bearing in mind the significance of the breach and the comments I made earlier in relation to that.
45. The second option available to me is to force the parties to enter into a bond in accordance with section 70NFE. It seems to me also that serves no significant purpose. I took some trouble last year to put in my reasons those comments at the end so that the parties would understand that these were orders and the impact of these orders upon the children. I made it absolutely clear, I think crystal clear is probably the easiest way to put it, as to what I meant at that time. I tried to use language that was plain and simple, and yet in the face of that the children did not spend time with their father as they ought to have. I do not consider that an option.
46. I do not consider changing of residence at this stage as an alternative, although that must be something which would be considered by the court if the matter comes back or whoever hears it comes back on a second time.
47. It is submitted to me this is not a matter for fine by counsel for the respondents. I agree with him but not for the reasons that he says. The maximum fine available is some 60 penalty units, and if I

am not mistaken a penalty unit is currently about \$110. So the maximum fine available to each of the parties is about \$6600. I do not consider that adequate, bearing in mind my earlier findings.

48. What happened in this case is that the court has said to these people, "Do not breach these orders," in circumstances where the finding was clear that the separation of these children from their father was at the higher end of emotional abuse. I made that absolutely clear, and yet notwithstanding that determination and explanation some two or three weeks later the order was contravened.

49. This case a term of imprisonment is entirely appropriate and I propose to sentence each of the respondents to four months imprisonment. The husband's counsel submitted that a suspended sentence would be appropriate. Having regard to a number of factors, the first of which is that neither of these people have been convicted of a criminal charge or a quasi criminal charge before, it is their first offence.

50. In respect of the second and third respondent they are both young men at the beginning of their lives. Mr S has three children, the youngest of whom was born, I think, his evidence was on 19 January. The wife is the mother of the children the subject of these proceedings. It seems to me that on this occasion that I ought to suspend those sentences but I will do so on terms, and those terms are that the wife comply with the orders, that the second and third respondent do not attend at either collection or return of the children with regard to the father. Those terms shall operate for a period of 12 months.

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

## **ANNEXURE TO REASONS**

From the Bible of *J N Darby*, Gospel of Mark, Chapter 12, Verse 17.

***“Pay what is Caesar’s to Caesar, and what is God’s to God.”***

1. I am a Judge appointed by the Australian Government under Chapter III of the *Constitution of Australia*. I am sworn to implement the civil laws of Australia, which, amongst other things, relates to the interaction between parents and their children.

2. Those laws are set out in the *Family Law Act* and my duty is to make certain that the best interests of C, J and L are met by seeing that they have the benefit of the involvement of both their mother and father in their lives and that they are protected from harm.

3. Children have a right to spend time and communicate with both of their parents. That law was reiterated in the Australian Parliament as recently as May this year.

4. In many ways these proceedings reflect a conflict between the principles of Church and the laws of Government.

5. My initial comments are directed the father and Ms M.

6. I will be making orders that all three children spend time with you, Mr E. This is not an opportunity for you to “show these children the other side of life”. It is not an opportunity for you to “release them from the clutches and

powers of **the Brethren**".

7. You no doubt had an epiphany in your life in or about 2003. Up to that time, you insisted that all eight of your children accept and live by the tenets of the **Exclusive Brethren**. This Court will make orders enabling the children to continue to have the benefit of a meaningful relationship with you, but will not allow that time to be used to meet your broader emotional or political objectives.

8. The orders I will make are intended to restrain you from taking the children to your church and from exposing them to television, radio, computers and other things and events which are in breach of the very tenets that you imposed upon them up to 2003.

9. To you, Mrs T, to your children ME, M, W, T and G, to your sons-in-law, Mr A and Mr S, and to your parents, I say this – these reasons and these orders acknowledge, but do not endorse the tenets of your church, but in the interest of C, J and L, I apply the laws of the Commonwealth of Australia.

10. This was the most difficult of cases. You will recall that Mr CH described that each and every one of your responses in terms of the time the children spend with their father was "totally unacceptable" and "cruel, unacceptable and abusive to these children". He described the emotional removal of these children from their father at the higher end of "psychological abuse of the children".

11. I did not find that you did this with malice. I acknowledge that your actions have been in accordance with what you consider to be right. However, I am going to make orders which are in the best interests of these children, as determined under Commonwealth law. I am making orders that the children spend time with their father. I am also making orders that your abusive behaviour in terms of these children cease immediately.

12. These children are not a thing or a possession of the wife or the church. They are human beings, who are the responsibility of both parents, I say again, of both parents.

13. These orders are not an "invitation" or "a request". They are orders of a Court exercising the laws of Australia. The orders are directed towards the father and the mother and I expect them to be obeyed in substance and in spirit.

14. Those who are not parties to these proceedings are still, in my view, affected by the orders.

15. I have all of you here, Ms M, Mr and Mrs C, W, M, T, G, ME, Mr A and Mr S, to tell you that if you aid and abet the breach of these orders, you may be liable to suffer the same consequence as if the father or the mother did it. 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. The laws regarding contravention of orders are tough. I have attached a copy of these comments to the judgment in this case so that any judicial officer, if it is not me, will understand who is here and the warnings that I have given so there will be no ability for any of you to say, you did not know.

16. To the elders of the  **Exclusive Brethren** , a review of the authorities shows that these difficulties have been going on for thirty years under the *Family Law Act*. It must surely not be beyond your intellect and wit to find a dimension in your beliefs so that they may reconcile with the law of this country and the need for children to know both of their parents.

17. Finally, C, J and L – I have taken the unusual step of having you here today. You are not in any way threatened by fine or prison. I am aware that you have expressed wishes not to see your father. I have heard evidence from your mother, your father, your sisters, your brothers, your grandfather and a court appointed expert. I have heard evidence from your teachers. One thing is abundantly clear, you all deeply love and care for your mother and for your father and that your reluctance to visit your father is out of natural concern for your mother and the faith in which you have been brought up. The last three years have been difficult for you as you struggle to understand the loss of your father from your home and community.

18. These proceeding are about you and the importance for each of you to know and be cared for by both of your parents. You may have received mixed messages from others close to you about whether it is okay to see your father and spend good times with him, let me make it clear – it is okay.

19. The law provides that you are entitled to know your father and spend time with him and he with you. I have determined that there is a benefit to each of you in having a meaningful relationship with him. I expect that the adults around you will obey these orders and that they will render to Caesar what is Caesar's. You may have been told that these orders only apply until you are sixteen. That is not the case. You are subject to the supervision of the orders of this Court until you are eighteen.

20. I am going to ask Mr Waterhouse, your independent lawyer, to explain these orders and these reasons to you. If you have any questions of me, now is the time for you to ask.

**I certify that the preceding 50 paragraphs are a true copy of the reasons for judgment of the Honourable Justice Benjamin**

Associate:

Date: 22 February 2007