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Factsheet 7

Domestic Violence Capacity Building for Community Legal Centres Program

Case summary: Appeals against domestic violence protection orders in the District Court

2018

RC v MM [2018] QDC 276

This was an appeal of a two year protection order naming the aggrieved, her husband, children and unborn child.

Issue: Whether the Magistrate had erred in concluding that an act of domestic violence had occurred, and predominantly, whether the Magistrate had erred in finding the order necessary or desirable.

Facts: Ms R was the aggrieved and the respondent to the appeal. Mr M was the appellant. They had an intimate relationship which ended after about 2 ½ months because Ms R was reconciling with her husband. Ms R contended that Mr M was pursuing and annoying her thereafter, which was distressing, if not rising to the level of stalking. Mr M sent a controversial email to Ms R and her husband sometime after the relationship had ceased. Ms R and Mr M had no children together, no shared bank accounts and they each gave evidence that they had no desire for contact in future.

Appeal Decision and Reasoning: Her Honour's reasons did not analyse the question of whether the protection order was necessary or desirable at all, in circumstances where the sworn evidence showed there was no ongoing relationship between the parties

Her Honour erred by acting upon a wrong principle (not turning her mind to the "necessary or desirable" element), allowing erroneous or irrelevant matters to be taken into account (unjustified conclusion that at the date of hearing, Mr M wanted ongoing conversation when the email was sent six months back and there had been no bad behaviour since) and not taking into account material considerations (uncontested evidence that there was no ongoing relationship – and implication that he was only behaving for six months because of the temporary order, not put to him in cross).

The appeal was allowed, the orders were set aside and the application was dismissed.

CPD v IVAMY [2018] QDC 244

This was an appeal of a five year protection order naming the aggrieved and the children of the relationship.

Issue: The primary issue was whether the Magistrate had erred in finding the order necessary or desirable to protect the appellant's ex-wife and the children of the relationship.

Facts: Ms B (the aggrieved and the respondent to the appeal) was a police prosecutor. She had been married to Mr C, the appellant, a former detective, with two children. Ms B accused Mr C of controlling, emotionally abusive and threatening behaviour towards her during the breakdown of their marriage. There was an incident where Ms B was filling out a rental form and Mr C tried to remove it from her. Amongst other things, there was a scuffle over it and the form was ripped apart. There was later an undertaking that Mr C would contact Ms B through emails by his mother i.e. his mother acted as conduit.

Magistrate decision and reasoning: The Magistrate found that emails from Mr C's mother to Ms B contained negative input from Mr C, i.e. from time to time unnecessary comments critical of Ms B, and there was a continuation of harassment and offensive conduct through these emails. Furthermore, the "overzealous" and "unsubstantiated attack" on the aggrieved in her personal capacity throughout the conduct of the trial (by counsel) was a prolongation of bullying through harassment and intimidation, characterised as an act of domestic violence.

Appeal decision and reasoning: The trial was plagued by acrimony and confusion. There was a seven month delay between the end of the hearing and the decision and there was no evidence about the nature of the relationship in that time, which would have been relevant. Her Honour's finding that the appellant was behind the tone and wording of the emails was not open on the evidence. The consequence to the appellant of a finding that he was behind the emails, required a high level of satisfaction.

The conduct of the trial may be relevant to matters such as costs but the finding that the conduct of the trial constituted domestic violence was inconsistent with the nature of the relationship between counsel and client.

The appeal was allowed, the order was set aside and the matter was remitted back to the Magistrates Court for rehearing (having regard to credit findings and the state of the affairs since the hearing).

RCK v MK [2018] QDC 181

This was an appeal of a five year protection order.

Issue: Whether the Magistrate had erred in finding sufficient evidence to justify there was domestic violence or that the order was necessary or desirable, and in making the order and not adjourning the application.

Facts: The appellant Mr R was the nephew of the aggrieved and respondent to the appeal Ms K. There was a violent assault by Mr R's father on Ms K after which Mr R threatened Ms K, ran off and drove off. At a later date Mr R made a gesture in the form of a pistol and pointed to the aggrieved whilst they were both in separate cars at traffic lights. There were other related applications and criminal proceedings involving the assailant in the prior event. There were adjournments until the outcome of the related criminal proceedings. When the matter finally came on, the respondent (or his legal representative) did not appear.

There is no express guidance on whether to hear and decide, or adjourn, the application in the absence of the respondent pursuant to section 39 of the Act.

Appeal decision and reasoning: There was no positive explanation for the absence of the respondent or his solicitor despite the notice being addressed personally. The only rational inference was that it was a mere oversight.

Matters which should have been taken into account were: that the proceeding was subject to active management with other related proceedings, particularly one criminal proceeding which had not yet been determined; it was common ground that those cognate proceedings should be finalised; there was no courteous attempt by the representative of the aggrieved to contact the solicitor for the respondent; and that the state of the evidence was the subject of express dispute.

The Magistrate did not take into account material considerations in exercising the discretion to proceed or grant an adjournment and misdirected herself in proceeding to hearing and making the final orders, which result as being unreasonable, unjust and the result of a failure to properly exercise the discretion.

The appeal was allowed, the orders set aside and the matter remitted to be re-heard.

Notwithstanding his decision, Judge Morzone went on to discuss the sufficiency of evidence which would have justified the making of the order. His Honour noted that the Magistrates Court was not bound by the rules of evidence and should be satisfied on the balance of probabilities. Though not bound by the rules of evidence, it is well settled that the court's decision must arrive from relevant reliable and rationally probative evidence that tends logically to show the existence or nonexistence of the facts in issue. In this case, the matters about the respondent's conduct was in the category of suspicion or speculation, which ought be subject to a hearing. The evidence as it stood fell well short to justify the making of a protection order.

NBE v PRT [2018] QDC 029

This was an appeal of a decision to dismiss an application for protection order in the absence of the applicant and on a basis that would engage section 157(2), enabling the recovery of costs.

Facts: The notice of appeal was filed late.

Section 165 (5) allows the District Court to extend the period for filing the notice of appeal. General principles applicable are whether there is good reason for delay and whether it would be in the interests of justice to grant the extension. There was no explanation for the delay of one week except lack of understanding and difficulties encountered because the applicant was self represented. However, the applicant was only seeking the intervention of the District Court concerning the costs order below. This is not usually allowed by section 164 however the costs order was exceptional.

Magistrate decision and reasoning: The Magistrate awarded the cost order for reasons including: the application was filed in Harvey Bay as opposed to Western Australia, forcing the respondent to incur substantial costs; the aggrieved did not attend despite being informed by the registry that it was necessary; her continued emails to the registry; and the conduct of the aggrieved in posting for financial assistance in the electronic media.

Decision and reasoning: Costs pursuant to 157(2) should have a cautious approach especially in the absence of the party against whom the order is sought. A party seeking the exercise of such power should expect to justify the conclusion as a clear one and from an objective point of view. For costs, the respondent needed to show the application had no foundation. This was not so in the context of the temporary order and undertaking, and there was no clear and objective indication of the application being frivolous.

Further the Magistrate entered error and did not take into account section 147 (1) that the aggrieved may be represented by a legal officer, police officer or authorised person in circumstances where she had a Justice of the Peace outside the courtroom to represent her and this was refused by the Magistrate. The magistrate would not have been bound to allow him to represent the applicant but the issue was never appropriately considered.

Held: The Magistrate erred in giving little or no consideration to the weight to be attached to the applicant's material and to allow it to be swept aside by the effectively contentious evidence of the respondent, with significant misunderstanding as to the applicant's preparedness to pursue her application and to have her representative pursue it, in determining the questions for costs.

In these circumstances of substantial error, the applicant was granted the extension of time for filing her notice of appeal and the cost orders were deleted.

BLJ v QLB [2018] QDC 14

Reasoning: [31] As to the nature of a fair trial, in National Companies and Securities Commission v The News Corporation Limited4, Gibbs CJ explained that:

> "The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise." [32]

In Allesch v Maunz5, Gaudron, McHugh, Gummow and Hayne JJ, referring to the earlier decision of the High Court in Taylor v Taylor,6 said:

> "A Court will ordinarily be satisfied that there has been a miscarriage of justice if a person has suffered an adverse order in circumstances where his or her failure to appear is adequately explained unless it also appears that no different result would be reached on a rehearing or that a rehearing would work an irremediable injustice to the other side. Such an injustice will often be capable of remedy by the imposition of terms as to costs."

[33] As to the principle to afford a hearing, Kirby J said at [35]:

> "It is a principle of justice that a decision-maker, at least one exercising public power, must ordinarily afford a person whose interests may be adversely affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made. The principle lies deep in the common law. It has long been expressed as one of the maxims which the common law observes as "an indispensable requirement of justice". It is a rule of natural justice or "procedural fairness". It will usually be imputed into statutes creating courts and adjudicative tribunals. Indeed, it long preceded the common and statute law. Even the Almighty reportedly afforded Adam such an opportunity before his banishment from Eden." [footnotes omitted]

[34] Kirby J went on to address the criteria for setting aside a judicial order made in default of appearance of a party in the following way:

> "…Thirdly, it is desirable, as it seems to me, to treat the considerations applicable to such decisions conceptually and to classify them as impinging upon the two criteria that have for a very long time been viewed as critical to an affirmative decision to set aside a judicial order made in default of the appearance of a party. These are: (1) that an explanation, reasonable to the circumstances, is provided for the party's absence or other default; and (2) that the party in default has a material argument which, if heard and decided on its merits, might reasonably affect the determination of the rights and duties of the parties in a way different from that in the impugned order." [footnotes omitted]

Held: The appellant's affidavit provided a reasonable explanation for his failure to be heard at the pre-trial review. The appellant's misunderstanding was understandable and it was promptly brought to the attention of the court, soon after he learnt the orders had been made. The affidavit demonstrated he had an arguable case. Re-hearing the matter might produce a materially different result. No apparent prejudice to the first respondent if the interim orders remain in place pending the determination of the hearing in relation to the final orders.

Community Legal Centres Queensland

2017

JC v KP [2017] QDC 175 (26 May 2017)

Magistrate had represented incorrectly to the appellant that the protection order would not affect the appellant's weapons license. The order was set aside on the grounds that the appellant did not understand the full consequences of the order being made.

Appeal type: Appeal against decision to grant protection order.

Facts: The appellant and respondent were brothers. A Magistrate ordered that a protection order be made against appellant by consent (p 2), with the respondent as the aggrieved. The Magistrate represented to the appellant that order would not affect the appellant's weapons license (p 3). In fact, a protection order would limit the applicant's weapon's license for five years (p 5). The appellant appealed the decision on the ground that the appellant was in to consent to the order being made (p 2-3).

Issues: Whether the order should be set aside.

Decision and Reasoning: The order was set aside. Judge Long of the District Court concluded that the appellant did not understand the full consequences of the order being made, and the matter was remitted to a contested hearing (p 6-7)

CED v HL [2016] QDC 345 (22 December 2016)

A temporary protection order against the appellant had been varied to name the son of the appellant and respondent as a protected person, and also to prevent the appellant from permitting, encouraging or facilitating in-person contact between the child and the child's grandfather...

Appeal Type: Appeal against variation to Temporary Protection Order.

Facts: A temporary protection order was made against the appellant which stipulated his former female partner, the respondent, as the protected person. The appellant and the respondent had a son together, K. The terms of the temporary protection order were varied twice. The first variation occurred after the respondent took K out of school (against K's wishes). The appellant arrived to pick up K, at K's request. An argument ensued between the appellant and the respondent. The temporary protection order was varied to name K as a protected person.

Second, the respondent reported that her father (the maternal grandfather of K) had made threats against the appellant in the presence of K. The temporary protection order was varied to prevent the appellant from permitting, encouraging or facilitating in-person contact between K and the grandfather. The appellant's position was that he had never been threatened by the respondent's father in that way and that K wanted to see his grandfather. The appellant applied to a magistrate to have these terms varied and removed. The application was refused.

Issue/s: Whether the variations ought to be allowed?

Decision and Reasoning: The appeal was allowed. Kent J held that there were insufficient reasons given for the orders made refusing the variations. This was an error of law and the decision had to be set aside on that basis. Further, there was an insufficient evidentiary basis to prove that either of the contested conditions were necessary or desirable.

First, K's presence at the incident between the appellant and respondent was purely incidental. It was upsetting but no more upsetting than other separate actions of the respondent. It was not prolonged or dangerous and not wilfully brought about, or persisted with, by the appellant.

Second, the grandfather's threats against the appellant were out of the appellant's presence and not initiated by the appellant. They were unlikely to be repeated and did not involve any violence against K. This was too tenuous to substantiate the challenged conditions (see [38]).

RWT v BZX [2016] QDC 246 (30 September 2016)

Appeal type: Appeal against a protection order and an order for costs

Facts: Male appellant and female respondent were married in India (arranged marriage). They lived in Australia with their son and the appellant's parents. Each applied for a PO against each other, making serious allegations which were denied; there were also proceedings in the Family Court at the time of the PO hearing. R's application and affidavit set out particulars of DV under several headings: verbal abuse, controlling behaviour, psychological abuse using the child, sexual abuse, financial abuse, threats and intimidation; she perceived an alliance against her involving A, his parents and their child); she annexed to her affidavit a transcript of a recording she made as she was packing to leave the family home to provide evidence of this. A alleged R had assaulted the child; he had previously taken the child to a doctor and reported the complaint. Magistrate made an order in favour of R; dismissed A's application and made order for costs 'I wish the Family Court could hear what I think about the reliability of [A]. It has been a scurrilous case. On my view, his application has been deliberately false and vexatious. I can say that, in 12 years as a magistrate, I have never ordered costs in a DV case before. I intend to today ofr the first time in many hundreds of cases'.

Issue(s): grounds of appeal included:

1. There was no proper basis on the evidence for the Magistrate to make a PO under (s 37 of the DFVPA 2012 (Qld))

2. There was no proper basis for the Magistrate to order costs under (s 157 of the Act) against A in favour of R

Decision: appeal dismissed

Reasoning:

1. Devereaux SC DCJ also held that it was open to the magistrate to conclude that the protection order was necessary or desirable to protect the respondent from domestic violence: s 37(1)(c) of the Act. Devereaux SC DCJ noted the magistrate's conclusions about the appellant's application, namely that it w outrageous case and pure nasty, vindictiveness on this woman because she wouldn't hand over her mon controlling, bullying husband. I don't believe she has been anything other than a good mother to her child dismiss the [appellant's] application …, as I said, but I do intend to make an order in favour of the wife'. The magistrate continued: '[i]n my view, as I mentioned during submissions, the fact that property settlement in family law matters are still contentious and, indeed, the mother still isn't even getting face-to-face contact with her own child at the moment, there is every opportunity for the husband to continue his bullying behaviour to try and manipulate the wife into caving in to his demands about the child, about financial affairs, and an else that he might have a penchant to do in his bullying behaviour. She is absolutely in need of protection needs to be kept well away from her' (see [26]). Devereaux SC DCJ held that these statements could be properly understood as the magistrate's reasons being satisfied that the protection order was 'necessary or desirable to protect the aggrieved from domes violence' (see [28]). This reasoning, that it was necessary or desirable for an order to protect the respond from domestic violence in the setting of the continuing family court proceedings, was correct: GKE v EUT [32]). Devereaux SC DCJ noted generally that '[i]t is advisable that a magistrate make specific findings with respect to the matters set out in s 37 of the DVFP Act' (see [27]). However, here, 'the manner in which His Honour reached and conclusions is sufficiently clear to be amenable to examination and review' see [28].

2. Devereaux SC DCJ held that it was open to the magistrate to conclude that the appellant had committed acts domestic violence against the respondent: s 37(1)(b) of the Act. The magistrate was correct to use the transcript of the recording made by the respondent as proof of her and as relevant to the credibility of the appellant. The transcript showed the way the appellant treated the respondent. Further, the 'startling' language and attitude of the child towards his mother in the transcript gave rise to the inference that the appellant had treated the respondent in such a way over a lengthy period in front of the child: see [12]. The magistrate, correctly, interpreted the transcript as confirmation of the respondent's claim that the disc was principally about money – the appellant's demand that she deposit all her wages into the joint account [13]. Evidence of the respondent's friend further corroborated the respondent's evidence about financial a see [18]. Devereaux SC DCJ agreed with the magistrate's analysis of the transcript of the recording (see [14], [29] provided evidence of threats by the appellant, that the appellant would shout at her in front of the child, a the child had been 'coached and poisoned against his mother' (see [15]-[24]). His Honour further held that: 'the passages I have referred to in this judgment from His Honour's reasons reduce to the finding that his Honour rejected utterly the credibility of the appellant and accepted complete credibility and reliability of the respondent. There is nothing in the materials which objectively suggests th those findings were not open to His Honour or that I should draw different inferences from facts in the record [29]. Devereaux SC DCJ held that the magistrate was entitled to thoroughly reject any of the appellant's assertions. Ha done so, it was open to the magistrate to conclude that the appellant's application was brought to vex the respond 'it was deliberately false and vexatious', brought because 'she wouldn't hand over her money to a controlling bully husband'' (see [65]-[66]).

AJS v KLB v Anor [2016] QDC 103 (13 May 2016)

The appeal was dismissed and DVO upheld.

Grounds of Appeal:

1. There was insufficient evidence to support the finding that order was not necessary and desirable.

2. His Honour erred in using the finding that the appellant had told lies out of court as a basis for concluding the DVO was necessary and desirable and to make up a shortfall in evidence.

Facts: The conduct occurred after the end of a relationship. Appellant presented himself to first respondent under a fake name, and lied about job and married status etc. He continued to stand by the false name well into police attempts to locate 'the perpetrator' after the first respondent spoke to police regarding his conduct. The appellant sent abusive and threatening text messages, many sexually explicit in content, to the appellant. He also sent a letter threatening (unsubstantiated) legal action after police attempted to contact him regarding her concerns. Judge said this would have been intimidating for anyone who does not have a good understanding of the law and their rights. The letter was described as far more serious than someone making reference to various forms of legal action within his rights and the behaviour of a controlling individual clearly intended to intimidate her.

Held: The Magistrate held that it was not necessary to make the protection order but concluded he was satisfied that it was desirable.

The appellant's behaviour consistent with someone who was trying to reassert control was clearly relevant to consideration of whether it was necessary to make a protection order. The safety, protection and wellbeing of the first respondent and need to treat her with respect and minimise disruption to her life are relevant under s4(1)(a and (b), along with the need to hold the perpetrator responsible for his DV and its impact on the first respondent. The lengths that he went to in terms of writing the latter and trying to avoid the application through presenting lies to the police via his solicitors display an ongoing need for him to be held accountable. The Magistrate noted that the respondent was clearly intimidated, having difficulty coping when giving evidence. It would appear that she would be vulnerable should there be further contact from him in the future. The court could also have regard to the fact that both lived and worked in a small community where there were real opportunities for contact in the future. There was more than sufficient evidence to make the orders without placing undue reliance on the lies told by the appellant.

DMK v CAG [2016] QDC 106 (15 April 2016)

The appeal was dismissed and DVO upheld.

Facts: The DVO was based on behaviours including: the appellant's complaint to the police that his daughter was 'sexting' (meaning kissing boys), which he said was made out of concern for his daughter's safety and wellbeing; the appellant's complaint to police that the respondent had texted him in contravention of a protection order he had against her and he was being bullied and harassed by the respondent, which the court found to be unfounded as the conduct was in accordance with a Family Law Court order; the appellant's threats to the children that he would kill them, the respondent, the respondent's new partner and his children; the appellant's complaint to the police that the respondent's partner had unregistered firearms, which resulted in a police search in the presence of the respondent, her children and her partner during which no unregistered firearms were found; the appellants' complaint to police that the respondent had kidnapped his 17-year-old daughter, determined by the police to be unfounded as the child told the police she had visited of her own free will; and the appellants' alleged threats to the children to have the respondent arrested and sent to jail.

Grounds of Appeal: The appellant's complaints to police did not constitute DV; the Magistrate should have found the prosecution case frivolous/vexatious/an abuse of process; other grounds dismissed by the Judge at the outset.

Held: The conduct was DV because it was emotionally and psychologically abusive, threatening or 'in any other way controls or dominates...' (sections 8(1)(b), (d) and (f)). Complaints to the police were demonstrably over-reaching, baseless or made for a collateral purpose, impacting the respondent and those associated with her. Threatening communication with the children was found to constitute DV calculated to erode confidence and support of the children's mother. The Magistrate had accepted the respondent's evidence that the appellant's conduct caused her to live in constant fear that the appellant would act on his threats to kill her; that she was in fear of the police because of complaints made by the appellant; that she felt he was using the protection order against her to bully or harass her; and that she was in fear of what the appellant might say to the children.

The prosecution was not frivolous and vexatious. The case against the appellant was meritorious, warranted serious consideration and was successful. The case was not frivolous and it is not unusual for proceedings in the context of highly emotional family breakdown and litigation to trouble, annoy or distress one or both parties thus there was no evidence of vexatious conduct.

The respondent's proceeding was not an abuse of process. It was commenced and maintained for the legitimate purpose of obtaining the appropriate remedy under the Act.

The DVO was necessary and desirable. There was evidence to make factual findings or draw inferences that DV may occur in the future. It was relevant that the parties remained entrenched in highly volatile Family Court disputation which would involve contact and communication in relation to children. The appellants' past DV and conduct had occurred under the guise of his notion of parental responsibility and purported enforcement of family court proceedings. There was no evidence of genuine remorse etc. The appellant's manner of handling the stress of the ongoing parental relationship with the respondent was inappropriate and he had insufficient insight into his behaviour. He maintained a blinkered perception of his responsibility and entitlement. His behaviour had been curbed during past protection orders. The order was desirable because the respondent was fearful of future DV.

BJH v CJH [2016] QDC 27 (26 February 2016)

Appeal Type: Appeal against a Protection Order.

Facts: The appellant appealed against a magistrate's decision to make a Protection Order requiring him to be of g behaviour towards the aggrieved (his partner) and her son. The order was made after a disagreement over the family meal. The appellant took the aggrieved's mobile phone in an attempt to get her to go downstairs to discuss matter him. The aggrieved tried to get the phone back and the appellant discarded it onto the floor, causing minor but irreparable damage to its cover. At some point, the back of the appellant's hand came into contact with the aggriev ear, causing relatively low level pain and no injury to the aggrieved. The appellant and the aggrieved continued arg loudly until the police arrived (see [9]).

The magistrate made the following findings of domestic violence (see [10]): The appellant took the aggrieved's phone in an attempt to force her downstairs. He threw the phone to the ground in response to the aggrieved's attempts to retrieve the phone. The appellant slapped the aggrieved in a backhanded motion to the head on purpose. There was constant harassment by the appellant towards the aggrieved that night that was intimidating (causing to retreat from him). This intimidation and harassment amounted to an act of domestic violence when conside with the yelling and the banging of plates (emotional and psychological abuse).

Issue/s: Whether the magistrate erred in making a protection order under s 37 [Domestic and Family Violence Pro Act 2012 (Qld)], specifically:

1. Whether the magistrate erred in finding that domestic violence had been committed against the aggrieved: s (b).

2. Whether the magistrate erred in finding that it was necessary or desirable to make the order to protect the aggrieved from domestic violence: s 37(1)(c).

Decision and Reasoning: The appeal was allowed. Rackemann DCJ held that it was open to the magistrate to con that there was at least some domestic violence committed by the appellant against the aggrieved. His Honour agr that the following behaviour amounted to domestic violence under s 8 [of Domestic and Family Violence Protection 2012 (Qld)]:

'The action of the appellant in seizing the aggrieved's mobile telephone was behaviour which, in the circumstance coercive - being designed to compel the aggrieved to do something which she did not wish to do (ie come downstairs to discuss matters of concern to the appellant). Further, the appellant responded to the aggrieved's attempt to get the telephone back by, amongst other things, throwing the phone onto the floor thereby damaging it. That the phone w discarded in a throwing motion had support in the evidence' at [11].

However, beyond that, the magistrate erred in her findings of domestic violence. In light of the evidence (see consideration at [14]-[29]), the magistrate's finding of an 'intentional back-handed slap' could not be supported. Further, the magistrate erred in characterising the appellant's behaviour as emotionally or psychologically abusive – behaviour that, amongst other things, intimidates (a process where the person is made fearful or overawed, particularly with to influencing that person's conduct or behaviour) or harasses (there must be an element of persistence): GKE v E consideration of the evidence could not support this conclusion (see [30]-[46]).

The finding of more extensive domestic violence on the night in question than what occurred further affected the magistrate's consideration of whether an order was necessary or

desirable. In reconsidering whether an order was necessary or desirable, Rackemann DCJ again noted the decision in GKE v EUT where McGill SC DCJ observed relation to s 37(1)(c) [Domestic and Family Violence Protection Act 2012 (Qld)] that:

'I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved … I also agree that there must be a proper evidentiary basis for concluding that is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future the mere fact that the applicant for the order is concerned that such a thing may happen in the future' (see [32]-[33

Here, the risk was not such to conclude that the making of a protection order was 'necessary or desirable' on the f as established at the time of the hearing before the magistrate in February 2015. This was in circumstances where there was no demonstrated history of domestic violence prior to the night in question; the event was a single incident involving domestic violence which, whilst in no way acceptable, was not at the most serious end of the scale of such conduct; the aggrieved gave evidence that she was not fearful of the appellant and did not believe that she needed protection from him; and, at the time of the hearing before the magistrate, the appellant and the aggrieved had continued their relationship without suggestion of further incident (see [49]-[50]).

Community Legal Centres Queensland

2016

SRR v SLG [2016] QDC

Appeal allowed in part. The Protection Order was varied to permit possession of weapons by the appellant limited to a geographical locality.

Facts:

- There was an assault where the appellant pulled the respondent back by the back of her neck in a car in the presence of the children.
- The appellant punched the respondent in the shoulder in the shower.
- The appellant had made a 'veiled threat' via expressing understanding of how a father in a media story might kill his two children and take his own life.
- The appellant used inappropriate language described as amounting to domestic violence in emails.
- The appellant had an attitude of ownership towards the respondent and had expressed an intention to attempt to 'save the marriage', not accepting that the relationship was over.

Held:

An order was made that the appellant may have possession and control of weapons only on the property which he was managing.

The appellant had contracted to manage a rural property and was found to be a person with the need for use of an appropriate firearm to execute his management and animal husbandry responsibilities. This is an example of where the practical effect of the order must be considered.

Alleged veiled threats as to the unlawful use of a weapon were not sufficient to warrant a complete prohibition on the appellant's possession of a firearm. However, the appellant has no legitimate interest in possessing weapons other than in connection with management of the rural property.

The appellant's conduct amounted to DV and there was a risk of future DV in the absence of a protection order.

The protection order was necessary or desirable. This is although the conduct was on the lower end of the scale of seriousness by reference to the experience of the court. DV does not require evidence to be of such quality as to amount to a criminal offence. Determination requires an exercise of discretion by the court based upon its view of the findings and appreciation of the evidence particularly where a judicial officer has had the benefit of seeing and hearing the applicant and respondent in the proceedings before him. The Magistrate was entitled to place reliance upon oral testimony.

Community Legal Centres Queensland

2015

SM v AA [2015] QDC 172 (29 May 2015)

Appeal Type: Application for an extension of time in which to file an appeal against the variation of a domestic violence order.

Facts: The appellant (the respondent in a domestic violence order) failed to appear at the Magistrates' Court for an application to extend the order. The Magistrate noted appellant's absence. The Court proceeded to 'hear and decide the application' pursuant to section 94 of the Domestic and Family Violence Act 2012 (Qld).

Issue/s: Whether the Magistrate correctly heard and decided the matter.

Decision and Reasoning: The appeal was allowed.

Judge Reid considered the remarks of the Magistrate. The remarks did not consider the reasons put before the Court by the applicant as to why the domestic violence order should be extended. These reasons included allegations of physical and verbal abuse and multiple breaches of the order. Instead, the Magistrate simply made the order and considered whether the order should be extended for 18 months or for two years.

Judge Reid was concerned that the Magistrate dealt with the matter, 'merely as a rubber stamp exercise'. There was nothing in the Magistrate's remarks to indicate that she had read the material to ascertain whether or not the breaches of the order actually occurred. There was little or no particularity in the allegations, specifically about when or where the breaches occurred. In circumstances where parties do not attend, it is incumbent upon the Magistrate to 'hear and decide' the matter, even if it is entirely upon affidavit evidence. The transcript did not indicate that the Magistrate considered the question at all. As such, the order was set aside.

LKL v BSL [2015] QDC 337 (15 May 2015)

Appeal Type: Appeal from dismissal of application for protection order.

Facts: The appellant appeared unrepresented in the Magistrates' Court and filed for a protection order pursuant to Domestic and Family Violence Act 2012 (Qld). She was initially granted a temporary protection order in the Magis Court. The Magistrate then made directions to the effect that the evidence of all witnesses in support of the applica was to be filed as affidavit evidence. No such affidavit evidence was provided. The appellant believed that the application itself, without further affidavit evidence was sufficient. The application for the protection order was then refused, with the Magistrate concluding that there was no material before the Court (see further at [7]-[9]).

Issue/s: Whether the aggrieved in a protection order application can rely solely on the application without further a evidence.

Decision and Reasoning: The appeal was upheld. The Domestic and Family Violence Act 2012 (Qld) makes clear the formal rules of evidence do not apply and gives the Court broad powers to 'inform itself in any way it considers appropriate' (see s 145). However, the court obviously still has an obligation of procedural fairness. Dick SC DCJ explained that in hearing and determining an application for a protection order, 'there still must be evidence in the of there being some material put before the Court which provides a rational basis for the determination and it must put before the Court in a way which gives the opposite party the opportunity to challenge that evidence and put th opposite party's case in relation to the matter' (See at [11]). The Magistrate's directions did not exclude the appella sworn application as evidence. Therefore, the Magistrate's conclusion that there was no material before the Court an error of law. The Magistrate did not consider and determine the application. As such, it is clear that an aggrieve person can rely solely on the application as evidence without the need for further affidavit evidence. The responde then respond to the application if they choose. The application was remitted back to the Magistrates' Court for determination by a different magistrate.

Kenny v Kave [2015] QDC

The appeal was upheld, a stay was not granted and the matter remitted to the Magistrates Court.

Facts: No affadavit was filed by the appellant in the Magistrates Court and her application for an order was dismissed.

Held: The ruling by the magistrate that there was no material before the court was an error of law. The directions did not exclude the appellant's sworn application as evidence. There was nothing in the circumstances to establish the case was appropriate to grant a stay. Refusal to grant a stay is no impediment to the appellant later obtaining the benefit of a protection order, and no material before the court supported the proposition that the decision not to grant a stay could result in irreversible loss or damage as there was no evidence that the conduct complained of has continued. It was necessary for the matter to be considered and determined in the Magistrates Court and procedural steps be followed to satisfy the requirements of fairness. The omission to consider the application goes to the heart of the matter and therefore the fairness of the ultimate Magistrates Court decision.

CR v CM [2015] QDC 146

Order to refuse a DVO confirmed and appeal dismissed.

Facts: There were disputed allegations that the appellant had: texted the respondent that he was moving out and would call the locksmith if she was not home within 15 minutes, followed by similar messages; turned off the main power on multiple occasions; let two dogs off the property of the respondent; reset the respondent's phone; caused photos and documents to be lost from the respondent's devices; blocked access to the respondent's email accounts; sent text messages amounting to harassment on several occasions, including a threatening text message followed by resetting the respondent's phone; gone to the former shared dwelling; turned off the power; continually changing passwords and erasing the respondent's devices; obtaining a Justices Examination Order by way of abuse of process; continually trying to take items from the shared dwelling which did not belong to him; changing the respondent's email account and facebook name; deleting the respondent's photo albums and business facebook page; sent emails to the respondent and communicating with the respondent in breach of a temporary protection order. The appellant had alleged the respondent had threatened to kill him whilst carrying a knife if he came near her and her daughter. He had applied for a Justices Examination Order. The magistrate had preferred the evidence of the respondent where it conflicted with the evidence of the appellant and dismissed the application of the appellant for a DVO.

Held: The respondent's submissions were generally accepted, including all of the allegations above. The evidence of the appellant's ex-wife can be regarded as similar fact evidence relevant to a finding on the balance of probabilities, including the appellant's skill with technology and capability of sending vitriolic emails. The impression given by the appellant in the witness box was relevant, showing that he was evasive and prepared to exaggerate evidence. There was no evidence of the alleged threat to kill made by the respondent. The appellant's application for a Justices Examination Order was an abuse of process deliberately not disclosed when the appellant applied for the order. The fact that no action was taken in respect of texts in breach of the order against the appellant did not undermine the case against the appellant. The fact that no action was taken against the appellant concerning the power being turned off does not prove that he did not do it, only that there was no evidence to prove that he did it. A number of the acts by the appellant against the respondent amounted to DV and on the evidence the respondent is most in need of protection. A DVO was both necessary and desirable.

Community Legal Centres Queensland

2014

GKE v EUT [2014] QDC 248

Appeal allowed; order set aside; order in lieu that application be dismissed.

Held: Was the appellant visiting the aggrieved's residence (the location of which he was not supposed to know pursuant to consent order childcare arrangements) to serve documents only shortly before the court date an act of domestic violence? A single incident of conduct which intimidates can satisfy the definition of emotionally or psychologically abusive behaviour in s11, referred to in s8(1)(b). However, a single incident does not constitute harassment as it lacks the element of persistence or repetition. Short service of the application, even if done maliciously, could hardly amount to more than an annoyance to the other party and in this case did not amount to intimidation or harassment. The finding that the incident constituted DV was, to some extent, justified by the evidence and appropriate. This was not the central issue as past DV had been admitted.

Comments were made on the meaning of 'necessary and desirable'. The focus must be on the issue of protecting the aggrieved from future DV, the extent to which on the evidence there is a prospect of such a thing in the future, and of what nature, or whether it can properly be said in the light of that evidence that is necessary or desirable to make an order in order to protect the aggrieved from that (*FCA v Commissioner of Police*). It is necessary to assess the risk of DV in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved. There must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend upon the mere possibility of such a thing happening in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future.

Was a DVO necessary or desirable to protect the respondent from DV? It was relevant that there would be continuing contact between the parties in connection with their respective rights and obligations in relation to the children. If as the appellant alleged the respondent had been difficult and uncooperative in the past in relation to the arrangements for him to have the opportunity to spend time with the children, there is a risk that there will be situations arising of a kind which have in the past produced DV. It was also relevant to bear in mind that going to the respondent's residence was a change in the appellant's pre-existing pattern of behaviour. The Magistrate had the opportunity to observe both parties and make an assessment of the extent of the respondent's fear and the extent to which she wanted to be rid of the appellant, and whether there was the prospect in the future of her being uncooperative in relation to the children, to be assessed against a situation where it was conceded that there had been at least to some extent some DV by the appellant to the respondent. DV by the respondent to the appellant would not be particularly relevant.

Comments were also made on Briginshaw: While some conduct falling within the definition of DV in the Act would amount to the commission of a criminal offence, some conduct satisfying the definition would not even be regarded in the community as involving grave moral delinquency. It is relevant in deciding whether or not to make a protection order to consider the consequences of making or not making the order, including the practical consequences of the making of the order to the person against whom the order is made.

The appeal was allowed on the basis that this was not a case where the evidence suggested any real risk of actual physical violence towards the respondent in the future, or other serious DV, as long as the respondent complies with the orders of the Family Court concerning the children. It would not be appropriate for an order to interfere with the appellant's rights to complain of non-compliance with the requirements of the Family Court orders in relation to the appellant's possession of the children.

TJA v TJF [2014] QDC 244

The appeal was dismissed and the decision below confirmed.

Held: The Magistrate did not fail to properly consider whether DV was likely to reoccur. The Magistrate did not err in making the protection order in light of the considerations that: the appellant had been released on a bail undertaking conditioned that he have no contact with the aggrieved and her daughter from a prior relationship; and that there had been no contact between the appellant and the others listed in the previous 12 months. The test used by the Magistrate was correct given the wording of s37(1)(c). This was that the nature and frequency of the acts of DV that had previously occurred together with the lengthy period of time over which they occurred created a reasonable inference that the risk of future DV was such that the making of a protection order was necessary or desirable to protect the aggrieved. The 'likelihood of future domestic violence' test in *FCA v Commissioner of the QPS* is now redundant given the fact that the legislature saw fit to significantly change the wording of the current legislation. The existence of a bail undertaking preventing the appellant from making contact does not have the consequence that the making of a protection order is no longer necessary or desirable. This is clear pursuant to s4(2)(e). A bail undertaking is not specifically designed with DV issues in mind and DV behaviour such as damage to property, threats towards children or unauthorised surveillance and stalking may not necessarily constitute a breach of a no contact condition under a bail undertaking.

The Magistrate did not err in finding he could consider evidence not led or relied upon by the appellant – being family court proceedings in relation to parenting issues regarding the children. Section 145 allows a court to inform itself in any way it considers appropriate without being bound by the rules of evidence. The Magistrate understandably took into account that the appellant and respondent would continue to have considerable interaction, which was a relevant consideration to whether a protection order was necessary or desirable.

A number of other grounds of appeal were disposed of as without merit.

Community Legal Centres Queensland

2013

MAA v SAG [2013] QDC 31 (28 February 2013)

Appeal type: Appeal against protection order.

Facts: The appellant and the aggrieved were in a relationship and had 2 children ([6]). During family law proceedings, the aggrieved alleged that the appellant harassed her in numerous ways including: making complaints to government agencies such as the Queensland Ombudsman and Centrelink; filing a Notice of Child Abuse in the Family Court; and applying for a domestic violence order and claiming $250,000 for damages for perjury, both of which were dismissed ([13]). The Magistrate granted the protection order. He was satisfied that the applicant committed domestic violence in intimidating and harassing the aggrieved and was likely to commit domestic violence again ([21]).

Issues: Whether the Magistrate erred in granting the protection order.

Decision and Reasoning: The appeal was dismissed. McGinness DCJ held that the appellant's numerous complaints about the aggrieved were 'unjustified and an abuse of process' ([44]). The actions constituted a course of conduct designed to intimidate and harass the aggrieved ([44]).

Community Legal Centres Queensland

2012

LCJ v KGC and Commissioner of Police [2012] QDC 67 (30 March 2012)

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle

Appeal Type: Appeal against a protection order.

Facts: The appellant applied for and was granted a protection order (under the then Domestic and Family Violence Protection Act 1989 (Qld)). The applicant (the respondent/aggrieved) tendered evidence to the Magistrate that the appellant was physically violent to her on two occasions by grabbing her around the neck. There was also evidence that the appellant threatened to kill her if she went to the police. There was a history of violence in the relationship, which had involved verbal and physical abuse and controlling behaviour since 1992.

Issue/s: Some of the issues concerned –

1. Whether it was open to the Magistrate to be satisfied that the appellant committed domestic violence against the aggrieved.

2. Whether it was open to the Magistrate to be satisfied that the appellant was likely to commit further domestic violence against the aggrieved.

Decision and Reasoning: The appeal was allowed and the protection order was discharged.

1. In relation to whether the Magistrate's conclusion that the appellant committed domestic violence against the applicant was correct, Irwin DCJ concluded that the Magistrate was entitled to prefer the evidence of the applicant's witnesses over the unsigned statements of the appellant and his witnesses. The statements tendered by the applicant were signed. The appellant's statements were not. It was also open to the Magistrate to conclude that the appellant had continually harassed and intimidated the applicant.

2. However, Irwin DCJ concluded that it was not open on the evidence for the Magistrate to conclude that the appellant was likely to commit an act of domestic violence again, or carry out a threat to do so. After the application was made, the applicant stated that the appellant had left the house where they were living, had not returned and there had been minimal contact since a temporary protection order was made. There was no evidence of physical violence and she said she did not feel threatened by him. As such, there was not sufficient evidence to support an inference that domestic violence was likely to occur again. While there were a string of emails that did constitute harassment, the last of these were 12 months before the Magistrate made the protection order. The appellant had also clearly indicated he wished to have no further contact with the applicant.

Armour v FAC [2012] QMC 22

Note: Magistrates Court case

Application granted.

Commentary: An order might be desirable but not necessary, e.g. where a perpetrator of DV needs to be held accountable. An order may be necessary but not desirable, e.g. where it is necessary despite the wishes of an aggrieved who stands opposed to the making of an order. Necessity or desirability must be predicated on a finding that there exists a need to protect the aggrieved from DV. The need for protection must be a real one, not some mere speculation or fanciful conjecture. The court needs to assess the risk to the aggrieved and assess whether management of the risk is called for. The risk of further DV and the need for protection must actually exist, but need not be significant or substantial. The 'likelihood test' may still be a relevant consideration, although even in the absence of the degree of likelihood previously required the making of a protection order may be found to be necessary and/or desirable. Magistrate compares State and Commonwealth legislation (several pages)

Facts: The aggrieved made a complaint to the police about FAC grabbing and throwing her to the ground, grabbing her throat and squeezing her windpipe, and picking her up and throwing her to the ground several times still holding her throat. She stated that she was fearful of the respondent, that his abusive and violent behaviour had increased over the last few months and that she did not want anything to do with him. The aggrieved now states that she does not remember the argument which preceded the violence and does not want the matter to go any further. She states that the respondent may have pressed her throat accidentally but did not agree with her statements to police. Constable Armour wrote a memorandum stating that she had no objection to proceeding as requested by the aggrieved, as the likelihood of successful prosecution was minimal. This was because the aggrieved was the complainant and there was no CCTV or independent witnesses; the aggrieved has recanted her expressed fear and attempted to have the matter withdrawn; her submission indicates she believes there will be no further DV; and it was submitted that as the aggrieved has acknowledged she will work actively against the prosecution her appearance at court would be counterproductive to any prosecution. The affidavits submitted by the aggrieved and the respondent were strikingly similar. The respondent stated that he prepared the aggrieved's affidavit while the aggrieved did not admit that he had prepared her affidavit.

Held: Satisfied that: the respondent and aggrieved were both lying; the respondent suborned the false evidence of the accused; the aggrieved lied about the manner in which the affidavit was produced and that DV did occur and a genuine complaint was made by the aggrieved to police.

The imposition of a protection order may cause detriment to the respondent. However, in balancing the private rights of parties and public rights the public interest in impeding, minimising and preventing DV outweighs the private rights of the parties. The fact that the respondent has maintained regular contact with the aggrieved and managed to compel her to give false evidence satisfied the Magistrate that he should be held accountable for his DV and further abuse of the aggrieved by convincing her to falsely testify against her interests. It is both necessary and desirable in the interests of the aggrieved to add conditions of no direct or indirect contact and not going within 100m of the aggrieved's residence of workplace.

Community Legal Centres Queensland

2006

Bottoms v Rogers [2006] QDC 080

Appeal allowed; protection order set aside; order in lieu that Magistrates Court application be dismissed.

Facts: The appellant spoke to the respondent in a supermarket and frowned at her. The appellant shouted at and threatened the respondent on several occasions. The appellant was seen sitting in his car on the street outside the respondent's house when she had her son on a weekend when it was the appellant's turn to have him. The appellant slowed down while driving past the respondent at a shopping centre and frowned and leered at her. The appellant had criticised the respondent to a witness Ms Eastwell.

Held: The Magistrate failed to give proper reasons. Failure to give proper reasons can amount to an error of law. The question of what is sufficient to amount to proper reasons depends on the nature of the matter and extent of the controversy, but in a matter such as this it is important to identify what particular facts were relied upon as founding the jurisdiction to make the order. There can be a single incident of conduct which amounts to intimidation, but something which does not in fact intimidate could amount to intimidation. Harassment, on the other hand, involves a repeated or persistent form of conduct which is annoying or distressing rather than something which would incite fear. Essentially harmless encounters which occur fortuitously do not amount to harassment or intimidation even if the respondent finds them upsetting. Yelling could be part of a course of conduct which amounted to harassment. In these circumstances on each specific occasion, the yelling by the appellant was in response to a criticism by the respondent and he departed afterwards. This, without more, does not amount to harassment or intimidation. A vague threat delivered in general terms will not generally be a threat to commit an act of domestic violence described in another paragraph under paragraph (e), even if the threat could be achieved by committing one of the acts mentioned in those paragraphs. A threat can be DV even if communicated to a person other than the relevant aggrieved, but in this case the threat was again in very general terms not amounting to DV. There is no evidentiary basis for an inference that there is any real likelihood of an act of DV in the future in circumstances where the court is not persuaded that there has previously been an act of DV, including a threat which was an act of DV.

Resources:

- Domestic violence capacity building for CLCs webinar – *Domestic violence appeal case round-up 2018-19*: https://communitylegalqld.org.au/clc-staff/staff-training-and-cle/webinars/dv-capacity-building/appeal-cases