

A resource kit for parents

My ex-partner isn't following the court orders about our children... What can I do?



About this kit

This kit has been prepared by Legal Aid NSW. Legal Aid NSW is an independent, government-funded agency which provides legal representation to people who cannot afford a lawyer and who qualify for legal aid.

Legal Aid NSW also provides free advice to the public, a duty solicitor at the Family Courts, and a lawyer-assisted family dispute resolution service. Details of Legal Aid NSW services are provided at the end of this kit.

This kit provides some basic advice and assistance to people who already have court orders about parenting, including consent orders. It provides information about:

- enforcing a term of the parenting orders;
- options about what to do where parenting orders have been breached; and
- what to expect if it is alleged that you have breached the parenting orders.

If you do not have any court orders about your children or you have a parenting plan which is not working, you should seek legal advice. See the contact list at the end of this kit to contact any Legal Aid NSW office or LawAccess NSW on 1300 888 529.

This kit is intended as a guide to the law and is not a substitute for legal advice. It is recommended that you obtain legal advice in conjunction with the information in this kit. Every situation is different when parenting orders no longer work and there may be a range of options available to you to fix your particular problem. Legal advice can assist you to decide which option is more appropriate for your circumstances.

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While every effort has been made to ensure the information in this kit is as up-to-date and accurate as possible, the law is complex and constantly changing and you are advised to seek expert advice when faced with specific problems. If you are likely to be involved in court proceedings or legal action you should obtain advice from a lawyer. Legal Aid NSW disclaims all liability for errors or omissions of any kind, or for any loss or damage, in whole or in part, arising from any person relying on any information in this kit.

Throughout this document the Family Court of Australia and the Federal Circuit Court of Australia are referred to collectively as “the Court”.

Getting started: what to consider first

1. What will contravention orders achieve?

A contravention application is an application where you ask the Court to remedy or fix a breach of a court order. A breach occurs when somebody disobeys a court order.

If you are thinking about making a contravention application, you should keep in mind that the Court's main focus will be determining whether or not there has been a breach of the court orders. If there has been a breach, the Court may first try to fix this problem by varying the orders so that there is less likelihood that a breach will occur in the future.

The Court may also make some orders giving you "make up" time with your children so that you are able to make up the time that you have missed with them when the breach occurred. In some circumstances, the Court may also make an order that the parent who breached the order has to participate in a parenting course so that they can learn more about the impact their behaviour can have on the children.

The primary aim of the Court when it hears a contravention application is to get things back on track. It is not necessarily to punish the other party or to impose a penalty. Whilst the Court will be concerned about the actions - or lack of action - of the other party, the main focus will be on restoring your relationship with your children and making sure that you can continue to spend time with them in accordance with the court orders. This should also be your main focus when making your contravention application to the Court.

2. Do you have your parenting orders?

Parenting orders deal with who is responsible for making decisions about the children, where the children will live and when they will spend time with each parent. If you are considering making a contravention application, you will need a copy of your parenting orders. If you do not have a copy of your parenting orders, you can:

- obtain a copy from the Registry of the Court that made your orders; or
- call 1300 352 000 if your orders were made in the Family Courts and ask for a copy to be sent to you.

For details of your Local Court go to www.lawlink.nsw.gov.au or contact LawAccess NSW 1300 888 529.

It will help if you can provide the file number of your case and the date your orders were made.

I have a parenting plan. What can I do?

A parenting plan is a written agreement about children which is signed and dated by the parents. If you have made a parenting plan following your court orders, this may replace your court orders. You cannot ask the Court to enforce a parenting plan or to find that a breach of a parenting plan has occurred. If your parenting plan is not being followed, you should obtain legal advice about what steps you can take. See the contact list at the back of this kit for details of where you can obtain advice.

Are your parenting orders clear?

Parenting orders need to clearly state who will do what, where, when and how. If this is not clear you may not be able to bring a contravention application because you may not be able to show how your court orders were breached. For example, if an order requires a child to spend every second weekend with a parent but does not say when this is to start, it may be difficult to prove that the other parent did not deliver your child on the correct date.



3. Do I need to attend family dispute resolution before I go to court?

Family dispute resolution (also known as mediation) is required before you commence any court proceedings about children, including contravention proceedings, unless you can show that an exemption applies to your case. If your orders are over 12 months old, you are normally required to attend mediation before you can make a contravention application.

A court will not usually allow an application to be filed unless a certificate from a family dispute resolution practitioner is filed at the same time.

Legal Aid NSW may be able to assist you by organising a mediation. See the contact list at the end of this kit for Legal Aid NSW and LawAccess NSW. A list of family dispute resolution practitioners can be found at www.familyrelationships.gov.au or by phoning 1800 050 321.

What are the exemptions from attending mediation or providing a certificate?

In some circumstances, you do not need to attend mediation before commencing court proceedings. If you are claiming you should be exempt from attending mediation, you will need to provide information to show how one of the exceptions applies to you when you file your application with the Court.

The exceptions include:

- where a person has contravened and shown a serious disregard for a court order made in the last 12 months;
- if the Court is satisfied that there are reasonable grounds to believe that:
 - there has been family violence or child abuse by a party,
 - there is a risk of violence by a party, or
 - there is a risk of child abuse if there were to be a delay;
- where a party is unable to participate effectively in mediation (for example, they are too far from a family dispute resolution provider or they suffer from a physical or mental incapacity of some kind).

Contravention of parenting orders

What is a “contravention?”

Contravening a parenting order means disobeying the parenting order.

For example if a person:

1. does not comply or makes no effort to comply with the terms of the parenting order; or
2. deliberately prevents or tries to prevent another person who is bound by the order from complying with the order; and
3. does not have a reasonable excuse for contravening the order; (See p11)

then they may have breached or contravened a court order.

Most parenting orders have terms about where the children will live and who they will spend time with. Therefore a contravention of the orders might occur if a person refuses to deliver or return the child to a person with whom the child lives or spends time with. For example, if there are orders for a child to see their grandparents every second Sunday and the father refuses to let the child go, then he may be contravening the parenting order.

What happens if a parenting order has been breached?

If the Court finds that an order has been breached, depending upon the seriousness of the contravention, the Court has the power to make a variety of orders. For example, the Court could make an order for:

1. make up time to compensate for the time that the person missed;
2. a person to attend parenting education programs such as a post separation parenting program;
3. a person to enter into a bond with the Court to do certain things for a period of up to 2 years. This may involve attending appointments for counselling, or

being of “good behaviour”. Good behaviour could include making sure that a person complies with the court orders in the future;

4. a fine to be imposed;
5. imprisonment for up to 12 months; and/or
6. the party who breached the orders to pay the other party’s legal costs.

In addition, the Court can decide to vary or change your original parenting order as part of the contravention proceedings. This can be done even if you did not apply for the Court to change the order. Often the first thing the Court will do when a breach has been proved is assess whether an order needs to be varied to prevent any further problems in the future.

The most common outcomes in contravention applications are orders for make up time and for the breaching party to attend a parenting course, especially the first time a breach of the court orders is found to have taken place.

Who is involved in contravention proceedings?

The person applying for a contravention order is called “the applicant”. Any person that has previously been a party to a parenting order is able to apply to the Court.

The “respondent” to a contravention application is the person alleged to have contravened or breached the parenting orders. This will usually be the other parent.

Should I be worried about court costs?

The Court is required to consider whether to make an order for the applicant to pay the respondent’s costs in the following circumstances:

- The contravention application is dismissed because the alleged breach could not be proved.
- A respondent successfully argues that there was “reasonable excuse” for contravening the order.
- There have been contravention applications made by the applicant in the past which have failed.

The Court must consider making a costs order against the respondent if it finds that there has been a contravention of the orders.

Choosing the best option for me

If your parenting orders are not working or the other parent has disobeyed the orders, there are a number of options to consider. Contravention proceedings may not be the best option for you.

Reaching a solution

Firstly it is important that you try to reach a solution with the other parent before you commence court proceedings. Options for informally attempting to resolve the matter could include writing a letter, or participating in mediation.

How do I write a formal letter?

[DATE]

Dear [NAME],

On [DATE] the [NAME OF COURT] made orders that [NAMES OF CHILDREN] spend time with me [SET OUT WHAT THE ORDER PROVIDES]

The orders also say I am to collect [NAMES OF CHILDREN] from you at [CHANGEOVER LOCATION] at [TIME].

You are aware of these orders as you were in court the day the orders were made. However, in case you have lost your copy I have enclosed a copy of the orders for your information.

I went to [CHANGEOVER LOCATION] on [DATE] just before [TIME]. You did not come, and I did not see [NAME OF CHILDREN] in accordance with the orders.

I am due to have [NAME OF CHILDREN] on [DATE] from [TIME]. I will again be at [CHANGEOVER LOCATION] at [TIME] on [DATE] to collect [NAME OF CHILDREN] for my visit with [HIM/HER/THEM].

If you do not bring the children I am putting you on notice that I will start contravention proceedings against you. At those proceedings I will rely on this letter in support of my case.

Yours faithfully

[YOUR NAME]

When would I consider other alternatives to contravention proceedings?

In some cases when your orders are not working, a contravention application may not be the best option for your particular circumstances. In some circumstances the Court may decide that you are not able to prove that a breach or contravention of the court orders has occurred.

If one or more of the situations below seems possible in your case, you should consider what alternatives might be available to you instead of filing a contravention application.

- Your court orders are a bit confusing and could be interpreted in more than one way.
- Your court orders do not clearly set out how they are supposed to work on a practical level. For example, if there is no specific location and/or time nominated for changeover to take place in your orders.
- Your court orders are not specific enough. For example you have an order which says you can spend time with your child “as agreed” between you and the other party.
- The other party could argue that they were not aware that the orders had been made. This could occur if they were not in court when the orders were made.
- The other party could argue that they did not understand the orders.
- The other party has a “reasonable excuse” for not complying with the court orders. See page 11 for an explanation of reasonable excuse.

What are the alternatives to contravention proceedings?

You should consider one of the options below rather than a contravention hearing if you are not confident you can prove the parenting orders have been disobeyed or if one of these options are more likely to fix the problem. Before making any application to the Court, you should seek legal advice to make sure that you are choosing the right option for your particular circumstances.

1. Family dispute resolution

Family dispute resolution is useful if there is a problem with your court orders, or if your court orders need to be revised because of changed circumstances. For example where:

- a party is unable to arrive at the changeover location at the time contained in the court orders due to a change in their circumstances (For example their work hours have changed, they no longer have access to a car or driver's licence, or they have moved address since the court orders were made.);
- your child is now involved in an activity that affects them being able to spend time with you in accordance with the court orders;
- an Apprehended Violence Order has been made that affects how changeover takes place or who attends changeover (You should keep in mind that, in some circumstances, it may not be possible or appropriate to participate in family dispute resolution where an Apprehended Violence Order has been made.);
- your ex-partner is not taking advantage of the opportunities the order gives them to spend time or communicate with their child (For example, they repeatedly postpone their days to have the children or they do not ring them when the court order says they should.); or
- there has been a change in circumstances which affects the court orders or makes them unworkable or inappropriate.

Family dispute resolution takes place in an informal setting and allows you and the other party to control what orders are made in relation to your child without having to go through what can often be lengthy and expensive court proceedings.

Any agreements reached through family dispute resolution can be made binding by filing the agreement with the Court as "consent orders". To obtain a consent orders kit, contact the Family Courts on 1300 352 000.

2. Making an application to vary the court orders

If you have already attended family dispute resolution in relation to the problems you are having with the court orders and you still have not been able to reach an

agreement with the other party, you may wish to make an application to the Court to vary the court orders.

When making an application to vary or change the current court orders, you will need to be able to satisfy the Court that there has been a change in circumstances that makes the current arrangements inappropriate. Depending on your financial circumstances and the changes you want to make to your court orders, you may be eligible for legal aid. Depending on your financial circumstances there may also be a court filing fee when you commence your case.

3. Recovery proceedings

In some circumstances, the Court will make a recovery order if you have an order to spend time with your child. Examples of situations where the Court may consider taking this approach is where the other parent has moved so far away that you are unable to keep spending time with your child, or where a parent consistently fails to make a child available in accordance with the current court order. Recovery orders can stay in place for up to 12 months and can be used to recover a child on any number of occasions during this period.

It is important that you keep in mind that the Court will not automatically make a recovery order in relation to your child just because you ask them to do so. You will need to satisfy the Court that a recovery order is the best option for your situation. For more information about recovery orders, see the Legal Aid brochure *"My ex-partner has taken our children without my permission... What can I do?"* and obtain advice from the contact points at the end of this kit.

4. Enforcement proceedings

Enforcement proceedings are another type of court proceeding which are used to deal with orders which have been breached. Generally, enforcement proceedings are only used in situations where a person has failed to comply with a court order relating to financial matters.

The Court will not enforce any orders in relation to a child spending time with a parent if that parent does not want to spend time with the child.

One situation where the Court may consider enforcing a parenting order is where a parent has been ordered to sign documents in relation to the child such as a birth certificate or passport application. The Court may make an order that the parent sign within a set timeframe or a representative from the Court will sign the documents on behalf of that parent.

Your contravention application

If you think that a contravention application is the best option for you, before you start, ask yourself the following questions:

- ✓ Have I obtained a copy of my court orders? See page 4.
- ✓ Do I need to attend family dispute resolution or does my case come within one of the exemptions? See page 5.
- ✓ Are my court orders clear? - check dates and times are clear and get legal advice if you are unsure. See page 4.
- ✓ Have my court orders been replaced with a parenting plan? See page 4.
- ✓ Is the respondent aware that the parenting orders are in place? Were they or their lawyer present in court when the orders were made? Do they have a copy of the orders?
- ✓ Could the respondent argue that they do not understand the orders or their obligations under the orders? Have they been following the orders until now?
- ✓ Is it likely that the respondent will have a “reasonable excuse”? See page 11.
- ✓ Have I exhausted all other options? For example, negotiation and family dispute resolution?
- ✓ Should I file an application to vary the court orders instead?
- ✓ Have I complied with the orders up until the time of my matter being dealt with by the Court? This may include attending a changeover location so that you are able to advise the Court that you have continued to comply with the orders.
- ✓ Have I done anything which might have contributed to the breach of the orders for example not arriving on time at changeover, or regularly changing the arrangements?

What do I need?

You will need:

- An “Application – Contravention” form;
- An “Affidavit” form.

Depending on whether or not you attended family dispute resolution you may also need:

- An “Affidavit - Non-Filing of Dispute Resolution Certificate”;

OR

- A section 60I Certificate from a family dispute resolution provider.

Forms can be obtained from a Registry of the Family Courts by calling the Family Law Courts Hotline on 1300 352 000, or on-line at www.familycourt.gov.au. You should obtain legal advice about how to complete your application and affidavit. See the contact pages at the end of this kit for Legal Aid NSW offices or Community Legal Centres.

Step 1: Complete the “Application – Contravention” form

You must complete all sections of the application form. You must state exactly what the respondent did or did not do which you say amounts to the contravention.

You will also need to attach a copy of the parenting orders to your application. The application for contravention form gives examples of how to allege that a contravention has taken place. You should pay close attention to how these examples are worded when preparing your own application.

Don’t set out the evidence you say proves the contravention in your application form. This information will need to go into your affidavit.



Important Tip

You may have many allegations of breaches you want the Court to determine in your application. However, it is up to the Court whether it will hear all of the allegations. The Court may ask you to select the two or three best allegations contained in your application for your hearing.

Step 2: Complete your affidavit in support of the application

The purpose of your affidavit is to provide the Court with evidence in support of your application. An affidavit is a written statement by a party or a witness. It must be sworn on oath or affirmed to be true in front of a person with the correct authority, for example a lawyer or a Justice of the Peace. You may need to obtain an affidavit from a witness in support of your alleged contravention. You should not put letters or statements from your children into evidence under any circumstances.

Step 3: Filing your application

You should file your application at the nearest Family Courts Registry. You can telephone 1300 352 000 to find the nearest location for you or search the internet. There are currently no filing fees for contravention applications.

Before filing your application, you should make two (2) copies of the original Application – Contravention as well as any attachments and affidavits. The Court will keep the original documents for the court file and give you a sealed (stamped) copy of the two (2) copies you have filed. One of these is for your own records and the other will need to be served on the respondent.

You can file the documents personally or post them to the closest Family Courts Registry.

The Registry will:

- stamp the documents with the Court's seal;
- give you a case number for your matter;
- list your application on the next available date; and
- arrange for the sealed documents to be sent back to you.

Step 4: Arranging for service of the documents on the respondent

Once your documents have been filed, you then need to make sure that the other party is given a copy of them. This is called serving the documents.

There is a formal process to follow when serving court documents and the Court does not do this for you. Contravention applications must be personally served. This means that somebody has to physically hand the documents to the respondent. Personal service can be arranged through a private process server, the Sheriff of the Local Court, or arranging for a person (other than you) aged over 18 years to hand the documents to the respondent.

To serve your documents, the Sheriff or process server will need:

- the address of the other parent;
- details of where they work; and
- details of any family member or friend that they may live with.

A photo of the person to be served sometimes helps. You will have to pay for serving the documents through the Sheriff or a process server.

Alternatively, you can ask a friend or family member over the age of 18 years to serve the documents. If they do so, they will need to complete an Affidavit of Service and swear or affirm it in front of a Justice of the Peace. You will then need to file this document with the Court. You can obtain a *"Do it yourself Service Kit"* from the Court's website at www.familylawcourts.gov.au or by calling 1300 352 000.

What if I am having trouble serving my application?

The Court considers it is very important that the other party is aware of any contravention proceedings. If you are having trouble serving the other party, a special application may be made to the Court for orders for substituted service or for a location order. If you are having trouble serving the respondent with your application, it is recommended that you obtain legal advice. See the contact list at the end of this kit.

Orders for substituted service can include orders allowing the documents to be served on another person who may know where the other parent or children are, such as a grandparent or sibling.

In a location order you can ask the Court to make orders that an individual person or government agency such as the Department of Human Services (DHS) Child Support, provide information about the location of a child or parent directly to the Court.

If you cannot find your children, you may need a recovery order as well as a location order. A recovery order can include a direction for the police to return your children. You will need to obtain legal advice.

For more information about recovery orders see the Legal Aid NSW brochure *"My ex-partner has taken our children without my permission... What can I do?"*

Information for the respondent

If you are served with a contravention application, you should obtain legal advice as to the options that are available in your particular situation. See the contacts page at the end of this kit for a list of organisations that may be able to assist you.

I have received a contravention application - What can I do?

It may be possible to negotiate a settlement with the applicant. You may decide to try to settle the matter by writing a letter or participating in family dispute resolution.

Negotiation may not be advisable if you have concerns about:

- family violence;
- a child being at risk of harm; or
- any criminal investigation involving the child, or someone else involved in the matter.

You should obtain legal advice if any of these circumstances apply to your case.

Do I need to attend court?

Yes. If you do not, the Court has the power to make orders in your absence. The Court also has the power to issue a warrant for your arrest.

What is a reasonable excuse?

Reasonable excuses for the contravention of a parenting order include:

- that you did not understand what you had to do under the order;
- that you believed on reasonable grounds that your actions in disobeying the parenting order were necessary to protect the health or safety of your child or another person; AND
- that the length of time that you disobeyed the order was not longer than reasonably necessary.

A court does not accept as reasonable excuses the following circumstances:

- you do not agree with the order;
- your reasons are personal (For example, you do not like the applicant's new partner.); or
- your child does not want to spend time with, or return to the other parent. It is your responsibility to actively encourage your child to spend time with the other parent and you should do everything possible to ensure this happens. This is a technical area and you should seek advice if these circumstances apply.

Examples of "reasonable excuse":

1. The parents have orders that their daughter lives with them for equal amounts of time. If she is ill for several weeks and her mother obtains medical certificates, the Court may still find there has been a contravention especially if the child is looked after by other people such as her grandparents while her mother is at work.
2. Where a car has broken down or there has been a car accident delaying a child being handed over to the other parent, the Court will accept this as a one off reasonable excuse as long as it is not used for delaying children spending time with the other parent for longer than necessary.

Do I need an affidavit?

You do not need to file an affidavit prior to the hearing. You only need to file an affidavit or give evidence if the Court finds that the applicant has an arguable case. See the section about the hearing on page 13.

If you admit the breach, but say you have a reasonable excuse it is important to file an affidavit explaining the circumstances. You should obtain legal advice about what to write or say. See the contacts at the end of this kit. See the section called "Your affidavit" at page 17 for some tips about your affidavit.

You may want to provide affidavits from witnesses. If so, the witnesses will need to be present in court for cross-examination if the other party wants to ask them questions.

Going to court: what to expect

Both parties must be at court at the time and date written on the documents. Before you leave for court, make sure you have copies of all the documents you need.

What do I take to court?

The applicant:

- ✓ A copy of your application;
- ✓ Your original parenting order;
- ✓ Any affidavits in support of your application;
- ✓ A copy of the Affidavit of Service and/or Acknowledgment of Service;
- ✓ Pen and paper to write down any directions or orders.

The respondent:

- ✓ A copy of the application;
- ✓ A copy of the applicant's affidavits;
- ✓ Any evidence demonstrating your "reasonable excuse". This could include medical certificates, hospital records or any receipts;
- ✓ Your affidavit (together with 2 spare copies);
- ✓ Pen and paper to write down any directions or orders.

The Court will have lists of where the cases for that day are to be heard. Ask court staff if you are confused about where to go. Court officers will call matters into court. If you are representing yourself you should let the court officer in your courtroom know you are there as soon as you can. If you have concerns for your safety, let security know as you enter the building.

Whether you are the applicant or respondent you should:

- be prepared to answer any questions asked by the Judicial Officer or Judge; and
- have a summary of your case prepared to help you answer any questions – a chronology or timetable of events can be useful.

When your matter is called into court, remember:

- the applicant will sit on the left hand side of the bar table; the respondent will sit on the right hand side;
- be calm and polite; focus your attention on the facts and do not make insulting, or derogatory comments about the other parent; and
- always stand when spoken to by the Judge. You normally address the Judge as "Your Honour" however you can check this with the court officer.

What happens on the first day?

You should be ready for your application to proceed on the first court date. However, the Court may not hear the application on this day. If this happens, the Court will make an order for an adjournment of the matter to another date. Either party may ask the Court that the matter be listed with priority on the next occasion. If the matter is to continue onto another day, the Court may give hearing dates, give directions about the process to be followed and give directions about what has to be done before the next court date.

If the matter is adjourned, the applicant may ask the Court that the respondent give an undertaking (a promise to the Court) to comply with the orders on the next scheduled occasion. It is up to the Court whether to do this.

The respondent may ask that the Court suspend the orders which the applicant alleges are being breached. If this happens, the applicant will need to address the Court as to why the orders being breached should stay in place.

If the respondent fails to attend, the applicant may ask the Court to issue a warrant for their arrest to appear on the next court date. The applicant must be able to demonstrate that the documents have been served by handing the Court their "Affidavit of Service" document. If the applicant is unable to demonstrate service of the documents on the respondent, the Court will make further directions relating to service.

The contravention hearing

Most contravention hearings will run according to the steps below, however there may be some differences in how hearings are run. This information should be used as a guide only.

The Judge may first decide to look at whether a variation of the orders would be in the best interests of the child, and may ask the parties questions about the orders and what has been happening so the Judge can consider whether to change the orders. If they do this they may not formally hear the contravention application, or they may adjourn it to see how the changed orders are working and to see whether any parenting courses have assisted in communication between the parties.

The applicant might be asked to choose their three “best” contraventions to continue with, especially if there is a long list of alleged breaches.

Stage 1: The allegations: admission or denial

The Judge will ask the respondent to stand and they will read each of the alleged contraventions.

The Judge will ask the respondent to either admit or deny each of the alleged breaches. If the respondent admits the breaches, the Judge will ask the respondent whether they had a “reasonable excuse” for the breach. If the respondent says they have a reasonable excuse, the respondent will give their evidence. See Stage 4 onwards.

Stage 2: The applicant’s case

If the respondent denies the contravention, the applicant’s case is heard first. The applicant must prove that the respondent has “a case to answer”. They need to prove the existence of a parenting order and that the respondent knew about the parenting order. The applicant then needs to prove that a parenting order was disobeyed and a contravention occurred.

Objections

The Judge will ask the applicant what documents they will rely on, and ask the respondent if there is anything in the applicant’s affidavits they wish to object to. Parties can object to anything they consider is not admissible by the rules of evidence. You cannot object just because you disagree with what the other party is saying. Objections can be made to anything that is an opinion, “hearsay”

(something that has not been directly heard or seen by the person giving that evidence to the Court), or any contravention which does not clearly state the exact date, time and place of the contravention.

Evidence in Chief

The applicant then gives their evidence in the witness box on oath, after they have either sworn or affirmed that they will tell the truth. If the applicant has a lawyer, the lawyer may ask the applicant questions about their affidavit. This is called the evidence in chief. If the applicant is self represented they will need to tell the Court that they rely on the affidavit they have filed. The Judge may ask questions. They will require a precise answer. The Judge may then ask the applicant if they have anything further they wish to say.



Important Tip

Parties cannot take notes into the witness box without the Court’s permission (known as “leave”) and the applicant cannot raise any new matter that is not in their affidavit without the Court’s leave.

Cross-Examination

After the applicant gives their evidence, the respondent or their lawyer is then invited to ask the applicant questions. This is called cross-examination. The purpose of cross-examination is to test what the other party or a witness is saying, or confirm facts you might want to establish in your own case.

Questions the respondent may wish to ask in cross-examination could include:

- whether the dates of the alleged contraventions are correct;
- testing that the applicant has done everything required to comply with the terms of the order (For example, if an order required a person to be at a changeover location, the respondent might ask questions about the applicant’s attendance at that time.);
- whether the applicant had entered into any further parenting plans following the making of parenting orders; and
- whether the applicant had discussions with the respondent that led to an oral variation of the order.



Re-examination

After cross-examination, the applicant will be allowed to address any new evidence that might have come out. If the applicant has a lawyer, they will do this by asking questions of the applicant. If not, the applicant may wish to say something from the witness box.

For example: "In relation to the fact I was on holidays in June, I wish to state the dates were between X and Y, and I did not leave my home".

Witnesses

Any witnesses for the applicant will then be called into court to give their evidence. The applicant can ask them questions (called evidence in chief). These witnesses can then be cross-examined by the respondent, and re-examined by the applicant.

Close of evidence

The applicant will then be asked if that is all of their evidence. After their evidence is closed, the applicant cannot put any new evidence before the Court or make any new allegations from the bar table.

Stage 3: Decision about whether the contraventions have been established

The Judge will then decide whether the applicant has produced enough evidence to make out a case that the contravention exists. The Judge will decide which contravention allegations have been proved and which will be dismissed. The Judge may decide to vary the orders whether or not the contravention has been proved.

Stage 4: The respondent's case

If the Court decides that a contravention has been proved, the respondent then gives their evidence. The respondent will be looking to either:

- disprove the breach - for example to say that they arrived with the child at the right time and place but the applicant was not there; or
- prove that they had a reasonable excuse – see page 11.

The respondent may hand an affidavit to the Court and the applicant at this time. This is called "tendering a document". The applicant will be asked if there is anything in the affidavit that they object to.

The respondent will then be asked to go into the witness box and take an oath or an affirmation to tell the truth. If they have a lawyer, the lawyer may ask them questions.

After the respondent has given their evidence, the applicant or their lawyer may cross-examine them on that evidence.

For example, the applicant may ask questions to:

- prove that the respondent was aware of the parenting orders (This could be based on evidence that they attended court, were represented by a solicitor, or had been complying with the orders.);
- prove the contravention occurred; or
- test the reasonable excuse defence (For example if it is alleged the child was ill, questions might be asked in relation to the seriousness of the illness, treatments, doctors visits and whether make up time was offered.)

After the cross-examination the respondent's lawyer can re-examine them about any new evidence that came out in the cross-examination, or if they have no lawyer the Judge may ask them if they wish to comment about any new evidence.

Any witnesses for the respondent will then be questioned about their affidavit, be cross-examined and re-examined.

Terms you will hear in court

Examination in chief

This is when you call a witness who has filed an affidavit in support of your case. You need to ask the witnesses to state their full name, address and occupation, and to tell the Court if there are any mistakes in their affidavit or any change in circumstances since the affidavit was written.

Cross-examination

After your examination in chief, the other party will have the opportunity to cross-examine your witness. This is the other party's opportunity to challenge the evidence given by that witness and to put a different version of events to the witness for their comment.

Re-examination

After cross-examination, you have the opportunity to ask your witness further questions to clear up or expand on any of the answers they gave in cross-examination. You must make sure that you only ask questions about issues that came up during the other party's cross-examination - if it did not come up during cross-examination, then you cannot raise it in re-examination.

Stage 5: Final submissions

At the end of presenting the evidence, the applicant and respondent then each give the Court a summary of their case. This is called "final submissions". The applicant would tell the Court why it should be satisfied there has been a contravention, and why the respondent's excuse is not reasonable. The respondent would tell the Court why it should be satisfied there is a reasonable excuse. You cannot raise any new evidence or make any new allegations during final submissions.

Stage 6: The Court's decision

The case will then be determined by the Court. Even if there is a contravention proved, the Court does not have to make orders. The applicant should be ready to tell the Court what orders they want, that is exactly when any make up time could occur. The respondent should be ready to say why the orders requested might not be in the best interests of the children, for example if the make up time requested means they will be travelling between houses late at night.

Examples of the findings the Court may make are:

- that the contravention has been alleged but not established, in other words the applicant was unsuccessful in arguing the contravention;
- that a contravention has been established but the respondent has given a reasonable excuse for the contravention;
- that a less serious contravention has been established; and
- that a more serious contravention has been established. The Court will look at any previous contravention orders and whether the behaviour of the respondent has shown serious disregard of their obligations under the orders.

See page 16 for more detail about the orders which can be made if a contravention is proved. Any penalty will depend on the seriousness of the matter.

Stage 7: Costs

Once the contravention application has been determined, the Court may hear an application from either party in relation to costs.



Important Tip: How strong does my evidence have to be?

If the applicant is asking for make up time or for the respondent to attend a parenting course, they need to prove that the contravention probably, rather than definitely occurred. The Court calls this proving the contravention "on the balance of probabilities".

If the applicant is asking the Court to consider one of the more serious penalties such as a fine or prison, they need to prove that the contravention definitely occurred. This means the applicant will need to prove the contravention occurred "beyond reasonable doubt". To do this the applicant will need to prove that the events they allege, occurred without any doubts and there is no other reason or explanation.

The respondent needs to prove any case they put (for example their evidence about their excuse) on the balance of probabilities- that is that their version of events probably occurred.

Contravention orders

Orders the Court can make in contravention proceedings

The kind of orders you might expect will depend on the outcome of your hearing, for example whether a contravention was found, whether the Court accepted there was a reasonable excuse, and how serious the contravention is. This will also depend on whether or not there had been a previous proven contravention of the orders.

The Court can make the following orders in contravention proceedings.

A. Where the contravention is not proved

1. An order varying the order alleged to have been contravened.
2. An order that one party pay some or all of the other party's legal costs.

B. Where the contravention is proved and the respondent has a reasonable excuse for the contravention

1. An order varying the contravened order.
2. An order that one party pay some or all of the other party's legal costs.
3. An order for make up time for the time the person did not spend with a child, or for the time the child did not live with the person, as a result of the contravention.

C. Where

- a. the contravention is proved; and
- b. the respondent does not prove a reasonable excuse for the contravention; and
- c. there have not been previous court proceedings where a contravention of the same order was proved; and
- d. the Court is not satisfied that the respondent has behaved in a way that shows a serious disregard of his or her obligations under the order he or she has contravened

1. An order varying the contravened order.
2. An order that one party pay some or all of the other party's legal costs.

3. An order directing the respondent, or the respondent and another party to the contravention proceedings, to attend a post-separation parenting program.
4. An order for make up time for the time the person did not spend with a child, or for the time the child did not live with the person, as a result of the contravention.
5. An order that the respondent pay some or all of the expenses incurred by the person who did not spend time with a child or with whom a child did not live as a result of the contravention.
6. An order requiring the respondent to enter into a bond.
7. An order adjourning the case to allow either or both parties to vary the contravened order.

D. Where

- a. the contravention is proved; and
- b. the respondent does not prove a reasonable excuse for the contravention; and either-
 - i. there have been previous court proceedings where a contravention of the same order was proved; or
 - ii. the Court is satisfied that the respondent in the current contravention has behaved in a way that shows a serious disregard for his or her obligations under the contravened order

1. An order varying the contravened order.
2. An order that the respondent pay some or all of the applicant's legal costs.
3. An order imposing a term of imprisonment for a maximum of 12 months.
4. An order imposing a fine up to a maximum of \$6,600.
5. An order that the respondent enter into a bond.
6. An order for make up time for the time the person did not spend with a child, or for the time the child did not live with the person, as a result of the contravention.
7. An order that the respondent pay some or all of the expenses incurred by the person who did not spend time with a child or with whom a child did not live as a result of the contravention.
8. Any other order the Court considers necessary to ensure the contravened orders are followed in the future.

Your affidavit

1. The applicant

How should I write an affidavit in support of my application?

It is important to keep in mind the following basic rules when drafting your affidavit:

- Use a computer or typewriter. Neat handwriting is also acceptable.
- Refer to the exact order you say has been breached and attach a copy of the parenting orders.
- Only include relevant facts that relate to the alleged contravention.
- Only include events directly observed by you and avoid repeating anything that other people have told you.
- Avoid giving your opinions – stick to the facts.
- Avoid alleging facts that could not be within your knowledge. For example, you cannot tell the Court what your child felt based on the “look” they gave you.
- Report conversations in the first-person. For example, do not write: *The mother said I couldn't have the children this weekend.* Instead write: *I said to the mother: "Can I have the children this weekend?" The mother said to me: "Not today, we are going to the movies".*
- Number each paragraph in your affidavit, and try to limit the information in each paragraph to no more than a few sentences.

What should I put in my affidavit?

You will need to include in your affidavit details about the following:

- personal history, including dates of birth of the children, date of marriage or date of commencement of relationship, date of separation and the current living arrangements for the children;
- when the parenting orders were made and where;
- facts that show the respondent was aware the orders were made (For example, “The respondent was present in court on 1 September 2009 when the orders were made”.);

- facts that show the respondent understood their obligations under the orders (For example, you might be able to give examples where the respondent has complied with the order previously.);
- how the order was breached and the circumstances of the breach of the order;
- a date and time for the alleged breach where possible;
- details about the circumstances of the breach; and
- any further evidence which supports that the alleged breach occurred (For example, parking station dockets or receipts from a shop which prove that you were at the changeover location at the time required by the orders; copies of letters, emails, text messages or faxes between you and the other parent relating to the visit that did not take place.)



Sample Affidavit

This sample affidavit is only an example, and may not fit your particular circumstances. You should seek legal advice if you are not sure how to complete your affidavit.

1. I am the applicant.
2. The respondent, [NAME], and I commenced our relationship in [DATE] and we were married on [DATE]. We separated on [DATE].
3. We have two children, namely [NAME], born on [DATE], now aged [AGE] and [NAME] born on [DATE] now aged [AGE].
4. On [DATE] the [NAME OF COURT] at [LOCATION OF COURT] made parenting orders. Annexed and marked with the letter 'A' is a copy of the parenting orders between the respondent and I which were made in the [NAME OF COURT] at [LOCATION OF COURT] on [DATE].
5. These orders provide that the children live with the respondent and spend time with me [SET OUT WHEN YOU ARE TO SPEND TIME WITH THE CHILDREN].
6. The orders state that we are to meet at [CHANGEOVER LOCATION] to exchange the children at [TIME].
7. The respondent was present in court for the making of the parenting orders and was legally represented.
8. The respondent complied with [HIS/HER] obligations pursuant to the orders during the period [DATE ORDERS WERE MADE] until [DATE OF FIRST BREACH].
9. I attended [CHANGEOVER LOCATION] at [TIME] on [DATE] to collect our children for my period of spending time with them. I waited at [CHANGEOVER LOCATION] until [TIME].
10. While I was waiting I purchased a [ITEM] at [NAME OF SHOP] at [TIME]. Annexed and marked with the letter 'B' is a copy of the receipt showing the time and date of purchase.
11. During the time I was waiting, the respondent and the children did not attend the changeover location. At [TIME] I left [CHANGEOVER LOCATION] without the children. The respondent did not bring the children to [CHANGEOVER LOCATION] and I did not spend time with the children between [PERIOD WHEN VISIT WAS TO TAKE PLACE].

12. At no time before [DATE] did the respondent contact me to advise that he/she would not attend the changeover location and he/she did not contact me during the period of time I was to spend with the children.
13. On [DATE] I wrote to the respondent. Annexed and marked with the letter 'C' is a copy of this letter. The respondent did not respond to this letter.
14. [REPEAT FOR EACH SPECIFIC BREACH ALLEGED]
15. I have not seen the children since [DATE] and have had no response from the respondent to my letter dated [DATE]. I have not had any contact with the respondent since [DATE].

2. The respondent

If you wish you can draft an affidavit that includes reasons why you have disobeyed the orders. You should obtain legal advice in relation to the drafting of any affidavit in your defence of a contravention application. See the contact list at the end of this kit for details of organisations that may be able to assist you.

If the Court finds that the applicant has an arguable case that you have disobeyed the order, you would then ask that your affidavit be admitted into the evidence. However if you do not have an affidavit, the Court will hear your evidence orally.

Do not try to give the Court affidavits from your children, for example an affidavit sworn by your child saying that they did not want to see the other parent. It is more appropriate to refer to statements your children made to you in your own affidavit.



Important Tip

If you write your affidavit in response, you will have a copy of the applicant's affidavit so you will know the allegations they are making. Resist the temptation to respond directly to each allegation- for example do not simply say: "I deny paragraph 6a."

Try to write your affidavit so that it can be read on its own without anyone needing to refer to the applicant's affidavit to understand it. It's best to respond as part of the body of the affidavit in your own words for example: "I deny that I was affected by alcohol on 1 April 2009 when I picked up the children. I had just finished night shift and was tired."

How can Legal Aid NSW help?

Legal Aid NSW is a government-funded agency which provides legal representation to those who cannot afford a private lawyer. Legal Aid NSW also provides free advice to the public and a duty solicitor service at Family Courts.

Legal Aid NSW can provide a lawyer who works at Legal Aid. Alternatively, legal aid can be granted to cover the costs of a private lawyer. Legal Aid NSW has panels of private lawyers throughout NSW who do legal aid work. There is usually a small contribution required with all grants of legal aid.

To be eligible for legal aid, you must meet a means test (income and assets) and a merit test. You will also need to satisfy Legal Aid NSW that your matter is “substantial”,

and that you have exhausted all other ways of solving the dispute. If you are unsure, it is best to discuss your circumstances with a solicitor at Legal Aid NSW or call LawAccess NSW on 1300 888 529. You can check the policies and guidelines for grants of aid on the Legal Aid NSW website at www.legalaid.nsw.gov.au under the tab *Policy Online*.

Legal Aid NSW provides a duty solicitor at Parramatta, Sydney and Newcastle Family Courts. You can use this service no matter what kind of case you have and whether or not you meet the means or merit tests.

Call your nearest Legal Aid NSW office to find out about duty solicitor services. Free legal advice is available at Legal Aid offices across NSW. Details of Legal Aid NSW offices are available at the back of this kit.

If you need urgent telephone advice LawAccess NSW provides information, referrals or advice on 1300 888 529.



Legal Aid NSW offices

Central Sydney

323 Castlereagh St
Haymarket NSW 2000
Tel: 9219 5000
TTY: 9219 5126

Metropolitan offices

Bankstown

Level 8, Civic Tower
66–72 Rickard Rd
Bankstown 2200
Tel: 9707 4555

Blacktown

'Kildare Court'
Level 2, Suites 36 & 37
13-17 Kildare Rd
Blacktown 2148
Tel: 9621 4800

Burwood

Level 4, 74–76 Burwood Rd
Burwood 2134
Tel: 9747 6155 TTY: 9747 0214

Campbelltown

Suite 1, Level 4
171–179 Queen St
Campbelltown 2560
Tel: 4628 2922

Fairfield

Suite 1, Level 2, 25 Smart St
Fairfield 2165
Tel: 9727 3777

Liverpool

Level 4 Interdell Centre 47 Scott St
Liverpool 2170
Tel: 9601 1200

Parramatta (Criminal Law)

Parramatta Justice Precinct,
Level 1, 160 Marsden Street
Parramatta 2150
Ph: 8688 3800
TTY: 9687 7538

Parramatta (Family and Civil Law)

Level 5, 91 Phillip Street
Parramatta 2150
Ph: 9891 1600

Penrith

95 Henry St
penrith 2750
Tel: 4732 3077

Sutherland

Ground Floor
3–5 Stapleton Ave
Sutherland 2232
Tel: 9521 3733

Regional offices

Coffs Harbour

41 Little St
Coffs Harbour 2450
Tel: 6651 7899

Dubbo

64 Talbragar St
Dubbo 2830
Tel: 6885 4233

Gosford

92–100 Donnison Street
Gosford 2250
Ph: 4324 5611

Lismore

Suite 6, Level 4
29 Molesworth St
Lismore 2480
Tel: 6621 2082

Newcastle

(Family and Civil Law)
Level 2, 51–55 Bolton Street
Newcastle 2300
Ph: 4929 5482

Newcastle

(Criminal Law)
Level 3, 400 Hunter St
Newcastle 2300
Ph: 4929 5482

Nowra

Suite 2, Level 2
59 Berry St
Nowra 2541
Tel: 4422 4351

Orange

Suite 4, 95 Byng St
Orange 2800
Tel: 6362 8022

Port Macquarie

107 William Street
Port Macquarie 2444
Ph: 5525 1600

Riverina Murray–Albury

Suite 1A, Level 1,
520 Swift Street
Albury NSW 2640
Ph: 6020 7200

Riverina Murray– Wagga Wagga

Ground Floor,
74–76 Fitzmaurice Street
Wagga Wagga 2650
Ph: 6921 6588

Tamworth

Level 1, 424–426 Peel St
Tamworth 2340
Tel: 6766 6322

Wollongong

73 Church St
Wollongong 2500
Tel: 4228 8299

Useful contacts

Legal help

LawAccess NSW

1300 888 529

A telephone service which provides legal information, referral and in some cases legal advice.

Legal Aid Family Dispute Resolution Service

(02) 9219 5118 or (02) 9219 5119

Legal Aid NSW Child Support Service

1800 451 784 or (02) 9633 9916

Law Society of NSW Community Referral Service

(02) 9926 0300 or call LawAccess on 1300 888 529

Combined Community Legal Centres

(02) 9212 7333 to find a legal centre near you, or look in the white pages under "Legal Centres". You can also search for a centre in your area.

Wirringa Baiya Aboriginal Women's Legal Centre

(02) 9569 3847 or 1800 686 587

Women's Legal Service NSW

(02) 8745 6900 or 1800 801 501

TTY for deaf and hearing impaired women

1800 674 333

Advice times: 9.30am – 12.30pm and 1.30pm – 4.30pm every day except Wednesdays.

Indigenous Women's Legal Service contact line

1800 639 784

10:00am – 12.30pm and 1.30pm – 4.00pm every day except Wednesdays.

Help with domestic violence

FACS NSW Domestic Violence Line

1800 656 463

1800 RESPECT Call 1800 737 732

Courts

The Family Law Courts share their registry and telephone information services.

Family Court of Australia

1300 352 000

www.familycourt.gov.au

Federal Circuit Court of Australia

1300 352 000

www.federalcircuitcourt.gov.au

Mediation services

Legal Aid NSW Family Dispute Resolution Service

(02) 9219 5118 or (02) 9219 5119

Family Relationship Centres and

Family Relationship advice line

1800 050 321

www.familyrelationships.gov.au

Other contacts

Centrelink Family Assistance Office

136 150

Department of Human Services (DHS) Child Support

131 272



Notes

Notes

This publication is intended as a general guide to the law. It should not be relied on as legal advice and it is recommended that you talk to a lawyer about your particular situation.

At the time of printing, the information shown is correct but may be subject to change.

If you need more help, contact **LawAccess NSW** on **1300 888 529**.

Do you need an interpreter?



If you need help to talk to us in your language, call the Translating and Interpreting Service (TIS) on **131 450** (9am – 5pm).

Do you find it hard to hear or speak?



If you find it hard to hear or speak:

- call us through the National Relay Service on **133 677** or www.relayservice.gov.au or
- Call **LawAccess NSW** on **1300 889 529**

To order Legal Aid NSW publications visit the Legal Aid website:

www.legalaid.nsw.gov.au/publications

or email us at publications@legalaid.nsw.gov.au