

FAMILY COURT OF AUSTRALIA

DODDS & DALE

[2007] FamCA 1304

FAMILY LAW - CONTEMPT - Contravention of Court order

Family Law Act 1975 (Cth) - Division 13A Part VII, s 70NFA(2)(b), s 112AP

Abduramanoski & Abduramanoska (2005) FLC 93-215

Pearce v R (1998) 194 CLR 610

Cummings & Cummings (1976) FLC 90-100

Rutherford (1999) FLC 92-866

R v Edwards (1996) 90 A Crim R 510

Wirth (1976) 14 SASR 291

APPLICANT FATHER:

DODDS

RESPONDENT MOTHER:

DALE

INDEPENDENT CHILDREN'S LAWYER:

Ms S Mordaunt, solicitor

FILE NUMBER:

SYC 1068 of 2007

DATE DELIVERED:

24 October 2007

PLACE DELIVERED:

Sydney

PLACE HEARD:

Sydney

JUDGMENT OF:

Johnston JR

HEARING DATE:

3 & 4 May, 6 June, 21 September &
24 October 2007

REPRESENTATION

COUNSEL FOR THE APPLICANT:

Ms P Hanna

SOLICITOR FOR THE APPLICANT:

Michael Conley, Lawyers

COUNSEL FOR THE RESPONDENT:

Ms D Hausman

SOLICITOR FOR THE RESPONDENT:

York Family Law

**SOLICITOR FOR THE INDEPENDENT
CHILDREN'S LAWYER:**

Marks Griffiths & Bova

ORDERS

IT IS NOTED:

- A. That [the Respondent Mother] has contravened orders of this Court made on 22 June 2005 without reasonable excuse and that the contravention has been established beyond reasonable doubt.
- B. That [the Respondent Mother] has behaved in a way that showed a serious disregard for her obligations under the orders.
- C. That the Court is satisfied that the circumstances of the contravention are such that it is appropriate to deal with the contravention pursuant to Subdivision F, Division 13A of Part VII of the *Family Law Act 1975*.

IT IS ORDERED:

1. That [the Respondent Mother] is to serve a term of imprisonment for six (6) months from 24 October 2007 until 23 April 2008 to commence forthwith and to be suspended on 23 January 2008 in the event that the mother has entered into a Bond to be of good behaviour and comply with all orders of all courts for a period of two (2) years commencing on 23 January 2008.
2. That a Warrant of Commitment issue forthwith.
3. That the reports of Dr P, Dr Q, Dr R and Dr S two reports by Dr T and letter dated 29 March 207 from Ms N may be released to the Department of Corrective Services.
4. That the parenting proceedings are adjourned for mention before Judicial Registrar Johnston at 10:00 am on 7 November 2007 and all parties are at liberty to vacate this date and / or arrange another date by arrangement with his Associate
5. That the Officers of the Department of Corrective Services make arrangements for [the Respondent Mother] to attend Court at 10:00 am on 7 November 2007 by way of telephone link.
6. That the father may attend by telephone at 10:00 am on 7 November 2007.

IT IS FURTHER NOTED:

- D. That [the Respondent Mother] has today entered into the abovementioned Bond.

IT IS NOTED IN CONNECTION WITH THESE ORDERS that the judgment of Judicial Registrar W P Johnston delivered this day will for all publication and reporting purposes be referred to as **DODDS & DALE**.

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: SYC 1068 of 2007

DODDS

Applicant Father

And

DALE

Respondent Mother

REASONS FOR JUDGMENT

INTRODUCTION AND APPLICATION

1. These are contravention proceedings. [Mr] DODDS, to whom for convenience I shall refer as “the father”, brings an application for the Court to deal with [Ms] DALE, to whom for convenience I shall refer to as “the mother”, for a number of alleged breaches of current parenting orders. Those parenting orders are in relation to the child D who was born in... 2001.
2. Those were orders made by this Court on 22 June 2005 by Moore J who determined that the child should live with her father, including during the following periods. Firstly, from after preschool on Friday, 2 September 2005 until the following Friday before preschool and in each alternate week thereafter. From 12 noon on Christmas Eve until 12 noon Christmas Day 2006 and in each alternate year thereafter, the father to collect and return the child at the commencement and conclusion of his residence time from the mother's residence. From 5 pm on the Saturday immediately preceding Father's Day until 5 pm on Father's Day unless the child is otherwise in his care, the father to collect and return the child at the commencement and conclusion of this residence time from the mother's residence. From preschool or school until 6 pm on D's birthday, unless otherwise in his care, the father to collect and return the child at the commencement and conclusion of this residence time from the mother's residence. From December 2007 / January 2008 Christmas school holidays, for the first half in each year ending in an odd year and the second half in each year ending in an even year, the father to collect and return the child at the commencement and conclusion of this residence time from the

mother's residence. Her Honour determined that the child should live with her mother in effect at all other times.

3. The mother has admitted that after complying with the orders for a period she has acted in a way which has completely contravened the orders. This has been by taking the child into her care and, contrary to the requirement of the orders, removing herself and the child from their usual place of residence in Brisbane, travelling to Perth with the child with the intention of depriving the child from having any relationship with her father and failing to notify the father at any stage of the whereabouts of herself and the child over a period of more than 16 months.
4. It is only as a consequence of action taken by the child's father in this Court that the Australian Federal Police have been able to locate the child and recover the child to her father. This has enabled the child to resume her relationship with her father.
5. The application in its original form alleged a considerable number of breaches of the current parenting orders. After some discussion with me, the father narrowed down his complaints to what became six alleged breaches. In respect of each of the alleged breaches, to the mother's credit, the mother admitted that she had committed those facts which constituted the breach. I shall go through these. I orally informed the mother, as required, at a very early stage of the hearing of details of each of the alleged breaches.
6. The first alleged breach was that between 15 November 2005 to 3 May 2007 the mother intentionally contravened Order 13 of the orders made on 22 June 2005 by removing the child from the [Kindergarten] without the consent of her father.
7. The second alleged breach was that between 15 November 2005 and 3 May 2007 the mother intentionally contravened Order 2(i)(vi) of the said orders by failing to produce the child to the [Kindergarten] into the father's care on each alternate week.
8. The third alleged breach was that on 12 noon on Christmas Eve 2006 the mother intentionally contravened Order 2(i)(vii) of the orders by failing to produce the child to the father for Christmas holiday time.
9. The fourth alleged breach was that from 5 pm on the Saturday immediately preceding Father's Day in 2006 the mother intentionally contravened Order 2(i)(viii) by failing to deliver the child to the father for Father's Day.
10. The fifth alleged breach was that from after preschool until 6 pm on the said child's birthday in 2006 the mother intentionally contravened Order 2(i)(ix) of

the orders by failing to make the child available for the father to have birthday time with the child.

11. The final alleged breach was that between December 2005 and 24 April 2007 the mother intentionally contravened Order 9 of the orders by failing to provide the current residential address and current telephone number of the said child to the father 14 days before the proposed change, if at all.

BACKGROUND

12. The orders which the mother has admitted breaching were made by consent on the third day of the substantive hearing about the final parenting arrangements for the child before Moore J. There had been difficulties during the early part of the hearing because the mother failed to disclose the child's whereabouts to the Court and in fact her Honour made an order for a recovery order to issue to empower the police to recover the child. In any event, the parties eventually asked the Court to make orders by consent, including the above orders which I have referred to, and the Court did so.
13. The matter which has brought these proceedings about lies in the fact that in November 2005 the mother decided that she could not place the child in the care of the father. As I have said, the mother has conceded that she disobeyed the orders, and, as I have said, she has admitted to six alleged breaches. The period involved has been from November 2005 until the child was recovered by the police on 24 April 2006, a period exceeding 16 months. The father has had no idea where the mother was, nor where the child was, but it is now clear that the mother was in hiding from him and the authorities, including this Court, for the duration of the period. The father has gone to a great deal of trouble in taking action, including through this Court and the media, to endeavour to have the child located and restored to his care.
14. The mother says by way of explanation for her behaviour that after the orders were made on 22 June 2005 she endeavoured to comply with the orders, but she said that there were problems. She said that on almost every occasion when the child was to live with her father the child said things to her which indicated that she did not want to spend time with him. The mother said that the child became increasingly upset and angry with her for making her go with her father. She said that during the early period, because she and the child were living in Brisbane and the father was living in Sydney, she had to get the child up at 5.30 am to be at the airport by 7.30 am on a Saturday morning and that this was too much for the child.
15. The mother said that within a few weeks of the orders the child was having nightmares and saying she was scared of her father and did not want to go.

Approximately four weeks after the orders were made the father started going to Brisbane and spending time there with the child. The mother said that he did not know what to do to entertain the child and usually terminated his time with the child early. The mother said that once the requirement under the orders for the father to collect the child from her childcare centre commenced there were difficulties with the child not wanting to be collected from childcare by the father. The mother said that these difficulties continued and that there were some departures by the parties from the strict requirements of the orders.

16. In mid-October the child stayed overnight with her father. The mother said it went badly. The mother said by late October the child was saying things to her which made her think the father might be sexually abusing her. The mother also said that he sent the child to the childcare centre in shoes that were too small for her.
17. At the end of October the mother suggested to the father that they change the orders to provide for different parenting arrangements. On 9 November 2005 the mother sent the father a letter in which she suggested that they change the parenting arrangements. The father replied that he did not agree to changing the arrangements, apart from permitting the child to accompany her mother to a children's Christmas party at her work.
18. On 15 November 2005 the father sent the mother an SMS message to the effect that he had taken the child to the doctor for a suspected urinary tract infection. The mother said that she was upset and concerned about this because there was an order which restricted the parties from doing this without the consent of the other. The mother says that she went straight to the childcare centre and collected the child. She then drove to the Queensland child protection authorities. She said that she was concerned that the child had been abused or that she had been so stressed that this stress became manifested in the infection. The mother decided that she would not willingly permit the child to return to the father's care.
19. On 20 December 2005 there was an application by the father before me for the issue of an order for the police to recover the child and deliver the child to the care of the father. The mother was represented. I was informed by counsel for the mother that the mother had filed a contravention application. I was informed by the father's solicitors that Order 6 of the orders dated 22 June 2005 provided in effect that in the event that the mother failed to provide the child to the father in accordance with the requirements of the orders, then the father was to have the sole residence of the child. That of course was a substantive order. The father sought an order to bring about this result.

20. Counsel for the mother conceded that the mother had not provided the child to the father in accordance with the requirements of the orders. In these circumstances I ordered that the self-executing Order 6 should come into effect. I also made an order for the independent child lawyer to be reappointed and adjourned the proceedings for a few weeks to come back to court in January.
21. It is clear that this action by the Court was more than the mother could bear. The effect of the self-executing order was that, at least for a period, there would be no contact between the child and her mother. Such an outcome was consistent with a recommendation by Dr T, the single expert who had provided reports to the Court in the substantive proceedings.
22. The mother says that this tipped her over the edge. She said that she felt that she had no say in what was happening and felt hopeless at trying to protect the child. She said that she felt that she had lost all options, so she drove to Perth with the child. The mother says that with the benefit of hindsight she knows that taking off with the child as she did and depriving the child of a relationship with her father was wrong. The mother said that there were many occasions when she thought she should return from Perth with the child, but she said that she felt overwhelmed by what had occurred.
23. The mother has apologised to the Court, to the father and to the child.

THE APPLICABLE LAW

24. Division 13A Part VII of the *Family Law Act 1975* provides the Court with power to deal with alleged contraventions of court orders which affect children. Subdivision F of Division 13A provides for the more serious contraventions. Sub-section 70NFA(2)(b) provides in effect that the Subdivision applies if the Court is satisfied that the person has behaved in a way that showed a serious disregard of their obligations under the order. I am satisfied that such is the situation in this case. In fact both learned counsel have submitted as much to the Court.
25. The mother knew of her obligations under the order, yet she deliberately acted in a way calculated by her to ensure that she did not enable the child to have the benefit of the arrangements under the orders and continued to flout the requirements of the orders for approximately 16 months, as I have said, until the police acted. This is serious.
26. In essence, the Court can make an order that the person who committed the contravention enter into a bond. The Court can make an order that compensates a person for the time that the child did not live with the person. The Court can fine the person, the Court can impose a prison sentence for a

maximum period of 12 months or impose a suspended prison sentence. But a court is not to sentence a person to imprisonment if one or other of the above sanctions is appropriate.

SUBMISSIONS

27. It is submitted by Ms Hausman for the mother that the mother has shown contrition and that she apologises for her actions, that the mother pleaded guilty to each of the six alleged breaches and that she did this in circumstances where this would enable a longer hearing to be avoided. It is submitted that the mother has not been convicted of any prior contraventions. It was submitted that the Court keep in mind the mother's state of mind that, as indicated above, the self-executing order was more than she could bear, especially in circumstances where the mother has continued to hold a belief that the father had inappropriately dealt with the child, both physically and in a sexual way.
28. It is submitted on behalf of the mother that, as Dr P, psychiatrist, has said – and I shall refer again to this below – her action was not an action of malice. It was also submitted that the Court needs to think about the mother's state of mind and what her doctors have said about her. Again I shall refer to that further below.
29. The ultimate submission is that it would not be appropriate for the Court to impose a custodial sentence. It is submitted that there is some material before the Court to the effect that such would be injurious not only to the mother's state of health, but also to the state of health of her unborn child. It is submitted that the Court should require the mother to enter into a bond. It is submitted that the mother has already been punished. She spent the best part of two days in custody in Western Australia when she was first arrested by the police. It is submitted that the mother has been punished severely by not having been able to continue her relationship with the child. In fact a long time went by before she and the child had any face-to-face contact and that only happened fairly recently. It is submitted that in the circumstances the mother has suffered sufficiently, that she sees the error of her ways, that a bond, which would require her to comply with court orders for a period at the Court's discretion, would be the appropriate sanction in all the circumstances.
30. There was a subsidiary submission in relation to penalty; that if the Court was minded to impose a custodial sentence, then, firstly, the mother would be anxious to commence serving that sentence as soon as possible rather than have a situation come about where in effect a prison sentence would be ordered but its commencement suspended until some time after the birth of the child, perhaps in February or March next year. But that was not a course which learned counsel submitted the mother would prefer. If a prison sentence was to

be imposed it was said that the mother would prefer that to commence immediately. But the other part of the submission was to the effect that it would be open to the Court to impose a sentence and require the mother to serve a part of that sentence and then have the remaining part of the sentence suspended upon the mother entering into a bond to be of good behaviour for an appropriate period.

31. Ms Mordaunt, the independent child lawyer, submitted that in considering the imposition of a sentence the Court would need to consider the best interests of the child. It was submitted that Dr P had the opinion that the child would be able to spend time with the mother even if the mother was incarcerated. The consequences of a discussion between the Bench and learned independent child lawyer was to the effect that any face-to-face contact between the child and the mother in the near future would need to be supervised in some way. If this was done at a supervised contact centre some appropriate safeguards could be put in place. Obviously if it was to be at a prison, the child's safety would be secured. The only other submission that was made by the independent child lawyer was that the Court was reminded that the mother had been fully aware of the provisions of the orders at the time that she contravened them.
32. Ms Hanna for the child's father made a very strong submission to the effect that a bond would not be an appropriate sanction in the circumstances of this case. This was a matter where some prison sentence was said to be essential in circumstances where the mother was only too well aware of two previous reports by Dr T which pointed out quite clearly what the likely consequences would be if the mother was unable to implement her obligations under the parenting orders. It was submitted that the mother has taken no notice of those matters or, if she has, she has not been able to help herself observe the requirements of the orders.
33. I was reminded that her Honour had to make a special order for the recovery of the child because of the mother's inability to be able to arrange for the child to be brought to the Court during the substantive hearing, notwithstanding that she was ordered to do so. It was submitted that the mother simply ignores what the experts say and has simply ignored the requirements of the orders when she has found those too hard to comply with. In those circumstances it was submitted that a bond would not be appropriate.
34. The Court was reminded that Dr P had observed in his report that the mother is not available for therapy until she can arrive at a point where she is prepared to acknowledge some of the observations that have been made and described, which I might describe as shortcomings, deficiencies or blind spots on her part. It was suggested that until she can arrive at that point, then there would not be any purpose for therapy because the first step would not be able to be made.

35. The final thrust of the submission was that the Court needs to issue what was described as a wake-up call to the mother; that is, to impose a penalty which really brings home to the mother the seriousness of the situation that she is in and the seriousness of her obligations under the Court's orders in terms of the interests of the child.

SENTENCING PRINCIPLES

36. This Court has considered many matters over the years where there have been proceedings before the Court in which the Court has been asked to deal with a person who has contravened current orders. In the case of *Abduramanoksi & Abduramanoska* (2005) FLC 93-215 the Full Court of this Court considered at page 79,592 that in dealing with contempts under s 112AP of the *Family Law Act 1975* if a custodial sentence is to be imposed, transparency in the sentence imposed will be afforded in the appropriate case if general criminal law sentencing procedures are adopted, including imposing a sentence for each offence to be served either cumulatively or currently, but such procedure is not mandatory.

37. The Full Court also referred to the decision of the High Court of Australia in the case of *Pearce v R* (1998) 194 CLR 610 and to the following passage summarising the principles in that case as set out in the publication *Sentencing Law In New South Wales*, (Butterworths), at paragraph 01-030:

A fundamental principle of sentencing is that sentencing does not involve precise mathematical formulae nor admit of a single correct answer.

38. Although the present proceedings are not brought pursuant to s 112AP of the Act, in my view, the same broad approach should be taken under Division 13A Part VII where there has been an application for imposition of a custodial sentence.

39. As early as 1976, the first year of this Court's operation, the Full Court of this Court said in the case of *Cummings & Cummings* (1976) FLC 90-100:

In deciding whether to impose imprisonment, fine or other penalty, there are a number of factors which the Court needs to consider. Firstly, the need to consider the parties' future relationships and the role of counselling. Secondly, the need to ensure compliance with a particular order. Thirdly, the need to protect a party from violence or interference. Next, the need to impose a punishment appropriate to the breach, and finally, a need to uphold the authority of the Court to make effective orders.

40. In the case of *Rutherford* (1999) FLC 92-866 the Full Court approved the following observations of Coleman J in the case of *Nonemacher*, which was an unreported decision in May 1993.

There is a necessity to give a signal to the community that the Court expects its orders to be obeyed and that flagrant breaches will be regarded extremely seriously.

Having referred to this, the Court must be careful not to order a sentence which is more severe than that which is necessary to achieve the purpose for which it is imposed. The nature of the contravention is obviously relevant, as are personal factors of the offender, including character, age, means, physical and mental condition and their conduct since the contravention occurred, including and in particular remorse.

THE BREACHES

41. I turn to consider the individual breaches. As I have said, the first one is that between 15 November 2005 and 3 May 2007 the mother intentionally contravened Order 13 of the orders by removing the child from the [Kindergarten] without the consent of the father.
42. The obligations were for the enrolment of the child at this Centre not to be disturbed by a parent unilaterally. This was a most important parental responsibility. It was a matter of considerable importance to the education of the child. It was an important part of the settled and regular arrangements for the child. The mother's behaviour in bringing this to an abrupt end has deprived the child of an important educational opportunity, an opportunity to continue to develop her friendships with her former peers at the Centre as well as all the important socialising benefits which would flow to the child.
43. This is a serious breach.
44. The second breach is that between 15 November 2005 and 3 May 2007 the mother intentionally contravened Order 2(i)(vi) of the orders by failing to produce the child to [Kindergarten] into the father's care on each alternate week.
45. In my view, this is the most serious of the breaches. It is the obligation which should have brought about the reality of the shared parenting arrangement by providing for the mechanics of this. Failure by the mother to provide the child to the father in accordance with this obligation from 15 November 2005 until 24 April 2007 has deprived the child of all opportunity for developing her relationship with her father.

46. The third breach is, as I have said, that on 12 noon Christmas Eve 2006 the mother intentionally contravened Order 2(i)(vii) of the orders by failing to produce the child to the father for Christmas holiday time.
47. The consequence for the child of this breach is that she has not been able to spend any time on Christmas Day with her father. Christmas Day is a very special day for young children and the child was deprived of spending part of this special day with her father.
48. But this is a much less serious breach than the above two breaches.
49. The next breach is, as I have said, that from 5 pm on the Saturday immediately preceding Father's Day in 2006 the mother intentionally contravened Order 2(i)(viii) by failing to deliver the child to the father for Father's Day.
50. This breach has deprived the child of spending Father's Day with her father. This is also a special day in the Australian culture. Not only has the child not spent this day with her father, but she has lost, at least for the last year, the opportunity of learning any understanding about the cultural aspects of this.
51. But again this is a much less serious breach than the first two.
52. The fifth breach is that from after preschool until 6 pm on the child's birthday in 2006 the mother intentionally contravened Order 2(i)(ix) of the orders by failing to make the child available for the father to have birthday time with the child.
53. Birthdays are very special occasions, especially for children. Birthdays are important opportunities for parents to demonstrate their love for their child, not only in an emotional way, but also in a tangible way by providing gifts, parties and the usual physical aspects of celebration. The child has been deprived of this.
54. But this too is at the less serious end of the scale of seriousness of the breaches.
55. The final breach is that between December 2005 and 24 April 2007 the mother intentionally contravened Order 9 of the orders by failing to provide the current residential address and current telephone number of the said child to the father 14 days before the proposed change, if at all.
56. Provision by each parent to the other of current residential address and telephone number of the child was not only an important component of parental responsibility, but an essential requirement in the circumstances of this case of preserving the child's security and fundamental elements of the parenting arrangements.

57. This is a very serious breach because it has had very serious consequences. The effects of the breach are similar to those of the second breach in that, as I have said, the failure of the mother in fulfilling her obligations under this part of the orders deprived the child of any relationship with her father over a period of approximately 16 months.

PENALTY

58. In determining penalty I take into account, firstly, the mother's admissions as I have observed them, the fact that she has cooperated in these proceedings and not exacerbated the proceedings. As I have said, she has apologised to the Court, to the father and to the child. As I have also said, and as was pointed out by her learned counsel, the mother has no prior convictions. I also take into account the mother's state of health. This is, firstly, that the mother is pregnant, having conceived in approximately late April 2007. Her expected date of confinement is approximately 6 to 9 February 2008, although in the event of a caesarean delivery the birth would be in late January 2008. The mother had a very difficult delivery with D. Dr Q, specialist gynaecologist for the mother, says that the mother is going through tremendous anxiety, worries and stress/depression regarding the possible outcome of these proceedings. Dr Q says that if it is not a favourable outcome the mother might go into premature labour. The doctor also says that if the Court does impose a prison sentence, this will have a tremendous adverse effect on the pregnancy which might affect the unborn baby and the mother and that psychological trauma can bring adverse effects on an unborn child.
59. In relation to the state of the mother's mental health, the mother had attended Dr S, forensic psychiatrist, now some months ago for the purpose of a pre-sentence report. Dr S said that in his opinion the mother was suffering from an adjustment disorder characterised by depression and anxiety mainly arising out of these proceedings and what had occurred in terms of the child. But more recently Dr P, psychiatrist and single expert, has reported, amongst other matters, his opinion that the mother meets the criteria for a borderline personality disorder with narcissistic borderline and avoidant traits. Dr P said that the mother does not meet the criteria for a formal psychiatric illness.
60. This is similar to the earlier opinion of Dr T. It has since been confirmed generally by Dr R, consultant psychiatrist, who has been treating the mother since July this year, including for some mild depressive symptoms. Dr R said that the mother's past history and records are suggestive of a personality vulnerability with narcissistic and obsessional traits which are likely to make the mother more vulnerable to a more significant disturbance of her mood. Dr R has referred the mother to a psychologist, Ms K, for supportive treatment.

Dr R says that a custodial sentence would be prejudicial to the mother's health. Dr R says that the mother would be unlikely to be able to access appropriate treatment in prison and that a custodial sentence would create further distress, exacerbate her symptoms and be detrimental to the health of the foetus.

61. So far as the interests of the child are concerned, obviously it is not in the child's interests for the mother to be imprisoned and the longer the mother was in prison, the longer such would be operating against the child's interest. However, Dr P suggested that time could be spent between the mother and the child and suggested that this could be arranged at the prison from time to time, preferably not more than one month between visits. The reference to one month was not in the specific context of any imprisonment of the mother, but was really in the broader context of what would be appropriate for the child in terms of being able to continue a relationship with the mother.
62. I have also had the opportunity of reading an affidavit by Mr F, who is the mother's partner and the father of her unborn child. He is concerned about the effect a prison sentence might have on the unborn child and the likely trauma to the mother. He also asks the Court to consider the effect on the child D and on his son L of the mother being incarcerated. I also take account of those other matters which learned counsel for the mother drew to my attention during the course of submissions on not only this occasion but also the earlier occasion.

CONCLUSION

63. The mother's actions were deliberate and calculated, even if not malicious. I note that Dr P says that the mother taking D to Perth can be seen as a ruthless expression of her self-absorbed way of relating to the world and being consistent with a less than conscious motivation rather than a malicious motivation.
64. Having said this, the mother, at least in my view, knew precisely what she was doing. She was taking matters into her own hands and treating not only the welfare of the child and the rights of the child's father and the interests of the broader community with contempt, but she was also treating the authority of this Court with contempt. This is not a breach which can appropriately be dealt with by a bond or a fine.
65. I recall that on an earlier occasion the mother offered a surety from her mother. Yet breach of such a surety would affect the interests of her mother, not herself, and could hardly be effective as a real deterrent. But the thrust of the submission today did not really include that matter.

66. In my view, a fine would be of little value as a deterrent as I am told the mother is impecunious.
67. Courts are at the cornerstone of our democratic system. They are a last but necessary resort in checking behaviour which is against the interests of the community and individuals. This Court has a special responsibility to safeguard the rights of defenceless children. A blatant disregard of orders of a properly established court cannot be accepted or excused lightly.
68. Accordingly, in my view, the only proper sanction in the circumstances of this case is a prison sentence.
69. I note the decision of the Court of Criminal Appeal in New South Wales in the case of *R v Edwards* (1996) 90 A Crim R 510. I referred this case to all those present during the course of submissions. This was a decision about the extent to which a court in sentencing is able to consider hardship, particularly hardship on other persons. I will refer to a passage at page 515 in which Gleeson CJ and James and Ireland JJ say as follows:

There is nothing unusual about the situation in which the sentencing of an offender to a term of imprisonment would impose hardship upon some other person. Indeed, as senior counsel for the respondent acknowledged in argument, it may be taken that sending a person to prison will more often than not cause hardship, sometimes serious hardship and sometimes extreme hardship, to another person. It requires no imagination to understand why this is so. Sentencing judges and magistrates are routinely obliged, in the course of their duties, to sentence offenders who may be breadwinners of families, carers, paid or unpaid, of the disabled, parents of children, protectors of persons who are weak or vulnerable, employers upon whom workers depend for their livelihood, and many others in a variety of circumstances bound to result in hardship for third parties if such an offender is sentenced to a term of full-time imprisonment.

70. Then there is a reference to what is described as the frequently cited Australian judgment, being that of Wells J in the case of *Wirth* (1976) 14 SASR 291 at 295-296 as follows:

...

Hardship to spouse, family, and friends, is the tragic, but inevitable, consequence of almost every conviction and penalty recorded in a criminal court ... It seems to me that courts would often do less than their clear duty – especially where the element of retribution, deterrence, or protection of society is the predominant consideration – if they allowed themselves to be much influenced by the hardship that prison sentences, which from all other

points of view were justified, would be likely to cause to those near and dear to prisoners.

But it has been often remarked that the strength of our law lies in the willingness of judges, when applying a principle, not to carry it past the point where a sense of mercy or of affronted common sense imperatively demands that they should draw back. So it is proper that I should here add that, in my opinion, hardship likely to be caused by a sentence of imprisonment under consideration ought to be taken into account where the circumstances are highly exceptional, where it would be, in effect, inhuman to refuse to do so. ... For example, if it were demonstrated to the satisfaction of the court that to send a man to prison would, without much doubt, drive his wife to suicide, it would be a steely-hearted judge who did not, however illogically, at least try to meet the situation by suitably framed orders as to penalty. But further than that, in my judgement, courts should not go.

71. Having referred to these authorities I do not regard the circumstances of the present case to constitute hardship at a level which would justify not imposing a prison sentence. I have taken the mother's state of health, particularly her pregnancy into account in relation to the course I propose. I also take into account the fact that her counsel indicated the mother would prefer to commence serving a sentence immediately rather than postpone its commencement.
72. The maximum sentence available to the Court is imprisonment for 12 months. This must have been intended by the Parliament for the most serious and culpable behaviour. While I regard the mother's behaviour to have been very serious, as I have said, with serious consequences for the child in particular, I do not regard it as at the higher end of the range. In my view, it is broadly in the middle of the range.
73. What I have decided is for the mother to serve three months on the bottom. While I propose to impose a six-month imprisonment term, three months of that will be suspended upon the mother entering into a bond to comply with all court orders for a period of two years.
74. The mother has been anxious to show the Court that she has some recognition of the error of her ways and that she has been taking steps through her medical practitioners to obtain some assistance in relation to her behaviour. She has cooperated in these proceedings and she admitted the relevant breaches. As I have said, she has apologised to the father, the child and also to this Court. In these circumstances, together with all the other circumstances referred to above, I have decided to reduce the sentence which otherwise would have been imposed.

I certify that the preceding seventy-four (74) paragraphs are a true copy of the Reasons for Judgment of Judicial Registrar W P Johnston.

Associate: _____

Date: 5 November 2007