



## **My child does not want to spend time with my ex. Can I force them to?**

**Date: Tuesday October 6, 2020**

After separation where there are children of the relationship, it's important to put plans in place to ensure both parents have equal shared responsibility for the children, except in cases of family violence or child abuse. This shared responsibility could include the child spending time with each parent. At times, a child may say they do not wish to spend time with one parent. The question then becomes, "Can you force them to spend time with the other parent?" or "Can you prevent them from spending time with the other parent?"

### **Are there Parenting Orders in place?**

If there are Parenting Orders in place, those court orders will obligate you do everything the order says.

This means you must take positive action and including taking all reasonable steps to ensure the order is put into effect. So, if your child says they do not want to spend time with your ex, you can't simply be passive and allow the child to determine who they spend time with.

Where Parenting Orders provide for your child to spend time with your ex, you must not only ensure the child is available during the specific times but you must also positively encourage the child to spend time with the other parent.

### **What if I am worried about the health and safety of my child while in my ex's care?**

The safety of your children, no matter whose care they are in, is a priority. Most Parenting Orders will have dispute resolution clauses that will provide parties with a process of what should occur when there is a disagreement (including disagreement about safety).

More often than not these orders will stipulate that the parties attend [mediation with a Family Dispute Resolution Practitioner \(FDRP\)](#) to attempt to resolve their dispute. Attending a mediation with an FDRP should be the first step if there is any disagreement about the orders.

If you reasonably believe that you need to stop your child spending time with your ex to protect their health and safety, you may have a reasonable excuse for contravening Parenting Orders or withholding the child from the other parent.

It is important to note that the period in which the child does not spend time with the other parent should not be longer than is necessary to protect the health and safety of the child.

## Case review where mother contravened Parenting Orders related to spending time with the other party

In the case of [Pandell &Walburg \(No 2\) \[2020\] FCCA 1843](#), the mother contravened a Parenting Order by not making the child available to the father from March 2020.

The mother had medical advice that as a result of a pre-existing health concern, the child was at greater risk of suffering an adverse reaction to a possible COVID-19 infection. The mother, therefore, asserted that the child was at risk if he was to spend time with his father.

An updated medical report was ordered by the Court prior to the Court deciding if the mother had in fact contravened the orders.

The updated medical report was received by the parties on 5 June 2020. This latest report considered that the child was not high risk for severe COVID-19 related illness. On 29 June 2020, the mother indicated that she was prepared for the child to resume spending time with the father.

On 13 July 2020, pursuant to [section 70NAE\(5\)](#) of the *Family Law Act 1975* the Court found that the mother had a reasonable excuse for not allowing the child to spend time with the father up until the 5 June 2020 when the parties received the updated medical report. The Court further found that, from 5 June onwards, the mother no longer had a reasonable excuse to withhold the child from spending time with the father on medical grounds. Therefore, the Court ordered that the father receive some make-up time with the child (to cover the time from 5 to 29 June that he did not spend time with the child).

## Suitable evidence is crucial if you are considering contravening Parenting Orders

If you are considering not complying with Parenting Orders, you need to ensure that you have sufficient evidence so that a Court can find that you had a reasonable excuse to do so.

The evidence needs to show that it was necessary to contravene the orders to protect the health and safety of your child. Of equal importance is that the contravention should not be longer than necessary. In the above case, contravention of the orders was considered reasonable but only to the date of the updated medical report (5 June). In other cases, this may be until the parties

attend mediation or an expert report is received addressing concerns for the health and safety of the child.

## COVID-19 update in relation to Parenting Orders

As noted in our previous blog, "[Parenting Orders during COVID-19. What happens if compliance becomes difficult](#)", if parents are unable to strictly comply with their current Parenting Orders and alternate arrangements are made, these alternatives must be in the best interest of the children and they must follow the spirit or purpose of the Parenting Orders.

It is, however, important to note that any order remains in force until a new Parenting Order or parenting plan changes it in some way. Parties will often talk about changing the arrangements and may even agree to a change, but these talks do not change the order. More importantly, even if your needs or circumstances change, the order applies until it is formally changed by the court.

## Hall Payne no longer provides services in family law

If you require assistance with your family law matter, we recommend you contact the relevant Law Society in your State or Territory for a referral:

- **Queensland:** [1300 367 757](tel:1300367757)
- **NSW:** [02 9926 0333](tel:0299260333)
- **Victoria:** [03 9607 9311](tel:0396079311)
- **Tasmania:** [03 6234 4133](tel:0362344133)
- **South Australia:** [08 8229 0200](tel:0882290200)
- **Western Australia:** [08 9324 8600](tel:0893248600)
- **Northern Territory:** [08 8981 5104](tel:0889815104)
- **ACT:** [02 6274 0300](tel:0262740300)

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