***WJ v AT* [2016] QDC 211 (19 August 2016) – Queensland District Court**

'Cross-application' – 'Cross-order' – 'Economic abuse' – 'Emotional and psychological abuse' – 'Exposing children' – 'Family law' – 'Physical violence and harm' – 'Protection order' – 'Purpose of the domestic and family violence protection act 2012 (qld)' – 'Risk'

Appeal Type: Appeal against the making of a protection order against the appellant and appeal against the decision of the Court to dismiss the appellant's application for an order.

Facts: The male appellant and the female respondent were in a relationship. They had two children together, DJ and MJ (aged 3 and 2), and another daughter, LS (aged 8), from the respondent's previous relationship. The appellant had been abusive to LS in the past. The parties had separated and the three children lived with the respondent. The respondent and the appellant each applied for a protection order against the other. There were also contact/care proceedings in the Federal Circuit Court.

The respondent's case was that on 14 August 2015 the appellant spoke loudly and in an insulting way towards her. Many, if not all, of these statements were made in front of DJ and MJ, upsetting the children. The appellant rubbed his beard against the respondent's eye area and continued to verbally abuse her. The respondent tried to ignore him. He took her phone and ran outside. There was a struggle. He pushed the respondent, she was thrown onto the car bonnet and the appellant sustained some scratches (see [6]-[32], [112]-[126]). Conversely, the appellant alleged that the respondent 'went berserk', pushed him around the balcony, grabbed and attacked him, and he ran away from her. She then physically assaulted him. He sustained scratches and a ripped shirt. He also alleged he was a victim of economic abuse (see [33]-[53]).

The Judicial Registrar (JR) made a protection order against the appellant in favour of the respondent. The JR dismissed the cross-application by the appellant (see [56]-[58]).

Issue/s: One of the grounds of appeal was that the decisions of the Judicial Registrar were made against the weight of the evidence, namely the making of a protection order against the appellant in favour of the respondent; including the two children, MJ and DJ, in the order; including the child LS in the order; and the refusal to make a protection order against the respondent in favour of the appellant.

Decision and Reasoning: The appeal was dismissed.

- *Should an order have been made against the appellant?*

First, Smith DCJA held that a number of the acts committed by the appellant amounted to domestic violence as per s 37(1)(b) of the Act *Domestic and Family Violence Protection Act 2012* (Qld)] ('the Act') – 'the rubbing of the beard was physically abusive, the taking of the phone was physically abusive and the insulting words about the first respondent was in my view emotionally or psychologically abusive' (see [131]).

Second, in considering whether a protection order was 'necessary or desirable' to protect the aggrieved as per s 37(1)(c), Smith DCJ noted that the reasoning of McGill SC DCJ in *GKE v EUT* applied here. McGill SC DCJ said:

'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 there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future'(see [32]-[33]).

Smith DCJA noted that 'necessary' is defined by the dictionary as 'requiring to be done, achieved; requisite, essential' and desirable is defined as 'worth having'. There is therefore a 'lower threshold when one is concerned with the term 'desirable'. But both are focused on the need to protect the aggrieved from domestic violence' (see [137]-[139]).

His Honour ultimately agreed with the JR's reasoning that an order was both necessary and desirable to protect the aggrieved from respondent. At [140]:

'There is no doubt that the parties are embroiled in Federal Circuit Court proceedings. There are children of the relationship about whom contact/care arrangements will need to be made. These will need to be dealt with in a civilised and appropriate fashion. I have considered s 4 of the Act. In light of the history between the parties, the events of 14 August 2015, the nature of the relationship, and degree of animosity expressed by the appellant towards the first respondent, in my view, it was both desirable and necessary that the order be made in favour of the first respondent. Like the JR, I consider without such an order there is a real risk of future domestic violence'.

- *Should MJ and DJ have been included in the order?*

Section 53 of the Act provides that the court may name a child ‘if the court is satisfied that naming the child in the order is necessary or desirable to protect the child from (a) associated domestic violence or (b) being exposed to domestic violence committed from the respondent’. Section 10 of the Act defines the meaning of ‘exposed to domestic violence’.

Smith DCJA was satisfied that the children were exposed to domestic violence (see [148]). Further, His Honour stated: ‘I do not consider there is any requirement they understand the words spoke, particularly bearing in mind they were spoken aggressively’(see [149]). Additionally, it was also necessary and desirable for the children to be included in the order because, as the JR found, there was a continued risk of exposure to domestic violence in the future. This was because the parties would continue to be in contact through the children of the relationship and proceedings were on foot in the Federal Circuit Court (see [150]-[151]).

- *Should LS have been included in the order?*

His Honour held that:

‘[I]n all of the circumstances, bearing in mind that there is a real possibility of contact between the appellant and LS, and bearing in mind the acrimonious situation between the parties and the events of 9 July 2015 [when the appellant was physically abusive towards LS] and 15 August 2015, I consider the JR was right to add LS to the order to avoid the risk of her being exposed to domestic violence’ at [159].

- *Should an order have been made against the first respondent?*

In this regard, Smith DCJA noted the respondent had tried to ignore the appellant and that the scratches sustained by the appellant could have been caused in self-defence or accidently by the respondent. In this regard, His Honour quoted the explanatory notes to the 2011 Bill at [166]:

‘Lastly, the Bill aims to ensure that the person who is most in need of protection is identified. This is particularly important where cross-applications are made, which is where each party to a relationship alleges domestic violence against the other and which often result in cross-orders. During consultation, stakeholders reported a disproportionate number of cross-applications and cross-orders and expressed the concern that in many instances domestic violence orders are made against both people involved. This is inconsistent with the notion that domestic violence is characterised by one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. Both people in a relationship cannot be a victim and perpetrator of this type of violence at the same time. A cross-application may be used by a respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings. Also, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken’ (His Honour’s emphasis).

In light of this, Smith DCJA held that there was no ‘physical abuse’ of the respondent by the appellant. Also, on the totality of the evidence, the respondent was most in need of protection (see [167]-[172]).