

FAMILY LAW CHILDREN Contravention contraventions alleged on first weekend of orders being made where settled means of communication via text message where communication book was not used where make up time is ordered Family Law Act 1975 (Cth) s 70NAE APPLICANT: Mr Girst RESPONDENT: Ms Girst FILENUMBER: PAC 664 of 2009 DATE DELIVERED: 26 September 2014 PLACE DELIVERED: Parramatta PLACE HEARD: Parramatta JUDGMENT OF: Hannam J HEARING DATE: 26 September 2014 REPRESENTATION APPLICANT- SELFREPRESENTED: Mr Girst COUNSEL FOR THE RESPONDENT: Ms Spain SOLICITOR FOR THE RESPONDENT: Watts McCray Kernans Lawyers ORDERS (1) Leave is granted to file the affidavit of the respondent sworn on 16 June 2014 in court today. (2) The contravention application relating to an alleged contravention of Order 11 of 13 July 2012 on 5 July 2012 is dismissed on the basis that the order alleged to have been breached was not yet in existence. (3) The contravention application relating to an alleged contravention of Order 5.4.1 of 13 July 2012 on the 22 December 2012 is dismissed as there is insufficient evidence to establish a case to answer. (4) The contravention alleging a contravention of order 5.1 of 13 July 2012 on 13 February 2013 is dismissed as there is insufficient evidence to establish a case to answer. (5) The contravention application alleging a contravention of order 10 of 13 July 2012 is dismissed. (6) The contravention application alleging a contravention of the orders of 13 July 2012 on 15 February 2013 is proved. (7) The contravention application alleging a contravention of order 20 of 13 July 2012 during March 2013 is dismissed. (8) That the father shall spend time with the children in addition to the orders of 13 July 2012 as follows: (a) From after school Friday until 4pm Saturday on the weekend of 17 October 2014 and 18 October 2014. (b) This time shall be conducted under the same arrangement provided for under the Orders in relation to the pick-up and delivery of the children IT IS NOTED that publication of this judgment by this Court under the pseudonym Girst & Girst has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT PARRAMATTA FILE NUMBER: PAC 664 of 2014 Mr Girst Applicant And Ms Girst Respondent REASONS FOR JUDGMENT By an application filed in this court on 10 April 2013, the father, Mr Girst alleges that on six occasions the mother contravened orders made by this court on the 13 July 2012, being the

primary orders. The allegations of contraventions relate to circumstances that commenced, it would appear, from the very first week of the operation of those orders. Three of the contraventions were dismissed on the basis that there was insufficient evidence brought by the applicant to establish that there was a case to answer. Two of them were admitted and in respect of a third, there was sufficient evidence for a case to be answered and the wife adhered to her denial that she had contravened the order. The first of the remaining allegations relates to an alleged contravention of order 10 of the primary orders. This order provides that the parties are to communicate in relation to parenting by a communication book and by SMS text message, if contact needs to be made in 48 hours or on an urgent basis. The part of the order said to have been contravened relates to the communication book. That order provides that the parties are to communicate in relation to parenting issues by a communication book which is to be placed into the children's bag at the commencement and conclusion of each of the father's periods with the children and neither parent shall use this book to denigrate each other. The allegation is that on 18 July 2012, the respondent mother contravened that order by not placing a communication book into the children's bag at the commencement of the father's period of time with the children. The mother admitted that she had contravened the order, in that she admits she did not place the book in the children's bag and says that she has established a reasonable excuse for the contravention of that order. The circumstances which amount to a reasonable excuse are set out in s70NAE(1) of the Family Law Act 1975 (the Act) which provides that 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). The respondent mother relies upon that subsection that says that if the court is satisfied that she ought to be excused in respect of the contravention that it amounts to a reasonable excuse. It is essentially leaving it a discretionary matter for the court as to whether that amounts to a reasonable excuse. The mother says in her affidavit and it was not disputed, in the sense that she was not cross-examined, that order 10 is a mutual obligation as both parties are required to communicate by means of a communication book. She says that it is something that neither party has done since the

time of the orders. She also says that the book was handed in as evidence in 13 July 2012 and that the parties have communicated by text message since that date. The father says very little concerning this in his affidavit. He relies on the fact that although it is a mutual obligation, clearly the obligation is first on the mother because it is the mother who is required to place the book into the children's bag at the commencement of their time with him. Then it becomes his obligation to place the book into the bag at the conclusion of the time with him. He says that he can't put something in at the conclusion of time if that something hasn't been put in at the commencement of the time. It is clearly meant to be something that they mutually do together. Although it seems quite incredible to me that the mother proffers as an excuse, that the communication book was handed up in Court, there seems absolutely no reason why she couldn't have purchased another one. It is also incredible that the father says that having not seen a book in the bag, that he could not have purchased one and started it, and that over two years after the event, this matter is continued to be seriously litigated in Court, where either one of the parties could have brought it to an end, by purchasing a communication book, writing things in it and putting in the bag. Presumably the Court put the particular orders in place for good reason and it is concerning that this allegation appears to have arisen on the very first weekend after the orders were made. However, it does seem rather sensible that the parties have settled into a process of being able to communicate with each other via SMS not just for urgent matters but for every day matters. I must say that it is rather bizarre when that is the settled means of communication, that two years after the event the father complains of not using the communication book, when if it was something that he particularly wanted to do, he could have purchased one himself and started the process and also made it clear that he wished to stick to the orders. I must consider all of the circumstances, including the actions of the parties subsequently in that neither of them purchased a new communication book and started using it. Neither identified to the other party that they wished to have that as the preferred means of communication for everyday matters. The father, if it was so important to him that that order be complied with (and as I say, presumably it was put in place for good reason) could have just bought another communication book and started the process off. In those circumstances, in my view, the respondent ought to be excused in respect of that

contravention, and accordingly I find that contravention not proved. The next contravention in time is a matter where the mother admits that she did contravene the orders, in that she took the children to Queensland for a family function at a time that was on a weekend when the father was to spend time with the children. She does not proffer the fact that the parties have had a bit of give and take between them, which I must say is to their credit, that they are able to on occasions be generous enough for the sake of the children to have some time outside the orders and it is probably not unreasonable that she would have hoped that that would happen in this situation, but she does not proffer that as a reasonable excuse. Accordingly, I find that contravention proved. The third remaining contravention is in relation to order 20, which is an order that reads; The mother shall not enrol the children in any extra-curricular activity to be conducted during time to be spent between the children and their father, without first obtaining his written consent. There is no dispute between the parties that the children were enrolled at the relevant time, that is March 2013, in Netball and Soccer, and that Soccer games did take place on a Saturday, and that training took place during the week and potentially at times that the children were spending time with their father. However there is no evidence to establish that the mother did enrol the children in these activities which were to be conducted during the time to be spent between the children and their father. There is uncontradicted evidence, in the sense that the father chose not to cross-examine the mother, that the particular arrangements that the mother was able to make with those responsible for the administration of Netball and Soccer, was that the children were able to participate and be part of the team, even though they may only be able to attend games every second weekend, and also miss out on some of their training. The father relies upon the fact that the emails at the relevant time say over and over again Would you please agree for the children to go to a game? clearly on an upcoming weekend when the father was to spend time with the children. However the exchange of emails also makes it clear that over and over that the mother also says that It is your choice and that It is up to you, directed to the father as to, whether he is going to allow the game to be played on that particular weekend. It is fortunate for the children that the particular local sporting clubs were able to be flexible enough that they could participate in a team sport even though they did not play every weekend. There is uncontradicted evidence that that

was the arrangement. In these circumstances there is no evidence as to a critical element that is required to be proved. That is, prior written consent is only to be sought in respect of an extra-curricular activity to be conducted during time to be spent with the children and their father and that has not been established in this matter. Accordingly I find that contravention not proved. In this matter, having found that the mother contravened the order on one occasion being on the weekend of 15 February 2012 when she failed to make the children available to the father in accordance with the orders, I am now to make an order in relation to that contravention. It has been urged upon me by the mother not to make any order, though I have some doubt that the Act provides for that. In any event, the mother relies upon her uncontradicted evidence that the father in fact spent some time additional to that which he is entitled to spend with the children under the orders and that she understood that to be make up time for the time that was missed. Unfortunately, although the mother may have regarded it in that way, there was no evidence that it was something that was discussed between the parties as to be treated that way. It appears that the children did miss out on some of the time to be spent with their father to which they are entitled to under the orders. In my view an order providing for the children to spend the equivalent time that they missed out on spending with their father is the appropriate order in these circumstances. Having made some inquiries with the parties as to a convenient time for that to occur, I order in addition to the time the children are to spend with their father under the current orders, they are also to spend time with him from after school Friday until 4pm Saturday on the weekend of the 17th October and 18th October 2014 under the same arrangements provided for under the orders in relation to the pick-up and delivery of the children. The mother seeks that her costs in relation to the contravention be paid and the father seeks that it be the usual circumstance, that is each party bears their own costs. In relation to the mother's application it has been put that she has been put to considerable expense as these matters have come back to court on three occasions and that she has engaged legal representation. I have no evidence before me as to the financial circumstances of each of the parties. I don't know but it hasn't been suggested to me that the mother is legally aided. As far as the conduct of the proceedings is concerned, although the father was unsuccessful in five of the six contraventions he brings, in my

view, there is nothing to suggest that he has conducted the proceedings in any way improperly. The reality is that he may have been at a disadvantage not having had legal advice, but that could have been remedied by him seeking legal advice in relation to contraventions. Nonetheless there is nothing to suggest he has done anything improper. The proceedings were necessitated by the failure of a party, being the mother, to comply with previous orders of the court so far as the one allegation that is proved against her is concerned. Neither of the parties is wholly unsuccessful in the proceedings. Although the majority of the father's contraventions were not proved, he is not in the category of being someone wholly unsuccessful particularly because in addition to the matter that was proved; the mother had in fact also admitted one of the other contraventions although ultimately a reasonable excuse was found. In all of the circumstances in my view, it is appropriate for each of the parties to bear their own costs in relation to these proceedings. No order as to costs is made. I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Hand. Delivered on 26 September 2014. Legal Associate: Date: 14 October 2014

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