FAMILY LAW ORDERS CONTRAVENTION Children Where the father alleges that themother contravened parentingorders Whether the mother has a reasonableexcuse. FAMILY LAW COSTS Where the mother has made anapplication for costs Where the application includes costs reservedtothe trial judge Where the parties subsequently made substantive consentorders Where those orders were silentas to costs. Family Law Act 1975 (Cth) ss 64B(2)(i), 65NA, 70NAC, 70NAD, 70NAE,70NAF, 70NEB, 70NFE, 117(2A), Family Law Rules 2005 (Cth) r 19.08. Colgate-PalmoliveCo v Cussons Pty Ltd [1993] FCA 536; (1993) 118 ALR 248. D & D (Costs) (No 2)[2010] FamCAFC 64; (2010) FLC 93-435. D & D (Costs) [2010] FamCAFC63. Kohan & Kohan (1993) 16 Fam LR 245. Lenova v Lenova(Costs) [2011] FamCAFC 141. Limousin & Limousin (Costs) [2007] FamCA 1178; (2008)38 Fam LR 478. Penfold v Penfold [1980] HCA 4; (1980) 144 CLR 311. APPLICANT: Mr Shaddock RESPONDENT: Ms Wren INDEPENDENT CHILDRENS LAWYER: FILENUMBER: BRC 11407 of 2008 DATE DELIVERED: 21 February 2014 PLACE DELIVERED: Brisbane PLACE HEARD: Brisbane JUDGMENT OF: Hogan J HEARING DATE: 22 October 2013 REPRESENTATION SOLICITORFOR THE APPLICANT: Barry Nilsson Lawyers COUNSEL FOR THE RESPONDENT: Mr Ehlers of Counsel SOLICITOR FOR THE RESPONDENT: Richard Gray & Associates IT IS ORDERED THAT (1) TheApplication for Contravention filed 12 July 2013 is dismissed. (2) The Respondents Application that the Applicant pay her costs of andincidental to the Amended Initiating Application filed23 October 2012 isdismissed. (3) The Applicant, Mr Shaddock, pay the Respondents costs of andincidental to the Application in a Case filed on 4 February2013 fixed inthe amount of $1,530.20. (4) The Applicant, Mr Shaddock, pay the amount of $1,530.20 referred to in (3)above to the Respondent by 4.00 pm on 21 April 2014. IT IS NOTED that publication of this judgment by this Court underthe pseudonym Shaddock & Wren has been approved by the Chief Justicepursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT FILE NUMBER:BRC 11407 of 2008 Mr Shaddock Applicant And Ms Wren Respondent REASONS FOR JUDGMENT CONTRAVENTION APPLICATION On12 July 2013 the father filed an Application for Contravention allegingtwo (2) contraventions of the Further Amended Order madein the FederalMagistrates Court (as it was then

known) on 15 December 2011 (theDecember 2011 Order): (a) incontravention of Clause 5, the mother, without reasonable excuse, failed to makethe children [K], born ... July 1997, and[C], born ... January 1999,(the children) available to spend time with him on the weekendcommencing 7 June 2013;and (b) incontravention of Clauses 6 and 7, the mother, without reasonable excuse, failedto make the children available to spend timewith him (during the school holidayperiod) commencing on 3 July 2013. Itis accepted that the children did not spend time with the father on theseoccasions. Thestatutory provisions relevant to the determination of this Application arecontained within Division 13A of Part VII of the Family Law Act 1975(Cth) (the Act). Section70NAC of the Act relevantly prescribes the circumstances in which a party istaken to have contravened an order under the Act: Meaning ofcontravened an order A person is taken for the purposes of this Division to have contravenedan orderunder 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) madeno reasonable attempt to comply with the order; Whilstparenting orders were made by the Court by consent on 18 July 2013, there is nodoubt that, on 7 June 2013 and 3 July 2013,the mother was bound by the terms ofthe December 2011 Order. Counselfor the mother informed the Court that the mother accepted that she hadcontravened the December 2011 Order in the manneralleged. I accept thisadmission in so far as it relates to the contravention alleged to have commencedon 7 June 2013. Consequently,the issue requiring determination is whether, onthis occasion, the mother had a reasonable excuse for the contravention. Itis for the mother to establish, on the balance ofprobabilities[1], that she had areasonable excuse for the contravention. Section 70NAE(1) of the Act providesthat the circumstances in which a person,such as the mother, may be taken tohave had a reasonable excuse for contravening an order such as the December 2011Order include,but are not limited to, the circumstances set out in subsections(2), (4), (5),(6) and (7) of that section. Did the mother have a reasonable excuse for the contravention on 7 June2013? Thefather attended at the childrens schools on 7 June 2013 to collect them.They were not present. He says that he later becameaware that the mother hadcollected the children earlier in the day. The mother accepts that she did sobecause K was unwell. Nearlythree (3) weeks later, the father sought an explanation for

the childrensabsence.[2] In response, the motheradvised that: K hadtold the father prior to the long weekend that she was working and would not bespending time with him; and C hadtold the father that she did not want to go to his residence that weekend andhad suggested a catch up weekend the followingweekend: a proposal that was notsuitable to thefather.[3] Themothers case is, therefore, that before he travelled to their respectiveschools on 7 June 2013, the father was aware thatthe children would not becollected by him. She says that her failure to inform him that she collected thechildren early that daybecause of Ks ill-health should be seen incircumstances where she thought he would not be attending that day because ofthechildrens prior communication with him. Themothers evidence was consistent with the explanation provided to thefather as outlined above. Iaccept that K, who was then nearly 16 years of age and in Grade 11, had weekendwork commitments (obtained after her involvementin a school-based traineeship)which, on occasion, conflicted with her time with the father. I accept that Khad previously soughttime away from her weekend work so as to spend time withthe father and had previously tried to spend time with him by juggling herworkcommitments or asking him to transport her to and from work. Thefather said, during his evidence in reply, that he did not recall Kdefinitely saying I am not going to come Dad. (myemphasis) Such evidence clearly suggests that there was, in fact, a priorconversationduring which K raised the topic of her non-attendance that weekend.Further, it cannot be forgotten that, for no less than about18 months beforethis weekend, she had ceased spending time with the father during holidays. Bywhatever terms, I accept that, onthis occasion, K told the father that shewould not be attending because of her work commitments. Iaccept the mothers evidence that when C, then 14 years of age,told her that she wanted to go to a birthday partyrather than spend time withthe father on that weekend, she tried to encourage her to go to thefathers residence. I alsoaccept that when C continued to maintain heroppositional position, the mother suggested that she try to negotiate with thefatherthat she spend time with him the following weekend. It is clear that themother herself did not email, text or send correspondenceto the father aboutthis issue and that personal direct oral communication between the parties isnon-existent. Iaccept the mothers evidence to the effect that her lengthy work hourshave resulted in the children being reluctant to

involveher in communicationwith the father about issues involving their time with him and that,consequently, direct communication betweenthe children and the father aboutthese matters has previously occurred. Thisconclusion is supported by the fathers evidence: whenasked whether the children had discussed with him what time they were to spendwith him, he responded to the effect that hewas told by thechildren that the mother says that they can come on this day during acertain time. (my emphasis); that,on occasions, the children did discuss their time with him, albeit that, onoccasions, he was not sure whether such discussionsoccurred without referenceto the mother; thaton very rare occasions in the past he had negotiated with thechildren about their time with him and that theyhad madearrangements. Suchevidence clearly establishes that, prior to the weekend commencing 7 June2013, there had been previous occasions when directdiscussions between thechildren and the father about their time with him resulted in differentarrangements aboutthat time being made. Whilstthe father said, during evidence in reply, that he had not made any arrangementswith C to change the long weekend time, helater admitted, during crossexamination, that it was possible that he could have told C thathe could not spend timewith her the following weekend. Given the specificreference in the correspondence (referred to in paragraph 9) to thefathersunavailability on the following weekend, I consider it morelikely than not that there was some discussion between C and the fatherprior tothe weekend about a change to the time arrangements for the weekend commencing 7June 2013. Againstthis background, I accept the mothers evidence that C told her that shehad spoken with the father who said that itwas okay and fine with him that shenot spend any time with him on the weekend commencing 7 June 2013.Whilst it may be easy, inhindsight, to conclude that the mother should havebeen sceptical about this information, I accept that the mother took it at facevalue, particularly in circumstances where the children had previouslythemselves negotiated changed time arrangements with the fatherand it hadpreviously been difficult for her to get C to spend time with the father againsther wishes. Itherefore accept that the mothers state of knowledge about thearrangements between the children (then aged nearly 16 yearsand 14 yearsrespectively) and the father for that weekend was that she understood that hehad agreed to arrangements whichwould accommodate Ks employment andCs

desire to attend at a party. Ialso accept the mothers evidence to the effect that she thought theparties, who do not communicate orally, had communicatedvia SMS message aboutmake up time the following weekend and that the father was happy for this tooccur. I accept the mothersevidence that she did not engage solicitorsto communicate with the father about the change to the weekend arrangementbecause ofthe cost involved in taking such action. Whilstit is, of course, legitimate to suggest that, as a parent, the mother should beable to ensure that the children spend timewith the father in accordance withoperative orders, I accept the mothers evidence to the effect that: asteenagers, the children do not always do what she tells them; and duringthe past six (6) years of post-separation parenting she has tried her best toget the children to go and spend time with thefather and has generallymade time occur; and sometimesit was too hard to make the children go to spend time with the father. Inall of the circumstances outlined above, I am persuaded that the mother had areasonable excuse for failing to provide the childrento spend time with thefather on the weekend commencing 7 June 2013. Did the mother have a reasonable excuse for the contravention on 3 July2013? Clause6 of the December 2011 Order provided that the children were to spend time withthe father for the second half of the midyeargazetted school holiday period in2013. Clause7 of the December Order provided that, for the purpose of clause 6 of the Order: (a) the holidayperiod commences from after school at 4.00 pm on the last day of school; (b) the holidayperiod concludes at 5.00 pm on the day immediately before the commencement ofthe new school term; (c) the midpoint of the school holidays is 4.00 pm on the second Saturday of theJune/July and September/October school holidays and the fourth Saturday of theChristmas school holiday period. Despitethese terms, the father calculated the midway point of this period to be onWednesday 3 July 2013 and, on 25 June 2013, correspondence to themothers solicitors outlined his intention to collect the childrenat4:00 pm that day. Thereis no evidence to support a conclusion that the parties had agreed to departfrom the clear terms of Clauses 6 and 7 of theDecember 2011 Order whichprovided that the midpoint for the purpose of calculating the childrenstime with the father wasthe second Saturday of the school holidayperiod. Inthese circumstances, I do not accept the admission proffered on behalf of themother that she contravened

the December 2011 Orderby failing to make thechildren available to spend time with the father from 4.00 pm on Wednesday,3 July 2013 and I am not persuadedthat she contravened the Order asalleged. Forthe reasons outlined above, I dismiss the Contravention Application filed 12July 2013. APPLICATION FOR COSTS Inan Application in a Case filed 13 August 2013 (the costsapplication) the mother soughtorders[4] that the father pay, on anindemnity basis: thecosts of and incidental to the appearance before the Principal Registrar on 19March 2013; thecosts of and incidental to the Amended Initiating Application filed by thefather on 23 October 2012. On18 July 2013, following agreement between the parties as to the terms ofparenting orders, the Court made final orders by consent(the July 2013Order). The July 2013 Order is silent as to costs. Thecosts application was filed within 28 days after the July 2013 Order wasmade. [5] Thegeneral rule in proceedings under the Act, is that each party bears his or herown costs. However, if the Court is of the opinionthat there are circumstancesthat justify it doing so[6] the Courtmay, subject to certain considerations, make such order as to costs as the Courtconsiders just. In considering what orderas to costs, if any, to make, theCourt shall have regard to matters prescribed in s 117(2A) of theAct. The costs reserved on 19 March 2013 On19 March 2013 the Principal Registrar dismissed the fathers Applicationin a Case filed 4 February 2013 (the Februaryapplication) andordered that the mothers costs be reserved to the trial judge (theMarch 2013 Order).At this stage the father appeared on his ownbehalf. Clearly,the issue of costs arising from February 2013 application was not heard anddetermined by the Principal Registrar other thanby a determination to reservethis issue to the trial Judge for consideration. Obviously, an order reservingthe question of costsdoes not amount to an order dismissing an application forcosts. Thefathers legal representative submitted that, given that Clause 32 of theJuly 2013 Order discharged all previous orders,the March 2013 Order was alsodischarged. WhilstI do not accept the submission by Counsel for the mother that Clause 32 of theJuly 2013 Order should be interpreted to referonly to substantive parentingorders there being nothing ambiguous in its terms the dischargeof the March 2013 Orderdoes not prevent the mother from applying for an orderthat the father pay her costs of and incidental to the February application:Rule 19.08 (1) and (2) of the Rules. Further,the July 2013 Order contains no provision in

relation to the manner in which theparties are to bear the costs of the proceedings.The position would have beendifferent had the parties, for example, decided and agreed upon a term to theeffect that thereis no order as to costs or each partybears their own costs. Theorder sought by the father in the February 2013 application was that thechildren K and C continue their enrolment through toand including the Year 11and 12 school years at B School, Suburb D, Queensland. This order was sought incircumstances where theoperative parentingorder[7] provided that the mother havesole parental responsibility for the children in relation to, among otherthings, issues about theircurrent and future education. Insuch circumstance, it is unsurprising that the Principal Registrar dismissed theill-conceived February 2013 application. Costs of and incidental to the Originating Application filed 23 October 2012 Counselfor the mother submitted that, whilst the Originating Application filed 23October 2012 (the October 2012 application)sought to vary theoperative final order dated 15 December2011[8] (the December 2011Order) by proposing changes to Clauses 1 and 29 of that order, the termsin which the parties agreedthe July 2013 order were almost identical to thosecontained in the December 2011 Order. Such an event, it is submitted, wouldpersuadethe Court to conclude that the father was whollyunsuccessful in the October 2012 application. Itis clear that the terms of Clauses 1 and 29 of the December 2011 and July 2013Orders are, for all intents and purposes, the same.However, in agreeing uponthe terms of the July 2013 Order, the parties had also reached agreement aboutother variations to theDecember 2011 Order: Clause3 of the July 2013 Order provides that the time that the child K is to spendwith the father and the communication betweenthem will occur at all such timesas that child expresses a wish to do so; but incontrast, the December 2011 Order provided that Ks time with andcommunication with the father occur each alternate weekends,for half of eachgazetted school holiday period, on Fathers Day and at specified times onChristmas Day, Boxing Day, GoodFriday and Easter Sunday, on Ks birthdayand by telephone no less than each Monday. Discussion of relevant s 117(2A) matters Themother is a healthcare worker who is employed on a permanent part-time basis atE Hospital. Her gross remuneration from employmentis $1,220.00 per week. Shereceives child-support in an amount of $30.00 per week from the father. She isresponsible for the paymentof private school fees for those

children who remainat secondary education. She has savings of $94,000.00, superannuation in anamount of $20,000.00 and two (2) motor vehicles valued at about $46,000.00. Shelives in rental premises and has credit card debtof about $2,500.00. She alsohas a HECS debt of $8,000.00. Itis apparent from the above that that her financial circumstances are modest. Thefather owns real property at F Street, Town G. It is said to be worthapproximately $300,000.00. He has a loan, secured by mortgage,in an amount of$170,000.00. He also says that he borrowed $80,000.00 from his mother in orderto fund the purchase of this property.He has equity of about $50,000.000 in theproperty. Thefather receives NewStart allowance in an amount of $220.00 per week. He has nosurplus income and juggles the payment of the mortgageand his living expenses.There is nothing in the evidence to suggest that the father has any physicallimitations which would preventhim from engaging in paid employment. Infact, the father has, with the financial assistance of his mother and brother,established H Business which he operates from rentalpremises in Suburb I. Hesays that he borrowed $7,500.00 from his mother to pay the bond associated withthe rental of these premisesand will commence paying rent of $650.00 per weekfrom December 2013. On his evidence, he personally earns approximately $120.00per week gross from this exercise and employs other managers. Thefather submits that he does not have the financial capacity to meet any orderfor costs and that the mothers financialcircumstances are such that sheis able to meet her own legal fees. Itcannot be forgotten that a limited financial capacity to meet an ordercannot be determinative; if it were, a party wouldalways be able to pleadimpecuniosity as a means of avoiding a costs order in circumstances wherepursuit of the litigation has continuedin the face of a reasonable offer tocease that litigation and the incurring of its attendantcosts.[9] Whilstmade in the context of discussing timely offers in writing to resolvelitigation, such comments are pertinent to my considerationof the current costsapplication. Counselfor the mother submitted that the overall conduct of the father inthe matter would persuade the Court thatthat it was appropriate that hecontribute to the mothers costs. In particular, I understood him to referto the fathersconduct in bringing the February 2013 application incircumstances where the operative order invested the mother with sole parentalresponsibility in relation to educational issues for the children. Neitherparty

is in receipt of assistance by way of legal aid. Both parties have engagedlegal representation. The father says thathis brother has agreed to payprevious legal bills of $10,000.00 and has agreed to meet the legal feesincurred by the father inresponding to the costs application. Giventhat the father: waswholly unsuccessful in prosecuting the February 2013 application and it wasdismissed; and sought,by it, specific orders about the childrens schooling in circumstanceswhere the operative parenting order investedthe mother with sole parentalresponsibility for educational decisions about the children;and didnot challenge the accuracy of the evidence given by the mother or her solicitorabout the Principal Registrars dismissalof the February 2013application;[10]and hassome equity in the real property owned by him and the demonstrated financialsupport of family members, I am satisfied that thecircumstances are such as to justify the making of an order that the father paythe mothers costs ofand incidental to the February 2013Application.[11] Giventhat the July 2013 Order reflected the parties agreed variation to theDecember 2011 Order, I am not persuaded that circumstancesare such as tojustify the making of an order that the father pay the mothers costs(exclusive of those already consideredabove) of and incidental to the October2012 application. Quantum of costs sought Themother relevantly seeks that, on an indemnity basis, the father pay her costs ofand incidental to the February 2013 Applicationin the followingamounts: $2,750.00in relation to the unsuccessful application heard by the Principal Registrar on19 March 2013; and $1,100.00being the costs of the prosecution of the costs application. Unlessthere are exceptional circumstances, an order for costs should be made on aparty and party basis. Ihave had regard to D & D Costs (No. 2) (2010) FLC 93-435 in which the Full Court reviewed extensively earlier authorities, including Limousin& Limousin (Costs) [2007] FamCA 1178; (2008) 38 Fam LR 478 and Kohan and Kohan (1993) 16 Fam LR 245, and also Sheppard Js decision inColgate-Palmolive Co v Cussons Pty Ltd [1993] FCA 536; (1993) 118 ALR 248. I am notpersuaded, on the evidence before me, that the circumstances of this case areexceptional so as to warrantthe making of an order for costs onan indemnity basis. Inthe circumstances of this case (including the clear difficulties incommunication between the parties), I consider it is appropriatethat I fix thequantum of the costs to be paid by the father to the mother rather than orderingthat payment occur in an amount

asagreed or failing agreement as assessed. Inundertaking this exercise, I have had regard to Schedule 3 of the Rules. Doingthe best that I can, I have determined that thetime reasonably spent inrelation to the February 2013 application, the appearance before the PrincipalRegistrar on 19 March 2013and the preparation of the application for costs isunlikely to have been less than about seven (7) hours in total. Using the scalerate of $218.60 per hour I arrive at the sum of $1,530.20. I consider it just inthe circumstances that the father pay to the motherthe sum of $1,530.20. Giventhe fathers financial circumstances, it is just that he have two (2)months within which to make such payment. Iorder accordingly. I certify that the preceding sixty-one (61)paragraphs are a true copy of the reasons for judgment of the Honourable JusticeHogandelivered on 21 February 2014. Associate: Date: 21 February 2014 [1] Section70NAF(2) [2] correspondence dated25 June 2013 [3] correspondencedated 1 July 2013 [4] Rule 19.08(1), Family Law Rules 2004 (Cth) [5] Rule 19.08 (2), Family LawRules 2004 (Cth) [6] Penfoldv Penfold (1080) [1980] HCA 4; 144 CLR 311,315. [7] made 9 June 2011 andamended 12 September 2011 and further amended 15 December 2011. [8] as amended on 12 September2011 and further amended 15 December2011 [9] Lenova & Lenova(Costs) [2011] FamCAFC 141,[12]. [10] D & D(Costs) [2010] FamCAFC 63 [11] see: Penfold at 315- 316.