DISTRICT COURT OF QUEENSLAND

CITATION:	*JKL v DBA (No. 2)* [2022] QDC 142
PARTIES:	**JKL** (appellant) **v** **DBA** (respondent)
FILE NO:	17 of 2021
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Gympie Magistrates Court
DELIVERED ON:	22 June 2022
DELIVERED AT:	Gympie
HEARING DATE:	13 June 2022
JUDGE:	Dearden DCJ
ORDER:	**1. Appeal dismissed** **2. I will hear the parties on costs**
CATCHWORDS:	MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – APPEAL – where the appellant appeals the decision to dismiss the application to vary the domestic violence order – where the order contains six conditions directed at the appellant's dealings with the respondent and their five children – whether there was improper admissions of documents – whether the appellant's evidence was not taken into account – whether there was improper cross-examination – whether there were errors of fact – whether there was procedural unfairness
LEGISLATION:	*Domestic and Family Violence Protection Act 2012* ss 23, 146 164(a), 168
CASES:	*Allesch v Maunz (2000) 203 CLR 172* *Armour v FAC [2012] QMC 22* *Coal and Allied Operations Pty Ltd v AIRC (2000) 203 CLR 194* *Fox v Percy* (2003) 214 CLR 118 *House v The King (1936) 55 CLR 499* *JKL v DBA* [2020] QDC 159

McDonald v Queensland Police Service [2018] 2 Qd R 612

Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679

COUNSEL: JKL (self-represented)
LA Ygoa-McKeown

SOLICITORS: Appellant in person
KLM Solicitors for the respondent

Introduction

[1] The appellant, Frank Randal Jones, appeals the decision of the learned acting magistrate at the Gympie Magistrates Court on 14 October 2021, dismissing the appellant's application for a variation of the domestic violence order originally made in the Gympie Magistrates Court on 20 November 2019 and upheld on appeal before Byrne QC DCJ in a decision delivered on 22 June 2020.[1]

Original order

[2] The terms of the original order are set out in *JKL v DBA* [2020] QDC 159, [2] as follows:-

> "[2] The order was made for a period of five years and contained a total of six conditions, directed towards the appellant's dealings with the respondent and each of their five children, as named persons. It was in the following terms:
>
> (1) That the respondent be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved.
>
> (2) That the respondent be of good behaviour towards the named person and not commit associated domestic violence against the person and not expose any named child to domestic violence.
>
> (3) The respondent is prohibited from entering, attempting to enter or approaching to within 100 meters of where the aggrieved or named child/ren live, work or attend for the purposes of education or child care.
>
> - Except for the purpose of having contact with children but only as set out in writing between the parties or in compliance with an order of a court
>
> - Except with the written consent of the aggrieved including a text message or email

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1 *JKL v DBA* [2020] QDC 159.

(4) The respondent is prohibited from locating, attempting to locate or asking someone else to locate the aggrieved or named child/ren

- Except in compliance with an order of a court

(5) The respondent is prohibited from following or remaining or approaching to within 100 metres of the aggrieved or named child/ren when the aggrieved or named child/ren are at any place.

- Except when appearing personally before a court or tribunal;
- Except when attending an agreed conference, counselling, or mediation
- Except for the purpose of having contact with child/ren but only as set out in writing between parties or in compliance with an order of a court
- Except with the written consent of the aggrieved including by text message or email.

(6) The respondent is prohibited from contacting or attempting to contact or asking someone else to contact the aggrieved or named children by any means whatsoever including telephone, text or internet.

- Except when appearing personally before a court or tribunal;
- Except when attending an agreed conference, counselling or mediation
- Except for the purpose of having contact with children but only as set out in writing between the parties or in compliance with an order of a court
- Except with the written consent of the aggrieved, including by text message or email.
- Except concerning parental or contact issues but then only by text message or email."

Grounds of appeal

[3] As Byrne QC DCJ noted in the substantive appeal, the appellant in that matter, and in respect of this subsequent appeal before me, was self-represented, and does not have the benefit of English as his primary language. As in the appeal before Byrne QC DCJ, the filed grounds of appeal are not always easily understood, but the appellant was able to effectively elaborate on and explain each of the grounds during the course of oral submissions.

The appeal grounds

[4] The Notice of Appeal sets out the following grounds:-

1. Improper admission of documents used in another court;
2. Appellant evidence was not taken into account;
3. Improper cross-examination of witness;
4. Error of facts; and
5. Procedural unfairness where appellant had no solicitor represent him and cud [sic] not convey his site [sic] of argument to the magistrate where the respondent had such representation.

The appellant seeks a hearing de novo of the proceedings which were the subject of the appeal.

On the hearing of the appeal the appellant will seek to adduce fresh evidence to the following effect, Uniting Church attendance evidence, Gympie Hospital Medical Records.

The appellant seeks the following orders from the District Court:

1. Appeal allowed.
2. Decision of Application dismissed dated 14 October 2021 be set aside/varied.
3. The children's names are taken out of the domestic violence order as named persons.[2]

Background

[5] The background to this matter has been helpfully summarised in the respondent's summary of argument as follows:-[3]

> "[3] On 20 November 2019, a final protection order was made by the Gympie Magistrates Court which named the appellant as the respondent, the respondent as the aggrieved, and the parties' children as named persons ('the final protection order').

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2 Notice of Appeal – District Court filed 9 November 2021.
3 Appeal Exhibit 3 [3]-[9].

[4] On 18 December 2020, the appellant filed an application to vary ('the application') in the Gympie Magistrates Court. The application sought that the final protection order be varied to remove the children as named persons.

[5] The application contained a number of annexures, including one labelled 'Affidavit of Frank Randal Jones', however the document was not correctly executed as an affidavit. In that document, the appellant appeared to seek that the final protection order be revoked.

[6] It was subsequently confirmed with the appellant at the commencement of the hearing that he sought for the final protection order to be revoked, but if that was not accepted, in the alternative he sought for the children to be removed as named persons, and for the condition prohibiting him from approaching the aggrieved be removed.

[7] The hearing was heard before [the learned acting magistrate] in the Gympie Magistrates Court and occurred on 29 September 2021.

[8] On 14 October 2021, the presiding magistrate gave an ex-tempore judgment essentially dismissing the appellant's application to vary the protection order and ordering costs in the amount of $500.

[9] On 9 November 2021, the appellant filed his Notice of Appeal with respect to the decision made on 14 October 2021."

[6] Respectfully, and with appropriate adaptation to reflect the fact that the appeal before me is from a decision of a magistrate refusing to vary the conditions of a domestic violence order, the observations of Byrne QC DCJ in the substantive appeal in this matter are also applicable to the appeal before me. I respectfully adopt and apply his Honour's summary of the applicable laws, as follows:

"[5] A person who is aggrieved by a decision to make a domestic violence order may appeal against the decision.[4] The making of a domestic violence order includes the making of a Protection Order.[5]

[6] The appeal is to be decided on the evidence and proceedings before the court below, unless the appellate court makes an order to the contrary.[6] There was no application in this appeal for an order to the contrary, and no such order was made.

f[7] Therefore, this appeal is in the nature of an appeal by re-hearing on the record. In an appeal of that nature it is necessary for me to consider all

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4 *Domestic and Family Violence Protection Act 2012* s 164(a).
5 Ibid s 23(2).
6 Ibid s 168.

> the evidence and make up my own mind about the effect of it, particularly where any inferences are to be drawn from primary facts.[7] I must give recognition to the fact that the magistrate had the advantage of seeing and hearing the witnesses in the evaluation of credit and in assessing the "feeling" of the case.[8] The onus is on the appellant to show that there is some error in the decision under appeal.[9]
>
> [8] As the making of the Protection Order involves the exercise of a discretion, error of the kind explained in *House v The King*[10] needs to be demonstrated before the appeal can succeed. The test has sometimes been expressed as requiring satisfaction that no reasonable decision maker could have made the decision under appeal.
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> [9] In the event that error is demonstrated, I must consider the whole of the evidence to determine whether the orders made are nonetheless justified.
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> [10] The powers of this court in an appeal under the DFVP Act are found in section 169 of the DFVP Act. Under section 169(2), the decision of this court is final and conclusive."

Grounds of appeal – discussion

Ground 1 – Improper admission of documents used in another court

[7] In the defendant's outline of submissions the appellant states:-

> "[The learned acting magistrate] relied on evidence, that the father can see his five children according to Family court order. Yet this is not the truth, paragraph 35, page 5 of the transcript."[11]

[8] The appellant, in his oral submissions, argued that the learned acting magistrate had misused documents from the Family Court and drawn the wrong conclusions from those documents.

[9] This appears to be a reference to concurrent proceedings before the Family Court. During the course of her decision, the learned acting magistrate stated:-[12]

> "I note that I was provided with an order of 9 July 2021 of the Federal Circuit Court of Australia which ordered on a final basis, inter alia, that the children spend time with the father for the first Saturday in each month of January, March, May, July, September

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7 *Fox v Percy* (2003) 214 CLR 118 [22]-[25]; *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679 [43], [57]; *McDonald v Queensland Police Service* [2018] 2 Qd R 612 [47].

8 *Fox v Percy* (2003) 214 CLR 118 [22]; *McDonald v Queensland Police Service* [2018] 2 Qd R 612 [47].

9 *Allesch v Maunz* (2000) 203 CLR 172 [23]; *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 [14]; *McDonald v Queensland Police Service* [2018] 2 Qd R 612 [47].

10 (1936) 55 CLR 499, 505.

11 Appeal Exhibit 1 – Submission of arguments by appellant, p 2.

12 Decision p 6, ll 25-31.

> and November each year for a period of two hours, at such times as can be arranged, at the Sunshine Coast Family Contact Centre, and to communicate by telephone or video each week, on Saturday at 9.00 am and other times that the children express to do so, and he can also send cards."

[10] The learned acting magistrate acknowledged that although this was "…quite limited time that the applicant has been ordered to be able to see the children",[13] she went on to say that "the appellant is misconceived … when he implies … that the reason for this is because of the domestic violence order."[14]

[11] The learned acting magistrate, having referred at length to the reasons for judgment in the Federal Circuit Court proceedings, went on to identify that:-[15]

> "I do not read those reasons [contained in the Federal Circuit Court judgment] in terms of supporting necessarily … the need for a domestic violence order, although some of them may do. The reason that I have referred to that decision is solely … to demonstrate that the father inaccurately believes or is of the view that … the Federal Circuit Court provided him with such limited time with the children because of the domestic violence order when, in fact, there was a myriad … of reasons why he obtained such limited time with the children, and the existence of a domestic violence order was considered but just one of a multitude of facts concerning his ability to care for the children, many of those reasons being outside the scope of a domestic violence application, that just simply goes to demonstrate that the applicant misstates – or misunderstands, perhaps, the reasons for the order of the Federal Circuit Court.
>
> In relation to the need to approach – in relation to removing the children's names, … the applicant has relied on again the reason – need to be in contact with his children. However, the order provides for the exception in relation to family law orders, and he will be able to have contact with the children regardless of an order in accordance … with the family law orders."

[12] The respondent submits, correctly in my view, that this ground of appeal must fail, as the learned acting magistrate has not made any error of fact or law in accepting the uncontroversial evidence contained in the Federal Circuit Court judgment. I accept that submission and this ground of appeal fails.

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13 Decision p 6, ll 33-34.
14 Decision p 6, ll 34-35.
15 Decision p 8, ll 8-26.

Ground 2 – appellant evidence was not taken into account

[13] The appellant in his submissions states:-[16]

> "The magistrate did not believed [sic] the card presented to her was true United Care Counselling. That [sic] why I attached affidavit marked Affidavit A [Annex 2]."

[14] As the respondent submits, it is open to a magistrate to determine what weight they place on evidence that is before them at a final hearing in deciding whether it is "necessary or desirable" to make an order, or for that matter, to vary an order.[17]

[15] The affidavit filed by the appellant in support of his application on 27 May 2021 did not annex any documentation in respect of the Uniting Care counselling, but a subpoena issued by the respondent on Uniting Care resulted in documents being produced which were available at the time of the hearing before the learned acting magistrate. Both parties were invited to compile a tender bundle of documents. The appellant declined to do so but the respondent did.[18] During the course of the learned acting magistrate's reasons, she noted that the appellant had attended Uniting Care and undertaken two face to face appointments with a third scheduled.[19] Clearly the learned acting magistrate did have regard to the evidence of the appellant's attendance on Uniting Care for counselling, but the weight given to that evidence was a matter for the learned acting magistrate to determine and no error of fact, law or discretion has been demonstrated. Accordingly, this ground fails.

Ground 3 – improper cross examination of witness

[16] The appellant in his submission of arguments on this ground states:-[20]

> "Father questions [sic] were dismissed in cross-examination of the mother. At the point father could not formulate, cross-examine [sic] questions magistrate should have halted the hearing and order [sic] duty lawyer represent the father who can cross-examine the mother in the interest of fair hearing'".

[17] The respondent submits that there has been a long history of litigation between the appellant and the respondent, including the appellant self-representing in two

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16 Appeal Exhibit 1, p 2 [4].
17 *Armour v FAC* [2012] QMC 22 [47].
18 Trial Exhibit 9.
19 Decision p 6, ll 15-21.
20 Appeal Exhibit 1 – Submission of Arguments by appellant, p 2 [3].

hearings of the respondent's application for a protection order, two appeals of the final protection order and many mentions in proceedings.[21]

[18] In the appeal before Byrne QC DCJ, the issue of the appellant's capacity to conduct proceedings as a self-represented litigant was canvassed at some length, but as Byrne QC DCJ noted:-[22]

> "It is fully understandable that the appellant might feel that he is disadvantaged in the conduct of his case, but the courts are increasingly alive to the issues faced by self-represented litigants and regularly take account of any actual disadvantage. Here, for the reasons outlined above, the appellant is better armed than many self-represented litigants and in my view suffered no actual disadvantage."

[19] Byrne QC DCJ went on to conclude "I … considered that the [appellant's] advocacy skills were such that he was suffering no actual disadvantage in the conduct of his appeal."[23]

[20] The respondent submits:-

1. The issue of the appellant's ability to comprehend proceedings has been considered and determined previously.

2. The appellant has not relied on any new information that would suggest that there has been a change in his circumstances requiring this issue to be examined again.

3. The appellant has not particularised why he says an error was made by the presiding magistrate.[24]

4. The appellant further submits:-

> "That an application was made by the solicitor for the respondent for the appellant to be banned from personally cross-examining the respondent. This application was not successful and therefore the appellant was not prohibited or restricted in any way from cross-examining the respondent at the final hearing."[25]

[21] It is clear that the appellant was capable and able to cross-examine the respondent and there was no prohibition on him doing so. In those circumstances, there has

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21 Appeal Exhibit 3 – Summary of Argument by the respondent [25].
22 *JKL v DBA* [2020] QDC 159 [55].
23 Ibid [57].
24 Appeal Exhibit 3 [28].
25 Ibid [29].

been no error demonstrated on the part of the learned acting magistrate. Accordingly, this ground must fail.

Ground 4 – error of facts

[22] At Appeal Exhibit 1,[26] the appellant expands on this ground in the following terms:-

> "The magistrate quoted Family Court proceeding [sic] which are still under appeal and never proven about children let loose in park."

[23] At Appeal Exhibit 1,[27] the appellant stated further:-

> "Magistrate considered scenario when children rune [sic] to father on the streets of Gympie or wave to him for which he was criminalised before, but fail to consider another means the mother can use to harass the father one of which is massaging [sic] still allowed under the Family Court plan which the mother use [sic] to block the father from seeing his children and report to the police for messages which she does not like. Police action is in progress."

[24] Further at Appeal Exhibit 1,[28] the appellant also states:

> "The magistrate say that the children want to see their father but are too young to know what's the best for them and for that we have Family Court who gave in [sic] mother wishes, to have five children for her own and have new father for them and discard the biological father."

[25] The learned acting magistrate addressed, at some length in her decision, the issue of the appellant's concern that he might inadvertently run into the aggrieved and the children in a relatively small town, including at the post office and at the library.[29]

[26] The learned acting magistrate identified that there had been evidence from both parties of other occasions when the children and the appellant had come into contact, and these incidents had not been reported to police and no charges resulted. As the learned acting magistrate noted:-

> "It is an obligation of the applicant to turn and walk away when that [bumping into the respondent] happens and to remove himself from that situation, and an inadvertent coming into contact, provided he does remove himself, is not penalised."[30]

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26 Appeal Exhibit 1, p 2 [5].
27 Appeal Exhibit 1, pp 2-3 [6].
28 Appeal Exhibit 1, p 3 [7].
29 Decision p 8, l 28 – p 9, l 10.
30 Decision p 8, l 46 – p 9, l 2.

[27] In those circumstances, given that the appellant agreed that he could use facilities such as the library at times when the children were at school, the learned acting magistrate appropriately concluded that this was not a reason to vary the domestic violence order.

[28] Further, in referring to the decision of the Federal Circuit Court,[31] the learned acting magistrate, appropriately in my view, indicated that the domestic violence order was only one "of a multitude of facts concerning [the appellant's] ability to care for the children, many of those reasons being outside the scope of a domestic violence application".[32] It is clear that the learned acting magistrate has not made any error of fact, as asserted. Accordingly, this ground must fail.

Ground 5 – procedural unfairness where appellant had no solicitor represent him and cud [sic] not convey his site [sic] of argument to magistrate where the respondent had such representation

[29] *Domestic and Family Violence Protection Act 2012* (Qld) s 146(1) provides as follows:-

> "**146 Right of appearance and representation**
>
> (1) A party to a proceeding under this Act may appear in person or be represented by a lawyer."[33]

[30] Clearly, the legislation contemplates that either or both of the applicant and the respondent might not have legal representation in domestic violence proceedings, even though each is entitled to be represented by a lawyer.

[31] Further, as identified above, the issue of the appellant's competence to adequately represent himself at trial and at appeal was considered at some length by Byrne QC DCJ in *JKL v DBA* [2020] QDC 159. As the learned appeal judge noted, although the appellant might feel that he is disadvantaged, in the original trial the appellant was "better armed than many self-represented litigants" and "suffered no actual disadvantage".[34] In my view, those observations are equally applicable to the appellant's conduct of the trial seeking a variation of the protection order, and of this appeal before me.

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31 Trial Exhibit 10.
32 Decision p 8, ll 15-17.
33 *Domestic and Family Violence Protection Act 2012* (Qld) s 146(1).
34 *JKL v DBA* [2020] QDC 159 [53]-[55].

[32] Byrne QC DCJ also noted from his own observations that, the appellant's "advocacy skills were such that he was suffering no actual disadvantage in the conduct of his appeal".[35] I respectfully adopt Byrne QC DCJ's view of the appellant's ability to self-represent and conclude that there was no procedural unfairness to the appellant arising from his lack of legal representation at the trial of the application to vary the protection order. This ground fails.

Miscellaneous maters

[33] Although not a ground of appeal, the appellant at Appeal Exhibit 1,[36] states:-

> "Magistrate ruled the father application was frivolous based on number of application made by the father… [the learned acting magistrate] failed to investigate. The truth was the father application for Legal Aid Queensland was denyed [sic] about 15 times. As resault [sic] was had solicitor in preparing affidavits, submission, father did not have even duty lawyer on most times. At the same time the mother who is foreign national had one or two lawyers present at all time. This can be viewed as manipulation by Legal Aid of the court system outcome. This may be seen as revenge by Legal Aid Queensland. This matter was reported to the Ombudsman. There were comments by Legal Aid such as 'you are band [sic] for two years' by Legal Aid staff, [the learned acting magistrate] failed to investigate why father lodged many application [sic] but did not get anywhere.
>
> [The learned acting magistrate] verdict should be set aside and new independent court hearing and investigation in legal aid practice in Queensland conduct [sic]."

[34] It is submitted, and I accept, that it is not the role of a trial magistrate to investigate, or otherwise become involved in, the granting or refusal of legal aid. The asserted 'failure' to investigate does not disclose an error of fact, law or discretion. Accordingly, to the extent that this could be considered a ground of appeal, although not contained in the original Notice of Appeal, it has not been made out and fails.

[35] By way of completeness, the respondent has identified further statements in the appellant's submission of arguments which do not reflect grounds of appeal, and it is appropriate to note and respond to them.

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35 *JKL v DBA* [2020] QDC 159 [57].
36 Appeal Exhibit 1, p 3 [9].

[36] At Appeal Exhibit 1,[37] the appellant states:

> "Magistrate considered scenario when children rune [sic] to father on the streets of Gympie or wave to him for which he was criminalised before, but fail to consider another means the mother can use to harass the father one of which is massaging [sic] still allowed under the Family Court plan which the mother use [sic] to block the father from seeing his children and report to the police for messages which she does not like. Police action is in progress."

[37] It is not entirely clear from the submissions what point the appellant seeks to make in respect of this matter, but as the respondent identifies, no error of fact or law by the learned acting magistrate has been demonstrated. Accordingly, if this is a matter that could be considered a ground of appeal, it must fail.

[38] At Appeal Exhibit 1,[38] the appellant states:

> "The magistrate say that the children want to see their father but are too young to know what's the best for them and for that we have Family Court who gave in [sic] mother wishes, to have five children for her own and have new father for them and discard the biological father."

[39] It is not clear whether this particular submission relates to any of the grounds of appeal identified in the Notice of Appeal, but in any event, issues in respect of access by the children to the appellant are within the jurisdiction of the Federal Circuit Court and not the Magistrates Court. The protection order in the Magistrates Court appropriately contemplates the concurrent operation of a family law order. Again, this is not a matter that raises any error of fact, law or discretion by the learned acting magistrate, and to the extent that it could be considered a ground of appeal, it must fail.

Conclusion

[40] It follows that the appellant has failed to make out any of his grounds of appeal.

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37 Appeal Exhibit 1, pp 6-7 [6].
38 Appeal Exhibit 1, p 3 [7].

Order

[41] I order:-

1. Appeal dismissed.

2. I will hear the parties on costs.