***CPD v Ivamy & Anor* [2018] QDC 244 (5 December 2018) – Queensland District Court**

'Appeal against protection order' – 'Family law' – 'Necessary or desirable test'

Appeal type: appeal against a protection order.

Facts: On 28 October 2015, in seeking parenting and property orders, the second respondent brought Family Court proceedings against the appellant. An incident on 1 November 2015 led to the making of a temporary protection order on 3 November 2015; the second respondent and the couple's two children were named as the aggrieved. The order included the respective usual conditions: a "no contact" condition and an "ouster" condition under ss 56, 57 and 63 of the *Domestic and Family Violence Protection Act* 2012 (Qld) (DFVPA) (see [21]). There was, however, an exception that allowed for communication via text between the appellant and second respondent with the appellant's mother acting as the conduit between them (see [21]). The appellant soon applied to vary the order to remove the children's names ([22]). The application was heard by the Magistrate on 9 December 2015; the second respondent consented to the variation but the police prosecutor denied ([24]). On 18 February 2016, following a mediation in the Family Court proceedings, a resolution as to the parenting and property orders was reached. 11 days later, final consent orders were made by the Family Court to the effect that the original exception to the order was removed and replaced with an allowance for direct communication via email. Both parties also agreed to try to remove the protection order. However, the police prosecution refused the second respondent's application to remove the order. On 11 March 2016, the domestic violence hearing listed to commence on 14 March 2016 was adjourned so as to provide the appellant with the opportunity to make submissions for the discontinuance of the order. After a four-day summary trial, extending over March and April 2017, the Magistrate gave *ex tempore* reasons on 10 November 2017 and ultimately granted a five-year protection order against the appellant (see [34]-[47]).

Issues: the appellant's grounds of appeal were two-fold. First, the Magistrate erred in finding that the emails sent by the appellant's mother and the conduct of the trial by his counsel constituted further acts of domestic violence. Second, the protection order was not necessary or desirable to protect the second respondent and the children from the appellant.

Decision and reasoning: appeal allowed and the protection order was therefore set aside and the matter was remitted to another Magistrate for re-hearing.

His Honour, after reviewing the exchange of emails between the appellant's mother and second respondent, concluded that the Magistrate's finding that the appellant was behind the tone and wording of the emails was based on speculation and not open on the evidence (see [50]-[57]). As to the second part of this ground of appeal, his Honour expressed the view that counsel is entitled to exercise their discretion on how to handle a matter and the Magistrate's characterisation of the appellant's counsel's cross-examination of the second respondent as an act of domestic violence was erroneous. The first ground of appeal was therefore allowed.

The second ground of appeal was allowed. His Honour felt that the Magistrate, in coming to their finding on the necessary or desirable condition, failed to consider the material matters such as the fact that the tension between the Magistrate's courts undertakings and the Family Court had resolved in April 2017 and the appellant's mother was no longer acting as a conduit and thereby no longer "inflaming" the relationship (see [66]). Accordingly, his Honour concluded that the Magistrate erred in granting the protection order.