CITATION:	*Nguyen v Schroeder* [2020] NTLC011
PARTIES:	Thao NGUYEN
	V
	David Ernest SCHROEDER
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	22026997
DELIVERED ON:	29 September 2020
DELIVERED AT:	DARWIN
HEARING DATE(s):	15 September 2020
JUDGMENT OF:	Norrington JR

CATCHWORDS:

DOMESTIC AND FAMILY VIOLENCE ACT 2007 (NT) – Interim Court DVO – hearing process and test to be applied.

Domestic and Family Violence Act 2007 (NT) s4, s16, s18, s19, s21, s35, s116
Evidence (National Uniform Legislation) Act 2011 (NT) s140
Family Law Act 1975 (Cth) s60CC(3)(k)
Interpretation Act 1978 (NT), s55(4)
*Local Court (Civil Jurisdiction) Rules 1998, r*21.01
AB v Hayes & Anor [2019] NTSC 13
Atkinson v Bardon & Ors [2018] NTSC 9
Australian Broadcasting Corp v O'Neill (2006) 227 CLR 57
American Cyanamid Co v Ethicon Ltd (1975) AC 396
Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618

Bonney v Thompson [2011] NTSC 81
Briginshaw v Briginshaw (1938) 60 CLR 336
Goode & Goode [2006] FamCA 1346
Muir v Nunn [2006] NTSC 71
NOM v DPP [2012] VSCA 198
Warner-Lambert Co LLC v Apotex Pty Ltd [2014] FCAFC 59
WJM v NRH [2013] QMC 12

REPRESENTATION:

Counsel:

Plaintiff:	Ms Batt
Defendant:	Mr Bortoli

Solicitors:

Plaintiff:	Domestic Violence Legal Service
Defendant:	Respondent Early Assistance Legal Service

Judgment category classification:	A
Judgment ID number:	011
Number of Paragraphs:	72

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22026997

BETWEEN

Thao NGUYEN

Plaintiff

AND

David Ernest SCHROEDER

Defendant

REASONS FOR JUDGMENT

(Delivered 29 September 2020)

NORRINGTON JR:

1. These are proceedings commenced by way of an Application for a Local Court DVO under the *Domestic and Family Violence Act 2007* ("the Act").

2. The applicant filed an Application for a Local Court DVO with the Court on 25 August 2020. The matter first came before the Court on 1 September 2020. At the first mention of the matter, each party was self-represented. The matter was adjourned to 15 September 2020 with both parties being encouraged to obtain legal advice and the applicant was encouraged to file further material in support of her application.

3. At the mention of the matter on 15 September 2020 the applicant was represented by the Domestic Violence Legal Service and the defendant was represented by the Respondent Early Assistance Legal Service. During the course of the mention, the applicant made an oral application for an interim court DVO to be made under section 35 of the Act. The defendant opposed the making of an interim order.

4. After hearing submissions from counsel for each party, I reserved my decision and adjourned the mater to 18 September 2020. An interim court DVO was ordered on 18 September 2020 and I indicated that I would deliver my reasons for the decision at a later date. These are the reasons for that decision.

Relevant Legislation

5. The source of the Court's power to make an interim court DVO is found in section 35 of the Act. The section provides:

> **35 Interim court DVO**
>
> (1) At any time during the proceeding for the hearing of an application for a Local Court DVO, the Court may make a domestic violence order under this section (an ***interim court DVO***).
>
> *Note*
>
> *Part 2.2 provides for the matters to be considered in making a DVO and Part 2.3 provides for the content of a DVO.*
>
> (2) The Court may make the interim court DVO:
>
> (a) even if the defendant does not appear at the hearing; or
>
> (b) if the defendant appears at the hearing:
>
> (i) before hearing the defendant's evidence; or
>
> (ii) even if the defendant objects to the order being made.
>
> (3) The interim court DVO is in force until the earlier of the following:
>
> (a) it is revoked by the Court;
>
> (b) if a Local Court DVO is made for the same parties and the defendant is before the Court:
>
> (i) on the making of the Local Court DVO; or
>
> (ii) on the later date ordered by the Court;
>
> (c) if a Local Court DVO is made for the same parties and the defendant is not before the Court:

(i) when the Local Court DVO is given to the defendant; or

(ii) on the later date ordered by the Court.

Note for subsection (3)

Under section 103H a Local Court DVO can be superseded in certain circumstances by an interstate DVO that is a recognised DVO in the Territory

6. The note to section 35(1) refers to Part 2.2 which includes the test for when the Court may make a DVO (section 18) and the matters to be considered by the Court when making a DVO (section 19). Section 18 provides:

18 When DVO may be made

(1) The issuing authority may make a DVO only if satisfied there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant.

(2) In addition, if the protected person is a child, the authority may make a DVO if satisfied there are reasonable grounds to fear the child will be exposed to domestic violence committed by or against a person with whom the child is in a domestic relationship.

7. Section 19 provides:

19 Matters to be considered in making DVO

(1) In deciding whether to make a DVO, the issuing authority must consider the safety and protection of the protected person to be of paramount importance.

(2) In addition, the issuing authority must consider the following:

(a) any family law orders in force in relation to the defendant, or any pending applications for family law orders in relation to the defendant, of which the issuing authority has been informed;

(b) the accommodation needs of the protected person;

(c) the defendant's criminal record as defined in the Criminal Records (Spent Convictions) Act;

(d) the defendant's previous conduct whether in relation to the protected person or someone else;

(e) other matters the authority considers relevant.

8. The note to section 35(1) also refers to Part 2.3 which contains the various orders the Court can make if the test in section 18 is first satisfied. Part 2.3 contains sections 21, 22, 23 and 24. The sections are as follows:

21 What DVO may provide

(1) A DVO may provide for any of the following:

(a) an order imposing the restraints on the defendant stated in the DVO as the issuing authority considers are necessary or desirable to prevent the commission of domestic violence against the protected person;

Examples of DVOs for paragraph (a)

1 An order restraining the defendant from contacting (directly or indirectly) the protected person.

2 An order restraining the defendant from approaching the protected person or premises stated in the DVO.

3 An order requiring the defendant to refrain from harassing, threatening, verbally abusing or assaulting the protected person.

(b) an order imposing the obligations on the defendant stated in the DVO as the issuing authority considers are necessary or desirable:

(i) to ensure the defendant accepts responsibility for the violence committed against the protected person; and

(ii) to encourage the defendant to change his or her behaviour;

(c) other orders the issuing authority considers are just or desirable to make in the circumstances of the particular case;

Example of other orders for paragraph (c)

An order requiring the return of personal property to the defendant or protected person.

(d) an order (an ***ancillary order***) that aims to ensure compliance by the defendant with another order under paragraph (a), (b) or (c).

(1A) An ancillary order may:

(a) prohibit the defendant from engaging in specified conduct; or

(b) require the defendant to take specified action.

Example for subsection (1A)(b)

An order that the defendant submit to testing to ensure compliance with an order prohibiting consumption of alcohol or certain drugs.

(1B) The Regulations may make provision about a matter relating to an ancillary order.

(2) Subsection (1) is not limited by the specific orders provided in this Part.

Note

Under sections 39 and 40 of the Firearms Act 1997, a licence, permit or certificate of registration is automatically suspended or revoked on the making of a DVO.

22 Premises access order

(1) A DVO may include an order (a ***premises access order***):

(a) requiring the defendant to vacate stated premises where the defendant and protected person live together or previously lived together; or

(b) restraining the defendant from entering such premises except on stated conditions.

(2) Before making a premises access order, the issuing authority must consider the effect of making the order on the accommodation of the persons affected by it.

(3) The order applies regardless of whether the defendant has a legal or equitable interest in the premises.

23 Order for replacement tenancy agreement

(1) This section applies if:

(a) the defendant and protected person live together or previously lived together in premises; and

(b) the defendant or protected person is a tenant of the premises or both of them are tenants of the premises (regardless of whether anyone else is a tenant of the premises); and

(c) either:

(i) a court DVO includes a premises access order for the premises; or

(ii) the protected person no longer wishes to live in the premises.

(2) The court may make the following orders in the DVO:

(a) an order terminating the tenancy agreement;

(b) an order creating a new tenancy agreement (the ***replacement agreement***):

(i) for the benefit of the protected person and anyone else who was a party to the terminated agreement other than the defendant; or

(ii) with the agreement of the protected person, for the benefit of the defendant and anyone else who was a party to the terminated agreement.

(3) The orders may be made only if:

(a) the court is satisfied:

(i) the domestic relationship between the protected person and defendant has broken down permanently; and

(ii) there is no reasonable likelihood of them living in the premises free of domestic violence; and

(iii) the protected person or defendant (as appropriate) will be able to comply with the replacement agreement; and

(iv) it is appropriate in the circumstances to make the order; and

(c) the landlord consents to the orders or, if the landlord refuses consent, the court is satisfied the refusal is unreasonable; and

(d) the protected person consents to the orders.

(4) The landlord and anyone else having an interest in the premises are entitled to appear and be heard in relation to the matter.

(5) The replacement agreement must have the same conditions as the terminated agreement other than the names of the tenants.

(6) If the terminated agreement is for a fixed term, the date of expiry of the replacement agreement must be the same as that of the terminated agreement.

(7) Part 12 of the *Residential Tenancies Act 1999* applies to the terminated agreement as if the tenants had given up vacant possession of the premises.

(8) In this section:

premises, see the *Residential Tenancies Act 1999*.

tenancy agreement, see the *Residential Tenancies Act 1999*.

24 Order for rehabilitation program

(1) A court DVO may include an order requiring the defendant to take part in a rehabilitation program.

(2) The order may be made only if:

(a) the court is satisfied:

(i) the defendant is a suitable person to take part in the program; and

(ii) there is a place available in the program for the defendant; and

(b) the defendant consents to the order.

(3) The order may be made subject to the conditions the court considers appropriate.

9. The objects of the Act are contained in section 3:

3 Objects of Act and their achievement

(1) The objects of this Act are:

(a) to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence; and

(b) to ensure people who commit domestic violence accept responsibility for their conduct; and

(c) to reduce and prevent domestic violence.

When may the Court make an interim court DVO

10. Section 35 of the Act does not expressly outline the threshold an applicant must reach in order for the Court to make an interim court DVO. However, the note to section 35(1) refers the Court back to Parts 2.2 and 2.3 of the Act. Notes are considered part of the Act[1] and it is clear that this note is directing to the Court to apply at least segments of these Parts when considering an application for an interim court DVO.

11. The note to section 35(1) provides "*Part 2.2 provides for the matters to be considered in making a DVO*". It is section 19 of Part 2.2 that contains the 'matters to be considered when making a DVO', so it is clear that at least section 19 applies.

[1] *Interpretation Act 1978*, section 55(4).

12. On the other hand, section 18 does not contain 'matters to be considered when making a DVO'. Section 18 outlines the threshold the Court must reach in order to make a DVO. Accordingly, there is some doubt as to whether the note to section 35(1) captures the test contained in section 18, and consequently, whether section 18 applies to the making of an interim court DVO.

13. Counsel for the Applicant submitted that the test contained in section 18 did not apply to the determination of an interim court DVO.

14. In considering whether section 18 applies, it should be noted that the section provides "*the issuing authority may make a DVO only if satisfied…*". The definition of 'DVO' as contained in section 4 is:

> ***DVO*** is an acronym for domestic violence order.

15. The definition of 'domestic violence order' as contained in section 4 is:

> ***domestic violence order***:
>
> (a) other than for Chapter 3A – means a court DVO or police DVO, and includes:
>
> (i) a DVO as varied under Part 2.7 or 2.8; and
>
> (ii) a police DVO as varied under Part 2.8, Division 2, or confirmed under Part 2.9; and
>
> (b) for Chapter 3A – see section 102.
>
> [emphasis added]

16. The definition of 'court DVO' as contained in section 4 is:

> ***court DVO*** means:
>
> (a) a Local Court DVO; or
>
> (b) an interim court DVO; or
>
> (c) a consent DVO; or
>
> (d) a DVO made by a court under Part 2.7; or
>
> (e) a DVO confirmed by the Court under Part 2.10.
>
> [emphasis added]

17. Given that an interim court DVO falls within the definition of a 'DVO', then section 18 must apply. *Ipso facto*, the Court may only make an interim court DVO if the Court is satisfied on the balance of probabilities that there are reasonable grounds for the protected person to fear the commission of domestic violence by the defendant.

18. The appropriate approach to the test contained in section 18 was outlined by justice Southwood in *AB v Hayes & Anor* [2019] NTSC 13 at 12:

> 12. The test of whether there are reasonable grounds to fear the commission of domestic violence is an objective test. 'Satisfied' in s 18(1) of the *Domestic and Family Violence Act* means satisfied on the balance of probabilities. The Act contemplates that in order to determine if it is satisfied that there are reasonable grounds for the protected person to fear the commission of domestic violence, the Local Court will make findings of fact about a defendant's past conduct on the balance of probabilities. In other words, it is usually necessary for the applicant to prove the defendant has committed past acts of domestic violence on the basis that past domestic conduct of the defendant is a reasonable basis for apprehending, or fearing, future domestic conduct. Domestic violence orders are made by the Local Court on the basis of a reasonable apprehension, or fear, of the commission of further acts of domestic violence against the protected person.

19. In *Bonney v Thompson* [2011] NTSC 81, Justice Kelly considered the nature of an interim court DVO and when such orders can be made under the Act. Her Honour observed at paragraph at 35 that:

> 35. An interim DVO, made pursuant to s 35 is a different kind of order. It may be made at any time – before all of the evidence is in, or even before any of the evidence is in. Under normal circumstances, as in the case of an interim injunction, it would be expected that an interim DVO under s 35 would be made for a limited period only – for example until the resumed hearing of an application which has been adjourned for some reason. It cannot be expected that the magistrate making an interim DVO will necessarily have been able to consider all of the matters set out in s 19 or be satisfied that a CSJ DVO should be made. In those circumstances, there can be no legitimate expectation that an interim DVO will be "confirmed".
>
> [emphasis added]

20. When Justice Kelly is referring to a 'CSJ DVO', Her Honour is referring to the term used under the Act at that time of that judgment. This term in the Act was replaced with 'Local Court DVO' in 2015 when the Court became the Local Court[2]. The term is used to describe a final court DVO made following a hearing of the matter. It is distinct from other types of DVO's, such as an 'interim court DVO', 'consent DVO', 'interim court variation order', a section 45 DVO, or DVO's made following a confirmation hearing under Part 2.10[3].

21. It appears to me that what Her Honour is saying is that the Court does not need to be satisfied to the same standard required to make a final DVO ("Local Court DVO"). Given the abridged nature of interim hearings and the fact that there is often limited evidence available, I agree with this contention. I will address the nature of the interim hearing process in more detail below.

22. Counsel for the Defendant submitted that the passage quoted above in *Bonney v Thompson* was made in the context of Her Honour addressing the differences between Local Court DVO's that are made *ex parte* and interim court DVO's made on notice. In particular, Her Honour was highlighting the differences in expectations as to whether each respective order would be 'confirmed' at a later date. Whilst this is true, I do not accept that this particular context takes anything away from the substance of what Her Honour was saying.

23. Counsel for the Defendant referred me to another passage in *Bonney v Thompson* in which Justice Kelly went on to consider the appropriate circumstances in which an applicant should apply for an 'interim court variation order' under section 52A of the Act. Her Honour said at paragraph 41:

> 41. An applicant should not apply for an interim variation order under s 52A, unless an interim order is really required for some reason – for example an urgent order is required to restrain imminent threatened domestic violence before the applicant has time to prepare the necessary affidavits, or an adjournment of the application is necessary for some reason.

24. The nature of a section 52A order is similar to an interim court DVO under section 35 and the 'considerations' referred to in section 53 for the making of such an order are similar to those found in the notes of section 35. For those reasons, paragraph 41 from *Bonney v Thompson* is relevant to my consideration of when an interim court DVO should be made.

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[2] The amending Act was the *Local Court (Repeals and Related Amendments) Act 2015*.

[3] See the definition of 'Court DVO' and 'domestic violence order' under section 4 of the Act.

25. While relying on paragraph 41 from *Bonney v Thompson,* counsel for the Defendant submitted that, an interim order should only be made if the applicant can show that there is 'imminent threatened domestic violence'. I do not accept this submission. Justice Kelly was simply giving an obvious example of when an applicant should apply for an interim Court DVO. Her Honour's view was that the Application should only be made when an "interim order is really required". The 'imminent threatened domestic violence' was just one example of when the Court may be satisfied that an interim court DVO is really required.

26. Further, as conceded by counsel for the Defendant, the passages quoted above by in *Bonney v Thompson* at both paragraphs 35 and 41 are *obiter dictum.* However, given the level of consideration undertaken by Her Honour and the status of the Court, such comments are persuasive and do carry significant weight in my determination.

27. I agree that the court must consider whether an "interim order is really required". In many ways this is an exercise of assessing the balance of convenience between the parties. There are the risks to the protected person on one hand and the rights and freedoms of the defendant on the other.

28. The Court must also consider that the defendant will always be at a significant disadvantage in hearings for interim court DVO's. There are no forms prescribed for an application for an interim court DVO. The Act does not provide for when such an application should be made and by whom. Section 35 simply grants the Court the power to make such an order at any stage of the proceedings. As a consequence, applications for interim court DVO's are made orally and defendants rarely have any notice that an applicant intends to make an oral application.

29. Often at the first mention of a matter the defendant will seek an adjournment to obtain legal advice and to file their own responding affidavit material. The Applicant may seek an interim court DVO to be made during the period of the adjournment. In such circumstances the Court will need to determine whether an interim court DVO should be made before the defendant is given an opportunity to reasonably present their case.

30. The defendant has a common law right to be given a reasonable opportunity of appearing at the hearing and presenting their case. This includes the right to test the evidence of the applicant and to present evidence to the Court to respond to and to counter the allegations made by the applicant. However, such rights can

be taken away by parliament provided the legislature does so using by plain words of necessary intendment.[4]

31. Section 35(2)(b)(i) provides clear and unambiguous words that the Court may make an interim court DVO in circumstances where the defendant appears at the hearing and opposes the making of the interim order and even before the Court hears the defendant's evidence. In my view, it is clear that parliament's intention is to permit the Court to make interim orders at the very first mention of the matter without being required to adjourn the matter to allow the defendant time to file their own evidence.

32. However, the Court should not exercise this power unless, the nature and imminence of the risk of domestic violence being perpetrated on the protected person, outweighs any hardship that will be suffered by the defendant and any prejudice that the defendant will incur, if an interim court DVO is made. In undertaking this assessment, the Court must consider the safety and protection of the protected person to be of paramount importance.[5]

33. For the reasons outlined above, I am of the view that the approach to assessing whether the interim court DVO should be made, should be separated into two inquiries. Firstly, there needs to be an assessment of whether the untested evidence is sufficient to satisfy the threshold under section 18. Secondly, there needs to be an assessment of whether an "interim order is really required". This second inquiry is analogous to the 'balance of convenience' assessment[6] used by courts hearing applications for interlocutory injunctive relief at common law.

34. The common law test for interlocutory injunctions was summarised by the Full Court of the Federal Court in *Warner-Lambert Co LLC v Apotex Pty Ltd* [2014] FCAFC 59. The Full Court said at [68]-[70]:

> [68] … There are two inquiries that must be undertaken when determining whether an applicant should be granted an interlocutory injunction. The first relates to the strength of the applicant's claim to final relief. The second relates to the balance of convenience or, as it is sometimes expressed, the balance of the risk of doing an injustice by either granting or withholding the interlocutory relief sought.
>
> [69] The principles to be applied in determining whether or not to

[4] See, *Atkinson v Bardon & Ors* [2018] NTSC 9 at 22 citing *Saeed v Minister for Immigration and Citizenship* (2010) HCA 23 at 14-15 and *Annetts v McCann* (1990) 170 CLR 596

[5] Section 19(1) *Domestic and Family Violence Act 2007*

[6] *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622-623

grant interlocutory relief were considered by the High Court in *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57; 229 ALR 457; [2006] HCA 46 (*O'Neill*), including by Gummow and Hayne JJ at [65]–[72]. Gleeson CJ and Crennan J agreed at [19] with the explanation of the relevant principles in those paragraphs. In *O'Neill* Gummow and Hayne JJ stated at [65]:

> [65] The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [(1968) 118 CLR 618; [1968] ALR 469]. This court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued [(1968) 118 CLR 618 at 622–623; [1968] ALR 469 at 470–1]:
>
> > "The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief … The second inquiry is … whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted."
> >
> > By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument [(1968) 118 CLR 618 at 620; [1968] ALR 469 at 468]. With reference to the first inquiry, the court continued, in a statement of central importance for this appeal [(1968) 118 CLR 618 at 622; [1968] ALR 469 at 470]:
> >
> > > "How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks."

[70] Whether an applicant for an interlocutory injunction has made

> out a prima facie case and whether the balance of convenience favours the grant of such relief are related questions. It will often be necessary to give close attention to the strength of a party's case when assessing the risk of doing an injustice to either party by the granting or withholding of interlocutory relief especially if the outcome of the interlocutory application is likely to have the practical effect of determining the substance of the matter in issue or if other remedies, including an award of damages, or an award of compensation pursuant to the usual undertaking, are likely to be inadequate.

35. While the second inquiry (the balance of convenience) is similar, there is an important difference between the first inquiry used in proceedings for interlocutory injunctions and the first inquiry for an interim court DVO under the *Domestic and Family Violence Act 2007*. For the former, a *prima facie* case or a 'serious question to be tried'[7] may be sufficient. However, a *prima facie* is not sufficient for the making of an interim court DVO. This is because the Act requires the evidence to be sufficient to satisfy the test under section 18 and to prove that an order restraining the defendant is necessary or desirable under section 21(1)(a). However, given that the Court may make the order without the protected person's evidence being tested and before it hears any evidence from the defendant[8], these tests will be easier to satisfy at the interim stage than it will be at the final hearing stage.

36. Having considered the legislation and the relevant authorities, it appears to me that when a party seeks an interim court DVO under section 35 in which orders are sought to restrain a defendant, the Court should apply the following steps:

    1. The Court must be satisfied that the parties are in a domestic relationship;

    2. If there is evidence before the Court of matters contained in section 19(2) of the Act, then the Court must consider those matters. However, at the interim hearing stage it is unlikely that such evidence will be before the Court and as such, the Court can proceed without considering all of the matters listed;

    3. The Court must be satisfied on the balance of probabilities that, there are reasonable grounds for the protected person to fear the commission of domestic violence against that person by the defendant, or if the protected

[7] *American Cyanamid Co v Ethicon Ltd* (1975) AC 396.
[8] Section 35(2)(b)(i) of the Act

person is a child, that there are reasonable grounds to fear the child will be exposed to domestic violence committed by or against a person with whom the child is in a domestic relationship[9];

4. The Court must determine whether an interim court DVO is really required at that stage in the proceedings. This involves the Court balancing the nature and imminence of the risk of domestic violence being perpetrated on the protected person, or the risk of a child being exposed to domestic violence and the possible consequences of delaying the making of an order until the matter can be fully heard, on one hand, against:

    (a) The defendants right to have a reasonable opportunity of appearing at the hearing and presenting their case. This includes the right to test the evidence of the applicant and to present evidence to the Court to respond to and counter the allegations made by the applicant; and

    (b) any hardship or prejudice to the defendant which may arise from the making of an interim Court DVO, on the other.

5. In considering the matters contained in steps 3 and 4, the Court must regard the safety and protection of the protected person as the matter of paramount importance;[10] and

6. The Court must only make restraints that are considered necessary or desirable to prevent the commission of domestic violence against the protected person.[11]

37. As is outlined above, step 4 is analogous to a 'balance of convenience' assessment[12]. In this step the applicant must provide evidence to satisfy the Court that an interim court DVO is "really required for some reason."[13] Such as, an imminent risk to the protected person in circumstances where an adjournment of the matter is necessary before a final hearing can occur. The risk can be in the form of any type of domestic violence as defined in Part 1.2, Division 2, Subdivision 1 of the Act. However, the more grave the risk, then the more likely it will be that the Court will find that the risks outweigh the potential hardships

[9] Section 18, *Domestic and Family Violence Act 2007.*
[10] Section 19, *Domestic and Family Violence Act 2007.*
[11] Section 21(1)(a), *Domestic and Family Violence Act 2007*
[12] *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1
[13] *Bonney v Thompson* [2011] NTSC 81 at 41.

to the defendant. For example, threatened physical harm is more likely to outweigh the hardship to the defendant than abusive text messages.

38. When assessing the potential hardships to the defendant under step 4, the following are some usual hardships and prejudices a defendant may face for what could be a number of weeks, if an interim court DVO is made:

    (a) Restraint on access to the defendant's own children;

    (b) Restraint on access to the defendant's own property;

    (c) Immediate mandatory suspension of a firearms licence; and

    (d) Consequences for certain occupations such as police officers, Australian Defence Force personnel and security officers.

39. Further, even if the interim court DVO is later revoked and a final DVO is never made, section 60CC(3)(k) of the *Family Law Act 1975* requires a Court in any family law proceedings to draw any relevant inferences from the fact that an interim court DVO previously existed.

40. The standard of proof, or as the Act provides - the standard to be 'satisfied', is the balance of probabilities.[14] As a civil proceeding, section 140 of the *Evidence (National Uniform Legislation) Act 2011* applies. However, the considerations are not limited to the matters contained in section 140(2) as the decision maker may also take into account other matters such as those outlined by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2[15]:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[16]

How should the interim hearing be conducted

41. As is outlined above, the Court is to apply the test contained in section 18. In order to satisfy the Court of those matters, the applicant will need to have sufficient evidence before the Court. Although the Act does not expressly

[14] See definition of 'satisfied' in section 4 of the *Domestic and Family Violence Act 2007.*
[15] *NOM v DPP* [2012] VSCA 198 at 73 – 74.
[16] see also the clarification of the principle by the majority in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449–450.

require the Applicant to file a Statutory Declaration or an Affidavit, sections 34(3)(b), 39(2)(b), 57(2)(b) and 62(2)(b) of the Act all provide that the Court can order that a party file a 'further affidavit'. This implies that the applicant has already filed an initial affidavit in support of the application.[17] Further, Rule 21.01 of the *Local Court (Civil Jurisdiction) Rules 1998* requires all evidence to be by Affidavit only.

42. The Chief Judge of the Local Court has also issued Practice Direction 30 which directs at 30.4:

> 30.4 When an Applicant files an Application for a Domestic Violence Order, an Application to Vary or Revoke a Domestic Violence Order, or an Application for Variation or Revocation of External Order under section 98 of the Act, the application shall be accompanied by an affidavit (initial affidavit) in support of the application.

43. However, this practice direction has since been suspended by a further Practice Direction issued in response to the COVID-19 pandemic to accommodate the need for parties to social distance and/or isolate. The *Practice Direction 39 - Special measures for Domestic Violence and Personal Violence Restraining Orders Matter* provides at 39.4 and 39.5:

> 39.4 Practice directions 30.4 and 37.2 are suspended until such time as this practice direction is revoked.
>
> 39.5 Subject to 39.7, when an Applicant files an application for a domestic violence order, an application to vary or revoke a domestic violence order, or an application for variation or revocation of external order under section 98 of the Domestic and Family Violence Act 2007, the application shall be accompanied by an affidavit, or if an affidavit is not practicable, a statutory declaration in support of the application.

44. The Chief Judge has also issued an 'affidavit form' pursuant to 126(1) of the Act.

45. For all these reasons, I am of the view that an applicant must file an affidavit in support of their application when commencing proceedings or if an affidavit is

[17] A similar problem was identified with *Domestic Violence Act* (the predecessor to the current Act) by Chief justice Martin (BR) in the matter of *Muir v Nunn* [2006] NTSC 71. When considering this issue His Honour observed at paragraph 17 that: *"The reference to a "further affidavit" appears to contemplate the existence of an affidavit in support of the application. However, no reference is made in the Act to the filing of an affidavit in support of the application. In addition, although the form of application set out in the regulations made under the Act contains a section headed "Basis of Application", there is no reference in the regulations or the prescribed forms to an affidavit in support of an application."*

not practicable, then they may file a statutory declaration in support of the application.

46. At the interim hearing, any affidavits or other admissible documents need to be tendered before they can be relied upon by the applicant.[18] The filing of an affidavit with the registry of the Court does not result in that material automatically becoming evidence before the Court at the interim hearing.

47. The hearing of the matter will ordinarily take place on the papers with limited oral submissions from the parties.

48. Family law courts regularly hear and determine interlocutory applications in a jurisdiction that has family dynamics and risk factors that are similar to the domestic violence jurisdiction. The Full Court of the Family Court has outlined the appropriate approach to be taken in interim hearings under the *Family Law Act 1975* (Cth). In *Cowling v Cowling* (1998) FLC 92-801 at 18, the Full Court said:

> The issue for determination at an interim hearing involves a consideration of what orders should be made to properly regulate the position of the children pending the final determination of the matter. Such proceedings are an abridged process where the scope of the inquiry is necessarily significantly curtailed. As a consequence, the Court needs to exercise considerable caution against being drawn into matters properly dealt with in the trial process. Ordinarily, at interim hearings, the Court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties.[19]

49. I am of the view that this is an appropriate approach to take in interim hearings under the *Domestic and Family Violence Act 2007*. The Court should try to avoid being drawn into deciding the substantive issues and disputed questions of fact. The interim hearing should not be a preliminary trial.[20]

The applicant's case

50. The applicant relies upon the following documents in support of her application:

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[18] See *Muir v Nunn* [2006] NTSC 71 at 32.

[19] Whilst some aspects of *Cowling v Cowling* have been overturned, the Full Court of the Family Court has endorsed this passage in *Goode & Goode* [2006] FamCA 1346 at 68.

[20] *American Cyanamid Co v Ethicon Ltd* (1975) AC 396 at 407; *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622-3.

(a) Affidavit of Thao Nguyen signed 25 August 2020 (marked as exhibit A2); and
(b) Affidavit of Thao Nguyen signed 14 September 2020 (marked as exhibit A1).

51. The defendant did not file or tender any evidence.

52. The applicant attests to the parties being married on 4 July 2019 and separating in late March or early April 2020. It is unclear if the parties lived together prior to their marriage.

53. The applicant is a Vietnamese national who is currently on a Bridging Visa pending her application for a Partner Visa, with the defendant as the sponsor for the Visa.

54. The applicant has made various allegations of domestic violence across her two affidavits. The allegations that can be summarised as follows:

A. The defendant tossed the protected person's belongings over the front fence of her new residence on an unspecified date after separation;[21]

B. After their separation, the defendant sent multiple text messages to the protected person demanding money, asking for a divorce and generally causing her distress;[22]

C. The defendant engaged in economic abuse, verbal abuse, social isolation, jealousy and intimidation during the relationship;[23]

D. At an unspecified time but during the relationship, the protected person slapped the defendant to the face during an argument and the defendant pushed her by the neck into a wall in response;[24]

E. The defendant called immigration to cancel her visa and has demanded that she pay him back the $25,000 he spent on the visa;[25] and

F. At the Palmerston markets on 14 August 2020, the defendant engaged in physical violence towards her new partner and also threatened and verbally abused her and her new partner.[26]

[21] Exhibit A2 paragraph 3.
[22] Exhibit A2 paragraph 3 – 4 and attached text messages.
[23] Typed unmarked document attached to Exhibit A2 pages 1-4.
[24] Typed unmarked document attached to Exhibit A2 page 3.
[25] Typed unmarked document attached to Exhibit A2 page 4, Exhibit A1 annexure TN1 pages 10-12

55. Regarding allegation A, the protected person does not specify when this is alleged to have occurred. A text messaged attached to Exhibit A2 suggests that the defendant sent a message to the protected person on 5 August 2020 saying "*Hi I drop your dress of at your home tim*". There is also a message from 11 April 2020 stating "*I've drop you clothes of at your partner house doo not call me only text*". Then another on 12 April 2020 saying "*I've dropped your shoes of at your house 150 saunter rd humpty doo*." Counsel for the protected person submitted that this constituted intimidation or harassment because the protected person believes the defendant did this to show the protected person that he knows where she lives.

56. Regarding allegation B, the protected person attaches multiple text messages to Exhibit A2. There are two groups of messages. The first three pages contain messages from 31 July 2020 until 7 August 2020. They depict one-way communications at regular intervals, that rather politely request a divorce and the repayment of money. The remaining 13 pages contain text messages from April 2020 until May 2020. They also depict one-way communications from the defendant at regular intervals. The date of the parties' separation is unclear but from the text messages, it appears that they separated in late March or early April 2020. The messages should be seen in the context of having been sent in the first few day or weeks after the parties separation. They depict the defendant requesting a divorce, saying he will call immigration and asking for her to respond to messages. The messages are not abusive but the frequency might be considered to be harassing.

57. My concern about the text messages is that they are not complete or chronological. There are text message screenshots showing that only messages were sent by the defendant over certain periods (such as 12 -15 April) and then on another screenshot it shows the protected person messaging the defendant over the same period. For some reason, these messages from the protected person do not appear in the first screenshot. This makes the first screenshot of messages appear to be one-way communications when they were not. This is the difficulty with incomplete and untested evidence.

58. Regarding allegation C, whilst some of the police reports support the protected person's allegations, the allegations are not sufficiently particularised and they are at least 5 months old now.

59. Regarding allegation D, whilst the allegation of the push into the wall by the neck is very serious, the allegation is not well particularised and without dates

[26] Exhibit A2 paragraph 6, Exhibit A1 annexure TN1 pages 10-12.

identified, the incident could have occurred almost a year ago. It is also unclear as to who was the primary perpetrator in the incident that occurred. These are matters which are best dealt with at a final hearing.

60. Regarding allegation E, the attached text messages appear to support the allegations. However, as was submitted by Counsel for the defendant, it would appear likely that the defendant would have had an obligation to notify the department of immigration regarding the change in the relationship status pending the partner visa application. The demand of $25,000 for the cost of the visa in my view is not particularly significant for the purpose of this hearing. There is no evidence about whether money was loaned and whether there is a debt owing. That matter is potentially more appropriately suited to the family law jurisdiction than the domestic violence jurisdiction.

61. Allegation F, is particularly concerning. It is alleged that the defendant brought his elbow into contact with the protected person's new partner's shoulder and then verbally abused him. The evidence of the physical contact is hearsay evidence as the protected person does not say she saw it and the police report found in Exhibit A1, annexure TN1, pages 10-12 is her new partner's report to police. Hearsay evidence is admissible under section 116 of the Act. However, being hearsay evidence in circumstances where the defendant hasn't been given an opportunity to test the evidence[27] or to file his own evidence, the Court should be cautious as to the amount of weight to be given to it.

62. The other allegation was that the defendant had approached the protected person on the same evening, while looking angry, her partner had to intervene and push the defendant away. It is then alleged that he verbally abused the protected person and her partner and threatened "*I will get you, I will get Thao. I want my $25,000 back*"[28]. This relatively recent public confrontation is of concern.

The defendant's case

63. Counsel for the defendant submitted that no interim order should be made and that the matter should be listed for a contested hearing. It was submitted from the bar table that the allegations in relation to the alleged physical contact with the new partner on 14 August 2020 were denied. It was submitted that the defendant had ceased all contact with the protected person since the incident on 14 August 2020. Counsel for the applicant conceded that she has no instructions to suggest that this submission was incorrect. Indeed, one would expect that if there had

[27] The affidavit was only given to the defendant on the day of the interim hearing.
[28] Exhibit A2 paragraph 5.

been further contact between the parties, this would have been contained in the protected person's affidavit settled on the morning of the hearing.

64. Whilst I accept that the defendant may have ceased all contact with the protected person since the incident on 14 August 2020, this cannot necessarily be taken as evidence that there won't be future unwanted communications or that there won't be a further incident when the defendant sees the protected person with her new partner in public again. It is not uncommon for parties to be on their best behaviour in the shadow of pending legal proceedings. It is also not uncommon for there to be a lull in hostilities immediately following a significant event, when shame, regret and remorse might temporarily outweigh other emotions. This can sometimes be what is described as the 'honeymoon phase' of the cycle of domestic violence. I make no findings in this regard but I give little weight to the apparent ceasing of contact between the parties.

65. When asked about the hardships the defendant would face if an interim order were made, counsel for the defendant conceded that there were little. The parties have no children together, the defendant does not have a firearms licence and any order will not impact on the defendant's accommodation. The only real impact on the defendant would be that he would be subject to an order that, if breached, could result in criminal charges and possible imprisonment. This is not an insignificant matter and I do take this into account.

Consideration

66. It is not in dispute that the parties are in a domestic relationship and I find that so proved.

67. In relation to the test found in section 18, after considering all of the evidence, I find that there is reasonable grounds for the protected person to fear the commission of domestic violence. In doing so I accept that the evidence before me is incomplete and untested and that the defendant is yet to be given an opportunity to present his own evidence.

68. In relation to whether an interim court DVO is really required, I accept that there is no evidence that the defendant has had contact with the protected person since 14 August 2020. However, the alleged incident on 14 August 2020 is very concerning and if true, it constitutes a significant escalation. Given the alleged history of coercive and controlling behaviour coupled with continuing unwanted and uninvited communications, an escalation to in-person verbal abuse, threats and physical contact with a new partner is worrying. I accept that these are merely allegations at this stage in the proceedings. However, they are the factors

which create the risk to the protected person between now and when the matter can proceed to a final hearing. I find that these are risks that outweigh the prejudice and hardships that the defendant may face if an order were made. For these reasons, I find that the balance of convenience lies in the applicant's favour. In reaching this conclusion I have considered the safety and protection of the protected person as a matter of paramount importance.

69. Having been satisfied that I may make an interim court DVO, I needs to consider what orders, if any, are appropriate under sections 21, 22, 23 and 24.

70. In this matter the applicant is seeking that orders be made restraining the defendant. Section 21(1)(a) provides:

> **21 What DVO may provide**
>
> (1) A DVO may provide for any of the following:
>
> (a) an order imposing the restraints on the defendant stated in the DVO as the issuing authority considers are necessary or desirable to prevent the commission of domestic violence against the protected person;
>
> [emphasis added].

71. A domestic violence order that contains restraints on a party is at its core a statutory injunction enforced by criminal sanctions. As with all injunctions, the order necessarily interferes with one person's rights for a specific period of time. However, as a general rule, the scope of the restraint and the duration of the restraint should go no further than is necessary to protect the protected person from the behaviour of the defendant.[29]

72. It appears to me, based on the incomplete and untested evidence of the protected person, that despite the passage of time since the separation of the parties, the defendant is still not coping with that separation. I find that it is both necessary and desirable for the defendant to be restrained in relation to his communications and contact with the protected person.

Orders

AN INTERIM COURT DVO IS ORDERED IN THE FOLLOWING TERMS:

The defendant is restrained until further order from:

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[29] *WJM v NRH* [2013] QMC 12 at 58 referring to *Australian Securities and Investments Commission, In the Matter of Richstar Enterprises Pty Ltd (ACN 099 071 968) v Carey (No 3)* [2006] FCA 433 at 26 -27.

1. Approaching, contacting or remaining in the company of the protected person directly or indirectly (contact includes by mail, phone, text messages, facsimile, email or other forms of communication).

   (a) EXCEPT, for the adult protected person, via or in the presence of a solicitor, family dispute resolution practitioner, third party nominated by the protected person for the purposes of these proceedings, making arrangements for the property of the parties, or in accordance with a Family Law Order.

2. Approaching, entering or remaining at any place where the protected person is living, working, staying, visiting or located;

   (a) EXCEPT, for the adult protected person, via or in the presence of a solicitor, family dispute resolution practitioner, third party nominated by the protected person for the purposes of these proceedings, making arrangements for the property of the parties, or in accordance with a Family Law Order.

3. Causing harm or attempting or threatening to cause harm to the protected person.

4. Causing damage to property, or attempting or threatening to cause damage to property of the protected person.

5. Intimidating or harassing or verbally abusing the protected person.

6. Stalking the protected person.

AND IT IS FURTHER ORDERED

7. The matter is adjourned to 9.30am on 29 September 2020 for mention.

Dated this 29 day of September 2020

Kris Norrington
LOCAL COURT
JUDICIAL REGISTRAR