

***HDI v HJQ* [2020] QDC 83 (14 May 2020) – Queensland District Court**

‘Abuse of Process’ – ‘Appeal’ – ‘Non-fatal strangulation’ – ‘Parenting proceedings’ – ‘Physical violence and harm’ – ‘Separation’ – ‘Systems abuse’ – ‘Variation of protection order’

Proceedings: Appeal of a decision to order a permanent stay of an application to vary a protection order.

Issues:

- > Does a Magistrate have power under the Domestic and Family Violence Protection Act 2012 (Qld) (DFVP Act) to order a stay of an application under the Act as an abuse of process?
- > Should the application to vary the protection order be allowed, dismissed or referred back to the Magistrates Court for further hearing?

Facts: The male appellant respondent (appellant) and female respondent aggrieved (respondent) were married for 23 years and had two children together. They separated after an alleged incident of choking, the respondent applying for a Protection Order under the DFVP Act. A Temporary Protection Order, including the children as named persons, was granted and the matter was set down for a hearing. The respondent then applied to vary its terms, seeking an order ousting the appellant from the former matrimonial home (this was later dismissed). The appellant then filed a cross application seeking a Protection Order against the respondent, but this was later withdrawn. At the hearing, the Magistrate accepted the respondent’s evidence and rejected the applicant’s version of events regarding the choking incident, making a two-year Final Protection Order. Two applications were then made to vary the Final Order, one by the appellant (to set aside the Order) and one by the respondent after the appellant breached the Order, in response to which a Magistrate made a Second Temporary Order against the appellant. The appellant then made a second application for a Protection Order against the respondent.

At the hearing of these last three applications, the Magistrate ordered that: the appellant was guilty of breaching the Final Order, the appellant’s application to vary be dismissed, the Second Temporary Order be revoked and replaced with a Varied Order, and the appellant’s Second Application for a Protection Order be adjourned. The appellant appealed these orders. At the hearing for the appellant’s Second Application for a Protection Order, the respondent sought that the application be estopped or stayed for abuse of process. The Magistrate agreed that the application constituted an abuse of process and it was permanently stayed.

The appellant further applied to vary the Varied Order. The Magistrate granted a permanent stay of this application on the ground that it was an abuse of process. The appellant appealed this decision on numerous grounds, including that the Magistrate erred in: a) allowing an oral application to permanently stay the application to vary on the basis it was an abuse of process, and b) not allowing the application to vary to proceed to full hearing.

Judgment: The judge held that the Magistrate had no jurisdiction to order a permanent stay and therefore that the order to stay had to be set aside as a nullity. Her Honour found that the DFVP Act and Rules provide expressly or by implication for applications that are an abuse of its process to be summarily dismissed by the Magistrates Court, but there is no express reference to a power to stay such proceedings on these bases [75], [77], [83]. After examining several pieces of legislation, Her Honour also found that there was no explicit power to order a stay of an application under the DFVP Act [91], and that such a power did not need to be implied for the effective exercise of the jurisdiction to summarily dismiss applications that are an abuse of court process [94].

However, Her Honour noted that, as an appellate court, it had the power to allow, dismiss or refer the application to vary back to the Magistrates Court [99]. Reviewing all the material before her, Her Honour held that, while there was no basis to allow the application in full, two variations ought to be made to the Varied Order, both minor [103].