

## **DMK v CAG [2016] QDC 106 (15 April 2016) – District Court of Queensland**

‘Abuse of process’ – ‘Definition of domestic violence’ – ‘Desirability of protection order’ – ‘Domestic violence protection order’ – ‘Emotional and psychological abuse’ – ‘Evidentiary standard of proof’ – ‘Relevant relationship’ – ‘Systems abuse’ – ‘Vexatious or frivolous’

Appeal type: Appeal against domestic violence protection order

Facts: The appellant and respondent were in a de-facto relationship for almost 10 years and had children together. After separating, the respondent became the children’s primary caregiver. The appellant assisted her in looking after the children and they continued in a parenting relationship. A domestic violence protection order was made against the appellant to protect the respondent in the Magistrates Court. The magistrate had regard to three court orders existing between the parties in making this order. These were a Family Court order, a protection order made against the respondent naming the appellant as aggrieved, and a temporary protection order with the respondent as the aggrieved.

Prior to the making of the domestic violence protection order, the appellant made a complaint to police that his daughter was ‘sexting’. A few weeks later, he made another complaint that the respondent texted him in contravention of the protection order naming him as the aggrieved. However, after investigations the police determined both these complaints were unfounded. The appellant then allegedly threatened to kill their children, the respondent, her new partner and his children. The appellant then made a further complaint that the respondent’s new partner had unregistered firearms. After searching his home, the police did not find any of the alleged firearms. Several months later the appellant complained that the respondent kidnapped his 17-year-old daughter. This complaint was also unfounded. Finally, the appellant allegedly threatened the children that the respondent would be sent to gaol.

The magistrate was satisfied that a protection order was desirable to protect the respondent from domestic violence. He accepted that the appellant’s conduct in making complaints to police caused the respondent to live in constant fear of the appellant. In particular, she feared that the appellant would act on his threats to kill her and her family. The magistrate considered that this amounted to domestic violence for the purposes of s 8 of the *Domestic and Family Violence Protection Act 2012* (Qld) (the Act).

Issues: Some grounds of appeal were:

1. Whether magistrate erred in finding the appellant’s conduct in making complaints to the police was ‘domestic violence’ within the meaning of the Act.

2. Whether the magistrate erred in failing to exercise his discretion reasonably by not finding that the prosecution case was frivolous or vexatious or otherwise an abuse of process.
3. Whether the magistrate erred in failing to exercise his discretion reasonably by making the protection order.

Decision and reasoning: The appeal was dismissed and the protection order was affirmed.

As a preliminary issue, Morzone QC DCJ denied the appellant's request for a de novo rehearing as of right ([12]-[23]). Further, His Honour rejected the submission that the evidentiary standard of proof under the Act is higher than on the balance of probabilities ([24]-[27]- discussing *Briginshaw v Briginshaw* [1938] HCA 34).

1. The magistrate did not err in finding the conduct amounted to domestic violence under the Act. The appellant's complaints to police were 'over-reaching, baseless or made for a collateral purpose' ([44]). They were not made for the purpose of protecting the children as submitted by the appellant, but rather to harass the respondent. This, together with the appellant's threats to the children, impacted the respondent and caused her to live in substantial fear for her own safety and the safety of her children, her partner and his children. The complaints to police were harassing and intimidating to amount to emotional and psychological abuse. They were also threatening and controlling or dominating to cause fear to the respondent's safety. Therefore, the behaviour fell within the definition of domestic violence under ss 8(1)(b),(d) and (f) of the Act.

In finding that the complaints amounted to domestic violence, the magistrate accepted the uncontested facts and rejected the appellant's evidence where it conflicted with other witnesses. There were no identifiable incontrovertible facts or uncontested testimony to demonstrate the magistrate erred in making these conclusions about the evidence.

2. The proceeding in making the protection order was not frivolous or vexatious: '*It could not be characterised as being of little or no weight, worth or importance, and thereby frivolous. It is not usual for proceedings of this nature to trouble, annoy, or distress one of both parties. That may be natural consequence of the proper conduct of proceedings in the context of highly emotional family breakdown and litigation. There is no evidence of vexatious conduct in this case*' ([7]). Nor was the proceeding an abuse of process. The proceeding was commenced and maintained by the prosecution for the 'substantial and legitimate purpose of obtaining the appropriate remedy under the Act' ([10]).
3. The magistrate did not err in concluding that a protection order was necessary or desirable to protect the respondent from domestic violence under s 37(1)(c) of the Act. The respondent was fearful of future domestic violence from the appellant. Therefore, the order was desirable. In coming to this conclusion, the magistrate considered and assessed that there was a risk of future domestic violence if an order was not made. The appellant and respondent remained in a dispute before the Family Court, were in contact frequently in relation to their children, and the appellant showed no remorse for his conduct. There was no requirement that the magistrate was satisfied that future domestic violence was 'likely'. The magistrate also assessed that the appellant's behaviour in the ongoing parental relationship was inappropriate and that he was misconceived about his 'responsibility, entitlement and nobility, which manifested in an absence of insight into the consequences of his actions' ([16]). These findings were open on the facts. Therefore, the magistrate exercised his discretion properly and reasonably in making the protection order against the appellant.