

***ACP v McAulliffe* [2017] QDC 294 (8 December 2017) – Queensland District Court**

‘Family law issues’ – ‘Necessary or desirable test applied to conditions’ – ‘Protection order’ – ‘Risk of future domestic violence’

Appeal type: appeal against a protection order.

Facts: The male appellant and the female aggrieved person (MP) were in a relationship. Commencing in October 2012, there were a number of ‘instances’ of domestic violence (see [28]-[38]). A temporary protection order was made on 15 February 2016. A year later, on 7 March 2017, a Magistrate made a protection order against the appellant for the benefit of MP and her three sons under the *Domestic and Family Violence Protection Act 2012 (Qld)*(DFVPA). There were five conditions stipulated under the order; the first and fourth were standard conditions under s 56 of DFVPA:

1. Appellant be of good behaviour towards the aggrieved and not commit domestic violence against her.
2. Appellant is prohibited from remaining at, entering or attempting to enter, premises or approaching the premises where the aggrieved lives or works.
3. Subject to four exceptions, appellant is prohibited from contacting, attempting to contact or asking someone else to contact the aggrieved.
4. Appellant be of good behaviour towards the named children and not commit associated domestic violence against them and not to expose them to domestic violence.
5. Appellant is prohibited from contacting the named children subject to the same exceptions applicable under condition 3.

Issue: whether the protection order was necessary or desirable to protect the aggrieved from domestic violence?

Decision and reasoning: the appeal was allowed to the extent that a protection order was made but only with the standard conditions. Conditions 2, 3 and 5 were removed and condition 4 was renumbered as condition 2.

Before considering the issue on appeal, Horneman-Wren SC DC's observed that the Magistrate did not expressly assess either of the first two steps of the three-step process considered by Morzone QC DCJ in *MDE v MLG* as the necessary approach to determining the requirement, under s 37(1)(c) of the *DFVPA*, that "*the protection order is necessary or desirable to protect the aggrieved from domestic violence*" (see [67]). His Honour then took the opportunity to emphasise the discretionary nature of this requirement and that Morzone QC DCJ's view on how to determine whether an order is necessary or desirable shouldn't be seen to mandate those three steps (see [68]-[69]). Indeed, his Honour later recognises that it was sufficiently clear from the Magistrate's reasons that she answered the first question of the three-stage approach in the affirmative (see [76]-[78]).

In relation to the issue on appeal, his Honour considers the Magistrate's finding that an order was necessary as unreasonable and reached in error. His Honour opined that evidence of risk of future domestic violence in the absence of a protection order (first step) is not a sufficient basis for concluding that the necessary condition is satisfied (see [80]). However, his Honour regarded the Magistrate's finding that the protection order was desirable as one that ought to have been made (see [81]). In accordance with the requirement under s 37(1)(c) that the court must only be satisfied with one of the two conditions (see [88]), and as reflected in the orders of this appeal, his Honour therefore agreed with the Magistrate in her decision to make the protection order (see [88]).

Ultimately, it was the terms in which the Magistrate made the order that necessitated modification of the protection order. His Honour noted that under s 57(1) of the *DFVPA*, before the court may impose other conditions in addition to those set out in s 56, it must be satisfied that the condition is both necessary in the circumstances and desirable in the interests of the aggrieved, named person or the respondent. Having recognised this, his Honour then pointed out that the Magistrate failed to explain that she was satisfied that the imposition of other conditions was both necessary and desirable (see [89]-[90]). The order to remove conditions 2, 3 and 5 of the protection order reflect this view of his Honour that the Magistrate erred in imposing those other conditions.