

***McCardle v McCardle* [2014] WASCA 129 (15 July 2014) – Western Australia Supreme Court (Court of Appeal)**

‘Appellant a legal practitioner’ – ‘Application for violence restraining order’ – ‘Delay’ – ‘Family law matters’ – ‘Following harassing, monitoring’

Appeal type: Extension of time within which to commence the appeal, appeal against decision dismissing application for violence restraining order.

Facts: The appellant originally obtained a restraining order against the respondent in Adelaide in March 2010 which expired in March 2012. The appellant then obtained an ex parte interim violence restraining order (VRO) in Western Australia on 11 July 2012. This was obtained on the basis that the appellant had received telephone calls from the respondent on at least 33 occasions in mid-2012. Prior to final orders being given in relation to the ex parte VRO, the respondent made an application to strike out proceedings on the basis that they were an abuse of process in light of the determination of family law matters in the Federal Magistrates Court. The Magistrate made orders cancelling the July 2012 order in March 2013.

In June 2013, the appellant appealed to the District Court. The respondent brought an interlocutory application seeking orders to have the appeal struck out. The respondent’s application was allowed. His Honour noted, amongst other things, that the appellant (herself a legal practitioner) had chosen not to seek a fresh restraining order on the basis of any actions since July 2012. There was no suggestion that the respondent had telephoned the appellant since July 2012. It was accepted that the original grounds of the 2012 interim VRO were ‘stale’ and ‘sufficiently minor’ so as to not justify the costs of the appeal.

Issue/s: Whether the appellant should be given an extension of time within which to commence the appeal against the decision of the District Court?

Decision and Reasoning: The application for an extension of time within which to appeal was dismissed. In terms of prospects of success, it was arguable that the judge erred by 'understating the degree of domestic and family violence' evidenced by the 'blocked number' telephone calls, the alleged verbal abuse of the appellant from the respondent in the call she answered, and the failure to take into account incidents which allegedly occurred after July 2012' (See [34]). However, it was nevertheless not in the interests of justice to grant the extension of time. The Court of Appeal was unable to make orders for the application for a VRO to be heard by a magistrate. Instead the matter would have to be returned to the District Court for a rehearing of that appeal (See [39]-[40]). The length of delay that would result was not minimal. The appellant's stated reasons for not filing an appeal notice on time were unsatisfactory for a legal practitioner (See [37]). Further, there was no impediment to the appellant seeking a fresh violence restraining order, particularly in relation to any events since July 2012 (See [41]).