CITATION:	*Lestari v Robinson; ex parte Lestari* [2021] NTLC 021
PARTIES:	Sri Puji Lestari
	V
	Ben John Robinson
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	22119337
DELIVERED ON:	7 September 2021
DELIVERED AT:	DARWIN
HEARING DATE(s):	24 June 2021
JUDGMENT OF:	Norrington JR

CATCHWORDS:

CIVIL LAW – DOMESTIC AND FAMILY VIOLENCE ACT 2007 (NT) – when should the Court grant leave to proceed *ex parte*

CIVIL LAW – DOMESTIC AND FAMILY VIOLENCE ACT 2007 (NT) – application for an *ex parte* DVO– hearing process and test to be applied.

Domestic and Family Violence Act 2007 (NT), s4, s5, s18, s19, s21, s22, s,23, s24, s27, s28, s32, s35, s37, s41, s47, 52A, Part 2.8, Part 2.10, s81, s82

Domestic Family Violence Protection Act 2012 (QLD), s37, s56, s57

Domestic Violence Act 1992 (NT), s 4(3)

Evidence (National Uniform Legislation) Act 2011, s140

Family Law Act 1975 (Cth), s60CC(3)(k), s61DA, 65DAA(1), 102NA(1)(c)(ii)

Family Violence Protection Act 2008 (VIC), s99

Firearms Act 1997 (NT), s 39

Local Court Act 2015 (NT), s70A

Local Court (Civil Procedure) Act 1989 (NT), s19, s20(1)

AB v Hayes & Anor [2019] NTSC 13

Ansah v. Ansah (1977) 2 W.L.R. 760

Aristocrat Technologies Australia Pty Ltd v Allam [2016] HCA 3

Armour v FAC [2012] QMC 22

Balchan v Anthony (2008) NTSC 02

Bell Group NV (In liq) Aspinall (1998) 19 WAR 561

Bonney v Thompson [2011] NTSC 81

Briginshaw v Briginshaw (1938) 60 CLR 336

GKE v EUT [2014] QDC 248

Joy Marjorie Cahill v Anthony David Cahill JA 67 of 2001 (unreported)

KAO v DL [2017] QMC 16

Malogorski v Peart [2011] NTSC 86

MDE v MLG & Queensland Police Service [2015] QDC 151

Ndjamba v Toyota Finance Australia Ltd [2010] NTSC 23

Sieling and Sieling (1979) FLC 90-627

Stowe and Stowe [1980] FamCA 92

Thomas A Edison Ltd v Bullock (1912) 15 CLR 679

NOM v DPP [2012] VSCA 198

Owners of SS Kalibia v Wilson (1910) 11 CLR 689

Police v Natasha George [2015] NTMC 018

WJM v NRH [2013] QMC 12

National Domestic and Family Violence Bench Book, published by the Australasian Institute of Judicial Administration

Family Violence Bench Book, published by the Judicial College of Victoria

REPRESENTATION:

Counsel:

	Applicant:	Ms Aughterson
	Defendant:	No Appearance

Solicitors:

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	Defendant:	No Appearance

Judgment category classification:	A
Judgment ID number:	021
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IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22119337

BETWEEN

Sri Puji Lestari

Applicant

AND

Ben John Robinson

Defendant

REASONS FOR JUDGMENT

7 September 2021

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 Local Court on 23 June 2021. In that application the applicant sought that the matter be listed and heard urgently and that the Court consider making orders prior to the defendant being given notice of the application. The matter was listed urgently for hearing of the *ex parte* application on 24 June 2021.

3. After considering the material filed in support of the application, the brief oral evidence given by the Applicant and the submissions from counsel for the applicant, I granted leave to proceed *ex parte* and made a domestic violence order against the defendant.

4. I indicated that I would reserve my reasons for the decision for delivery at a later date. These are the reasons for that decision.

Introduction

5. At the hearing the applicant sought that the order be made in the absence of the defendant and without notice to the defendant. For the purpose of this judgment, I'll refer to such an order as an '*ex parte* DVO'. This is to distinguish this type of order from an 'Interim Court DVO' made under section 35, which can also be made in the absence of the defendant but only after notice has been given to the defendant.

Relevant Legislation

6. The source of the Court's power to make an *ex parte* DVO is found in section 32 of the Act. The section provides:

> **32 Court may decide application in absence of defendant**
>
> (1) The Court may decide an application for a Local Court DVO even if the defendant does not appear at the hearing of the application.
>
> (2) Subsection (1) applies regardless of whether notice to the defendant to appear at the hearing is given to the defendant before the hearing.

7. When considering whether to make an *ex parte* DVO, the Court must apply the test contained in section 18 and the considerations outlined in section 19 of the Act.

8. 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.

9. 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.

10. If an *ex parte* DVO is made, section 37 of the Act outlines how the matter is then case managed. The section provides:

37. DVO taken to be summons to appear before Court

If:

(a) notice to the defendant to appear at the hearing of the application is not given to the defendant before the hearing; and

(b) a Local Court DVO is made in the absence of the defendant; the copy of the DVO given to the defendant is taken to be a summons to the defendant to appear before the Court, at the time and place shown on it for its return, to show cause why the DVO should not be confirmed by the Court.

Note: Part 2.10 deals with the confirmation of DVOs.

11. Under Part 2.10 of the Act, the Court is to hold a confirmation hearing to decide if the *ex parte* DVO is to be confirmed or revoked. Section 82 provides:

82. Decision at hearing

(1) At the hearing, the Court may, by order:

(a) confirm the DVO (with or without variations); or

(b) revoke the DVO.

(2) The Court must not confirm the DVO unless:

(a) it is satisfied the defendant has been given a copy of the DVO; and

(b) it has considered any evidence before it and submissions from the parties to the DVO.

Nature of *ex parte* DVO

12. In *Bonney v Thompson* [2011] NTSC 81, Justice Kelly considered the nature of an *ex parte* DVO under the Act at paragraphs 32 to 35:

> 32. If the Court makes a CSJ DVO in the absence of notice to the defendant pursuant to s 32, then the provisions of ss 36, 37 and 82 apply: a copy of the order must be given to the parties by a clerk of the Court [s 36]; that copy of the order is taken to be a summons to the defendant to appear before the Court at the time and place shown for its return, to show cause why the DVO should not be confirmed by the Court [s 37]; the Court then holds a hearing at which time it may confirm the DVO (with or without variations), or revoke the DVO [s 82(1)]. The Court must not confirm the DVO unless it is satisfied that the defendant has been given a copy of the DVO and the Court has considered any evidence before it and submissions by the parties [s 82(2)].
>
> 33. Because of the provisions of s 18 and s 19, before making a CSJ DVO under s 32 in the absence of notice to the defendant, the Court will already have considered a range of relevant matters (set out in s 19) and must have been satisfied "that there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant" [s 18]. In those circumstances, an applicant may well have a reasonable expectation that, unless the defendant appears to oppose the confirmation of the DVO, it is likely to be confirmed – although of course the magistrate must still be satisfied of the requisite matters.
>
> 34. If a CSJ DVO is made under s 32 in the absence of notice to the defendant, the DVO will be for the full term which the Court considers would be appropriate for a final order, and otherwise in identical terms to the proposed final order – but be subject to revocation if not "confirmed" under s 82.

13. Her Honour went on to observe at paragraph 40 that an *ex parte* variation under section 56 similarly results in an order that is expressed as a final order but that is subject to confirmation:

> 40. In the case of an order under s 56 (as with a CSJ DVO under s 32 made without notice to the defendant), the variation order should <u>not</u> be for a limited (interim) duration, but in the form,

> and for the duration, which it is proposed the Court will eventually confirm under s 82. This is because the copy of the order served on the defendant under s 58 serves as a summons to show cause why "the DVO" (ie the DVO a copy of which the defendant has been given) should not be confirmed: if the DVO made under s 56 is not the same as that proposed to be "confirmed", the defendant will not have had notice of the application against him.

14. Justice Kelly made this same observation some weeks later in the matter of *Malogorski v Peart* [2011] NTSC 86, where at paragraphs 31 and 32 Her Honour found:

> [31] Under this procedure in the NT Act, the *ex parte* order made under s 32 continues in force unless revoked. The confirmation process does not give rise to a new order, it simply confirms and continues the existing *ex parte* order.
>
> [32] Because of this, and because the copy of the *ex parte* DVO made under s 32 of the NT Act is the only notice which is given to the defendant of the order which the applicant seeks to have made against him, the order which is confirmed under s 82 of the Act should be in exactly the same terms as the *ex parte* order made under s 32, including the duration of the order, unless the court specifically exercises the power to vary the order under s 82(1)(a).

15. In making these findings, Her Honour noted[1] that Riley J expressed a similar view in *Balchan v Anthony* (2008) NTSC 02. In this matter His Honour said at 14:

> [14] In my view the proper construction of the provision is that the ex parte order continues in force unless revoked. The confirmation process does not give rise to a new order. If an order is "confirmed" it is, to adopt the dictionary definitions, established more firmly or ratified. It does not cease to exist. It is not replaced by another order. The requirement that there be service of the confirmed order upon the defendant is necessary to make the defendant aware of any changes to the terms of the order and to alert him to the duration of the order. In the event that the order is varied, until service of the varied order, the defendant will continue to be bound by the terms of the order with which he was originally served save insofar as those terms may have been ameliorated upon the confirmation hearing.

[1] Referred to by Her Honour in footnote 23

16. Accordingly, the effect of sections 37 and 82 is that an *ex parte* DVO is very different type of order to an interim DVO. This difference was emphasized by Justice Kelly in *Bonney v Thompson* (supra) at paragraph 35:

> 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".

17. The views outlined above by Justice Kelly in *Bonney v Thompson* (supra) and *Malogorski v Peart* (supra) were both *obiter dictum*. However, given the level of consideration undertaken by Her Honour and the status of the Court, such comments are persuasive to my determination.

18. A further characteristic of an *ex parte* DVO is that it is an unconfirmed Local Court DVO. Section 4 of the Act contains the definition of 'court DVO'. The definition provides:

> **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.

19. An *ex parte* DVO only becomes a 'court DVO' if it is confirmed at a section 82 hearing. Accordingly, an *ex parte* DVO does not fall within the definition of 'court DVO' under the interpretation section of the Act. That is, unless it was considered to be an 'interim court DVO'.

20. Section 4 also defines an 'interim court DVO' to be that which is outlined in section 35(1). Section 35(1) 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).

21. As is outlined above, an interim court DVO (s.35) is a different type of order to an *ex parte* DVO (s.32).[2]

22. Additionally, the avenues available to the defendant to appeal, vary, revoke, review or to set aside the *ex parte* DVO differ from other types of orders. Part 2.8 of the Act contains the Courts power to vary or revoke a DVO. Section 47 provides that Part 2.8 only applies to a 'court DVO' and it specifically excludes an 'interim court DVO'. As such, the only power the Court has to vary or revoke an *ex parte* DVO is at a confirmation hearing under section 82. However, at the confirmation hearing the Court can only vary the order if the Court also confirms the order. The only other option available to the Court at a section 82 confirmation hearing is to revoke the order.

23. A defendant could attempt to have the *ex parte* DVO set aside under section 20(1)(b) of the *Local Court (Civil Procedure) Act 1989*. It is a well established that where a judicial order has been obtained *ex parte* the party affected by it, may apply for its discharge. This has been described as an 'elementary rule of justice.'[3] The power to set aside an order made *ex parte* was considered in *Bell Group NV (In liq) Aspinall* (1998) 19 WAR 561. In that matter Pidgeon, Walsh and Owen JJ held at 569:

> A subsequent hearing, either by the judge who made the original order or by another judge with co-ordinate powers, is not an 'appeal' against the first order. Nor is it an application merely to reconsider the correctness of the original decision on the materials then placed before the judge. The application rests in every case on the production of further materials not before the judge who heard the *ex parte* application and which throw a new and different light on the situation

[2] See *Bonney v Thompson* [2011] NTSC 81 at 32 – 35; and *Malogorski v Peart* [2011] NTSC 86 at 31 and footnote 23;

[3] *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 694.

of the parties involved: *Farrell v Delaney* [1952] 52 SR NSW 236 at 238.

24. Their Honours went on to find at 570 that:

> In the absence of material non-disclosure it seems to us that he applicant must adduce or point to material sufficient to persuade the reviewing judge that had the initial judicial officer appreciated the full facts and circumstances the decision would have been different.
>
> There is no doubt that the power to review an *ex parte* order exists. That is the plain wording of the rule. However, it seems to us that the power must be exercised judicially. In these circumstances a proper exercise of the power should be reserved for those cases in which it can be demonstrated that there was material non-disclosure or that, on the basis of new material, the full facts and circumstances had not been appreciated.

25. In many ways it may be easier for a defendant to have an *ex parte* DVO varied or revoked at a section 82 confirmation hearing, then it would be to have the *ex parte* order set aside under section 20(1)(b) of the *Local Court (Civil Procedure) Act 1989*.

26. In relation to the possibility of an appeal, an *ex parte* DVO is not a final order so the defendant is unable to appeal to the Supreme Court under section 19 of the *Local Court (Civil Procedure) Act 1989*. The only other avenue would be an application to the Supreme Court for a judicial review. However, if the Court is constituted by the Judicial Registrar, as is the case here, the defendant could also appeal to a judge of the Local Court under section 70A of the *Local Court Act 2015*.

27. Consequently, unless an *ex parte* DVO was set aside under 20(1)(b) of the *Local Court (Civil Procedure) Act 1989* or successfully appealed under section 70A of the *Local Court Act 2015*, the defendant would likely remain subject to the *ex parte* DVO until the section 82 confirmation hearing occurs. The confirmation hearing need not occur at the next mention of the matter. The confirmation of a police DVO is no different to the confirmation of an *ex parte* DVO. Each occurs under section 82 of the Act. Judge Oliver considered these matters in *Police v Natasha George* [2015] NTMC 018 at 9 to 23:

> 8. In my view, there is nothing apparent either from this provision or any other part of the Act that requires there to be a hearing for a final determination of the matter on the date of first return.
>
> 9. A police DVO serves two purposes
>
> (a) it imposes certain restraints on a defendant for the protection of another or others

(b) it acts as summons to attend court to show cause why those restraints or other restraints that the court might see fit to impose and become confirmed as a court DVO

10. Under the *Justices Act* a summons may be issued to require the attendance of a person at court to answer a charge that has been made against him or her. Similarly pursuant to the *Sentencing Act* when a court makes an order for an offender to pay restitution that person can be required to attend on a future date to show cause why he or she should not be imprisoned for failure to make for restitution. In neither case is there a requirement that these matters be determined on the date of first return or show cause. This is of course partly due to the impracticality in terms of time in the Court of Summary Jurisdiction of hearing all summons matters listed on a particular day to finality but also due to the need to allow a defendant time to prepare his or her own case.

11. In the context of the first return of a Police DVO the impracticality of this submission is that it would require the prosecution to attend with all witnesses in tow or on standby on the first return so that in the event that the defendant appears in answer to the summons and does not consent to confirmation of the order they would be able to immediately then to proceed to a hearing in the matter. In the context of a domestic violence proceeding this would require the attendance of the protected person in circumstances where there may be potential for a risk to them arising out of their attendance. It is possible in some matters that the protected person would be unavailable because they are hospitalised with injuries.

12. On the other hand it would also be procedurally unfair to a defendant to insist that a police DVO be dealt with to a final determination on the first return date. As these matters are to be brought before the court as soon as practicable, it may be the case that a defendant has had less than 24 hours to consider his or her position. A defendant may be unrepresented on the first return but wishing to obtain legal advice. A defendant may wish to contest the confirmation of the DVO and will require time to consider the evidence that will be led by the police and may need to make arrangements for the attendance of their own witnesses.

13. A further outcome on the first return of a police DVO is that the parties may wish to discuss and negotiate a variation of the police DVO, for example from a full noncontact order to one that restraints conduct whilst the defendant is consuming alcohol or is intoxicated. Again it would be procedurally unfair to all parties, including the protected person, to insist on the finalisation of the police DVO on the first return.

14. It would also potentially impact unfairly on a protected person. A police DVO is taken out by police. It is not always the case that the conditions imposed with those orders are those which the protected person desires. A protected person is a party to the proceedings and has a right to be heard on the question of confirmation. As with a defendant, it would be procedurally unfair for the question of confirmation to be required to be determined on a first return.

15. In my view, the Legislature cannot have intended to introduce a procedure for domestic violence matters that would procedurally disadvantage and be unfair to the parties.

16. The submission referred to my decision in Police v RA [2010] NTMC 61 with reference to paragraphs [13] and [14]. There is nothing in those paragraphs that supports a contention that a Police DVO **must** be determined on the first review. As I think is clear the observations there were as to a case where the defendant fails to appear on the first return date. In that circumstance there is no impediment to the court considering the evidence before it and any submissions and either proceeding to confirm a domestic violence order (with or without variation) or revoke the police DVO.

17. In this case the defendant was present in the matter adjourned at the request of Counsel.

18. In my view sections 81 and 82 are clear in their intent and do not require the "hearing" of the matter on the first return.

19. Section 81 provides

> **81 Appearing at hearing**
>
> (1) Subject to applicable procedural directions, a protected person may appear at the hearing of the proceeding.
>
> (2) If the defendant has been summoned under section 44 or 71, the Commissioner is a party to the proceeding. (my emphasis)

20. If the intent was that a police DVO is be finalised on the first return there would be no opportunity for the court to make procedural directions as is envisaged by section 81(1). Such directions might include, for example, the giving of evidence by CCTV. It is obvious that this is not a matter that can be attended to or arranged at short notice. It should also be obvious that procedural directions of this nature are ones which may well be desirable in the context of dealing with domestic violence.

21. Section 82 provides

> **82 Decision at hearing**
>
> (1) At the hearing, the Court may, by order:

(a) confirm the DVO (with or without variations); or

(b) revoke the DVO.

(2) The Court must not confirm the DVO unless:

(a) it is satisfied the defendant has been given a copy of the DVO; and

(b) it has considered any evidence before it and submissions from the parties to the DVO.

22. In my view, the phrase "at the hearing" encompasses two separate circumstances. First, where a defendant fails to attend in answer to the summons to show cause. In that case the court may well proceed to "hear" the matter, consider the evidence and submissions before it and either confirm, with or without variation, a DVO or revoke the police DVO. It does not preclude and in my view, it envisages the alternate outcome, that is that a defendant (or protected person) wishes to contest the ongoing existence of a domestic violence order for its terms and in that case the matter may be set for a "hearing" at which time evidence may be provided by all parties and the matter finally determined.

28. I agree with Her Honour's analysis of the process. I agree that the Court may make procedural directions prior to conducting the 'hearing'. Sections 81 and 82 are clear in their intent and do not require the 'hearing' of the matter on the first return. In contested matters, it would be contrary to the interests of justice to force the matter to an early hearing before each party is given an opportunity to properly prepare and present their case. If the defendant opposes the confirmation or a protected person (who is not the applicant) opposes the confirmation, the matter would need to be listed for a hearing. The hearing would need to be set at a time when parties have had sufficient time to prepare and file their witness statements and when the Court is able to accommodate a hearing. This may take several weeks. The likely delay and the fact that the defendant will remain subject to the *ex parte* DVO for many weeks, is a relevant factor for the Court to consider when weighing up the potential hardship and prejudice to the defendant.

When should leave be granted to proceed *ex parte*?

29. Neither sections 32, 18 or 19 of the Act outline the threshold an applicant must reach in order for the Court to be prepared to make a Local Court DVO on an *ex parte* basis.

30. I was not referred to any relevant authorities by counsel for the applicant. There is very little guidance from this Court or the Northern Territory Supreme Court in relation to when this Court should make a DVO without notice to the defendant.

However, there is some guidance from the Northern Territory Supreme Court on the making of *ex parte* orders generally.

31. In *Ndjamba v Toyota Finance Australia Ltd* [2010] NTSC 23 Justice Blokland heard an appeal of an *ex parte* order made by the Local Court. In considering whether the Local Court should have proceeded *ex parte*, Her Honour said at paragraph 8:

> 8. I am mindful that courts proceed cautiously concerning *ex parte* applications. The primary considerations on whether or not to proceed *ex parte* concern whether there is urgency; whether irreparable damage would flow from making an *ex parte* order; whether hardship would flow to a party against whom an order is made and whether such an order can be set aside.

32. The Family Court of Australia regularly hears *ex parte* applications in matters where injunctions are sought to protect parents and children from domestic violence or to protect property from being dissipated or destroyed. It is therefore useful to consider how those Courts determine when it would be appropriate to grant leave to proceed *ex parte*.

33. In matter of *Sieling and Sieling* (1979) FLC 90-627, the Full Court of the Family Court of Australia observed at paragraphs 8 to 15:

> 8. Whenever a Court acts *ex parte* it is departing from one of the primary rules of natural justice, that each party should be given an opportunity to present his or her case to the Court. (See The Commissioner of Police v. Tanos [1958] HCA 6; (1957-58) 98 C.L.R. 383, 395-396; Lonard (1976) FLC 90-066 at p. 75,336.) For this reason, an *ex parte* order should be made only where there is a real and urgent need to protect a person or to preserve property and it should remain in force only until both parties can come before the Court.
>
> 9. The High Court Rules, O. 51, r. 5 provides:
>
> (1) Except as by these Rules otherwise provided, an application shall not be made without previous notice to the party to be affected thereby, but the Court or a Justice, if satisfied that the delay caused by giving notice would or might entail irreparable or serious mischief, may make an order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Justice think just.
>
> (2) A party affected by such an order may move to set it aside."

10. A series of decisions of English and Australian courts have defined the circumstances in which it is permissible for Courts to act *ex parte*. Mr. Broun referred the Court to Spry, on Equitable Remedies 1971 pp. 459-463 where the authorities are outlined. In a recent decision Ansah v. Ansah (1977) 2 W.L.R. 760, the Court of Appeal reviewed the circumstances in which the Court should exercise its power to make *ex parte* orders in matrimonial cases:

> *"Orders made ex parte are anomalies in our system of justice which generally demands service or notice of the proposed proceedings on the opposite party: see Craig v. Kanssen (1943) K.B. 256, 262. Nonetheless, the power of the court to intervene immediately and without notice in proper cases is essential to the administration of justice. But this power must be used with great caution and only in circumstances in which it is really necessary to act immediately. Such circumstances do undoubtedly tend to occur more frequently in family disputes than in other types of litigation because the parties are often still in close contact with one another and, particularly when a marriage is breaking up, in a state of high emotional tension; but even in such cases the court should only act ex parte in an emergency when the interests of justice or the protection of the applicant or a child clearly demands immediate intervention by the court. Such cases should be extremely rare, since any urgent applications can be heard inter partes on two days' notice to the other side: see Rayden on Divorce 12th ed. (1974) p. 909, para. 47, and the notice in the Daily Cause List headed `Matrimonial Causes and Matters — Urgent Applications'. Circumstances, of course, may arise when prior notice cannot be given to the other side; for example, cases where one parent has disappeared with the children, or a spouse, usually the wife, is so frightened of the other spouse that some protection must be provided against a violent response to service of proceedings, but the court must be fully satisfied that such protection is necessary."*[4]

[4] Whilst not referenced by the full court in *Sieling (supra),* the passage quoted from *Ansah (supra)* comes from the judgment of Lord Justice Ormrod at page 764 of that decision.

11. In Lee and Lee (1977) FLC 90-314, Butler J. considered the scope and application of reg. 42. In the opinion of this Court his Honour's comments should not be taken as implying that reg. 42 empowers the Court to go outside the general principles established for the making of *ex parte* orders. In particular the Court should give directions as to the service of the order and as to the hearing of an application for a further order.

12. The general principles are that the Court must be satisfied that the matter is of such urgency that the applicant's interests (or the interests of the child) can be protected only by an immediate order. It is necessary to balance the likelihood of harm to the applicant against the hardship to the respondent of making an order without hearing him. The more drastic the order the more grave must be the risk to be averted and the more important the requirement that the respondent be heard at the earliest opportunity. An order that a party be excluded from the home or that a child be removed from the custody of a party must be supported by evidence of an imminent risk of such a nature that the Court cannot wait even the period of time necessary for short service.

13. An order restraining dealings in property may have less drastic consequences for the respondent, or the consequences may be such that the respondent can be protected by an undertaking as to damages. Nevertheless, in such cases the need for urgent action by the Court may also be less apparent and the possibility of postponing the matter and bringing it on at short notice should be considered.

14. In Ansah, the Court of Appeal emphasised that if an order was made *ex parte* it should be limited in time to avoid serious injustice; the time should be the shortest period which must elapse before a preliminary hearing could be arranged (p. 764). The formula ``until the further hearing of this application... at the time and place to be notified'' was considered by the Court, in the circumstances of that case, to be undesirable (p. 764). It would follow that if, for any reason, such a formula is used, liberty should be reserved to either party to apply to set the order aside.

15. While it is not possible to lay down precise or exhaustive guidelines to cover the many different cases which arise, the matters which the Court should consider when asked to act *ex parte* include the following:

- the nature and imminence of the risk to the applicant, to a child, to property interests or to a third party;
- any hardship or prejudice to the respondent and children or to any third party which may arise from proceeding to make the order *ex parte*;
- where the order relates to property, whether there is a need to protect the respondent by requiring the applicant to give an undertaking as to damages;
- the possible consequences of delaying the order until the respondent can be heard, and the steps which could be taken to give notice to the respondent;
- the need to protect the respondent by ensuring that the order is clear in its terms, that it is served within the shortest possible time, that a return date is fixed and that the respondent be informed of his rights to apply to have the matter brought on before the return day.

34. In the matter of *Stowe and Stowe* [1980] FamCA 92, the Full Court of the Family Court of Australia followed the reasoning in *Sieling and Sieling* (supra) and *Ansah v. Ansah* (1977) 2 W.L.R. 760 and further observed at 25 and 26:

> 25. In those limited circumstances where it is necessary to make an *ex parte* order, the onus rests upon the applicant for the injunction both at the *ex parte* stage and at the later hearing of the matter to satisfy the Court that the circumstances justify the making and continuation of the order, This is so irrespective of whether the respondent formally applies to set aside the order. Counsel for the appellant husband submitted — correctly in our view — that the Court's discretion could miscarry if the onus were put upon the respondent to satisfy the Court that the order should be discharged.
>
> 26. That having been said, some regard must also be paid to the realities of the situation, in that the applicant must, at the first stage, establish a prima facie case for an *ex parte* order to be made. The applicant may seek to introduce additional material upon the further hearing of the matter. Whether or not this is

> done, as a practical matter the respondent requires an opportunity both to challenge the applicant's evidence, and to present his own evidence to the Court. But the onus, as such, does not shift to the respondent merely because the Court has already determined that a prima facie case has been established.

35. As is outlined above, the effect of sections 32, 37 and 82 of the Act is that:

    (a) an *ex parte* DVO should be expressed as a final order subject to confirmation; and
    (b) at the confirmation hearing the onus is on the defendant to show cause as to why the order should not be confirmed.

36. The Northern Territory parliament has therefore, legislated against the common law principles that:

    (i) an *ex parte* order should be an interlocutory order that is in place for a limited duration;
    (ii) an *ex parte* order should be in place for the shortest possible period before the Court can properly consider the matter after notice has been given to the respondent; and
    (iii) the onus remains on the applicant to show why the *ex parte* order should continue when the matter comes back before the court for further consideration.[5]

37. The *Domestic and Violence Act 1992* was the predecessor to the current *Domestic and Family Violence Act 2007*. Under the previous Act the making of an *ex parte* DVO also had the result of reversing the onus of proof through the issuing of a summons to show cause to the defendant. This consequence was highlighted by Justice Bailey in *Joy Marjorie Cahill v Anthony David Cahill* JA 67 of 2001[6]. This matter was an appeal following the making of an *ex parte* interim DVO under the *Domestic and Violence Act 1992* (now repealed). At paragraphs 3 and 4 on page 6 of the transcript, His Honour found:

> Ms Farmer submitted that, in effect, the present appeal was of little moment given that the appellant had been summoned to appear – summoned in accordance with section 4(5) of the Act – to show cause why the interim *ex parte* order should not be confirmed. Ms Farmer submitted that, in accordance with section 4(5), the appellant will have the opportunity to contest the continuance of the order

[5] *Stowe and Stowe* [1980] FamCA 92; *Ansah v. Ansah* (1977) 2 W.L.R. 760; *Sieling and Sieling* (1979) FLC 90-627
[6] This is an unreported judgment from case number 20115625. References are to the transcript of the proceedings as recorded at Darwin on Wednesday 12 December 2001 at 2.09pm.

> granted by Mr Loadman in the same way he could have contested the application on 12 October if he had been served and appeared.
>
> This, however, ignores the nature of a hearing under section 4(5) of the Act, where the appellant would bear the burden of showing cause as to why the court should not confirm the order. In the circumstances in which the order in this case was made, this could be a gross injustice to the appellant. If the matter is to proceed, the appellant should have the opportunity to contest the making of the restraining order, starting on a level playing field. The respondent is not entitled to any tactical advantage from having obtained an interim order on the basis of providing incomplete information.

38. At paragraph 6 on page 4 of the transcript, His Honour highlighted the particular care the Court is to take when making *ex parte* DVO orders:

> It is clear, from the terms of the Domestic Violence Act, that the Court of Summary Jurisdiction has the power to grant interim *ex parte* restraining orders. See section 4(3) of the Act. The making of such an interim order has significant and far-reaching consequences, and it is obvious that a court should exercise considerable caution before making such orders, particularly on an *ex parte* basis.

39. The far reaching consequences were articulated by His Honour at paragraph 1 of page 6 of the transcript:

> On the basis of the transcript, there is no indication the learned magistrate was satisfied that the criteria for granting an interim restraining order had been made out or that he had reached his decision to grant the order in accordance with the Act. As things stand, it is impossible to know the basis upon which the order was granted, an order which, if breached by the appellant, could see him imprisoned, and, if not breached, have significant and far-reaching effects upon him in relation to firearms licences, bail applications and Family Court proceedings.

40. In *Bonney v Thompson* (supra), Justice Kelly considered the appropriate circumstances in which an applicant should apply for an 'interim court variation order' under section 52A of the Act. This is an interim order made in circumstances where the defendant <u>has had notice and an opportunity to be heard</u>. 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.

41. There is of course a significant difference between the Court making an interim DVO with notice to the defendant, and an *ex parte* Local Court DVO without notice. The former is a temporary order made where the defendant is given the opportunity to oppose the application and where the applicant maintains the onus at a final hearing to prove that "*there are reasonable grounds for the protected person to fear the commission of domestic violence*". The latter is made without any procedural fairness to the defendant, with the order being expressed as a final order that is subject to confirmation and where at the confirmation hearing the onus is on the defendant to show cause as to why the orders should not be confirmed.

42. Despite the fact that the consequences flowing from an interim DVO are substantially less than that of an *ex parte* DVO, Justice Kelly was of the view that even for an interim DVO, there must be some urgency such as "imminent threatened domestic violence". Accordingly, one must expect that given the far greater consequences of an *ex parte* DVO, the threshold must be higher than that required for an interim DVO under section 35.

43. It is the reversal of the onus of proof and the more permanent nature of an *ex parte* DVO which sets it apart from the ordinary type of *ex parte* order that was contemplated by the Courts in *Sieling and Sieling* (supra) and *Ansah v. Ansah* (supra). Even in those cases where the order to be made was an interlocutory order for a short duration and with the applicant to retain the onus to prove why the order should continue, the Court's still required a "*real and urgent need to protect a person or to preserve property*"[7] or an "*an emergency when the interests of justice or the protection of the applicant or a child clearly demands immediate intervention by the court"*[8]. Given the different nature of an *ex parte* DVO under the Act, the threshold for such an order must be even higher than it is for an *ex parte* order under the *Family Law Act 1975*.

44. Having considered the legislation and the relevant authorities, it appears to me that when a party seeks leave to proceed *ex parte* in these types of proceedings, the Court must be satisfied that the urgency and seriousness of the matter outweigh the hardship and prejudice to the defendant. The 'urgency' is an assessment of the immanency of the risk. The 'seriousness' is the nature of the risk. These are separate considerations.

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[7] *Sieling and Sieling (supra)* at 8

[8] *Ansah (supra)* at 764

45. Regarding urgency, there must be a clear and compelling reason why the defendant cannot be served prior to the hearing. Unlike many other proceedings, domestic violence applications can generally be listed and heard within a matter of hours or days. Accordingly, there must be either:

    (a) very recent threats that would satisfy the Court that there is an imminent risk of domestic violence being carried out prior to the hearing of the matter, but after service has been affected on the defendant; or

    (b) the order is required because the defendant is likely to have a violent response to the service of the paperwork in the proceedings.[9]

46. Regarding seriousness, the applicant must provide sufficient evidence to satisfy the Court that the nature of the imminent risk to the protected person outweighs the hardship and prejudice to the defendant. The risk can be in the form of any type of 'domestic violence' as defined in 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 hardship to the defendant. For example, threatened physical harm is more likely to outweigh the hardship to the defendant than an abusive text message. Whilst it is not entirely inconceivable that harassing behaviour or verbal abuse might outweigh the hardship to the defendant, given the consequences to a defendant of the making of an *ex parte* DVO, it is unlikely that an order would be made unless it was to protect a person from physical harm or to preserve property that has either significant value or which is irreplaceable.

47. Regarding the hardship and prejudice to the defendant, as is outlined above in paragraphs 27 and 28, an *ex parte* DVO is likely to remain unchanged until the confirmation hearing is able to occur.[10] Such a hearing may not be able to occur for several weeks or months. During the period of the adjournment, the defendant could face some of the following hardships and prejudices:

    (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;[11]

    (d) Potential impact on family law proceedings due to:

        (i) inferences having to be drawn from the fact that there is or has been a domestic violence order, including any interim order, when determining what is in a child's best interests.[12]

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[9] *Ansah (supra)* at page 764.
[10] Unless the order is set aside under s.20(1) of the *Local Court (Civil Procedure) Act* 1989.
[11] Section 39 of the *Firearms Act 1997*.
[12] *Family Law Act 1975,* section 60CC(3)(k).

(ii) mandatory prohibition on the defendant cross-examining the protected person in family law proceedings without employing a solicitor (unless the order is considered to be an interim order);[13]

(iii) loss of the presumption of equal shared parental responsibility in family law proceedings (if the court finds there are reasonable grounds to believe that a parent of the child has engaged in family violence);[14]

(iv) potential loss of the family law courts mandatory consideration of whether it is practicable and in the children's best interests to spend equal time with each parent (if equal shared parental responsibility is not ordered);[15]

(e) Employment consequences for certain occupations such as police officers, Australian Defence Force personnel and security personnel; and

(f) Most significantly, the reversal of the onus of proof at the confirmation hearing.

48. In undertaking the determination of whether leave should be granted to proceed *ex parte*, the standard of proof, or as the Act provides - the standard to be 'satisfied', is the balance of probabilities.[16] 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[17]:

> 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.[18]

49. For the reasons outlined above, the gravity of the consequences for a defendant of the making of an *ex parte* DVO are significant and as such, the evidence is likely to need to be compelling and cogent.

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[13] *Family Law Act 1975,* section 102NA(1)(c)(ii).
[14] *Family Law Act 1975,* section 61DA.
[15] *Family Law Act 1975,* section 65DAA(1).
[16] See definition of 'satisfied' in section 4 of the *Domestic and Family Violence Act 2007.*
[17] *NOM v DPP* [2012] VSCA 198 at 73 – 74.
[18] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2; 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.

50. In providing the cogent evidence in support of their case, the applicant also has a duty to "*take particular care to put all the facts, favourable and unfavourable, to the applicant to the court*".[19] In *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-2, Isaacs J held:

> *Dalglish v Jarvie*, a case of high authority, establishes that it is the duty of a party asking for an injunction *ex parte* to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say he was not aware of their importance. *Uberrima fides* is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fail.

51. Following the reasoning in Bullocks case, Justice Gageler in *Aristocrat Technologies Australia Pty Ltd v Allam* [2016] HCA 3 stated at paragraph 15:

> 15. It is an elementary principle of our ordinarily adversarial system of justice that full and fair disclosure must be made by any person who seeks an order from a court *ex parte*, with the result that failure to make such disclosure is ordinarily sufficient to warrant discharge of such order as might be made. The principle is not confined to particular types of interlocutory orders. Its rationale lies in the importance to the administration of justice of the courts and the public being able to have confidence that an order will not be made in the absence of a person whose rights are immediately to be affected by that order unless the court making the order has first been informed by the applicant of all facts known to the applicant which that absent person could be expected to have sought to place before the court had the application for the order been contested.[20]

If leave is granted to proceed *ex parte* when should the Court make a DVO

52. If leave is granted to proceed *ex parte*, the Court will then proceed to hear the application for a DVO to be made.

[19] Cahill (Supra) at paragraph 7 on page 4 and referring to *Thomas A Edison v Bullock* (1912) 15 CLR 679 at 681.
[20] Footnote references removed.

53. The first step under the Act is to establish that the parties are in a 'domestic relationship'. When the protected person or an adult acting on their behalf brings the application, the requirement for the parties to be a domestic relationship is expressly contained at sections 28(1)(a) and (b). However, when a police officer brings an application under section 28(1)(c) (or indeed for a section 41 police DVO), there is no express requirement for the defendant and the protected person to be in a domestic relationship.

54. The requirement for there to be a 'domestic relationship' for a section 28(1)(c) application comes from the definition of 'domestic violence' as is contained in section 5 of the Act. The section provides:

> **5. Domestic violence**
>
> Domestic violence is any of the following conduct committed by a person against someone with whom the person is in a domestic relationship:
>
> (a) conduct causing harm;
>
> *Example of harm for paragraph (a) Sexual or other assault.*
>
> (b) damaging property, including the injury or death of an animal;
>
> (c) intimidation;
>
> (d) stalking;
>
> (e) economic abuse;
>
> (f) attempting or threatening to commit conduct mentioned in paragraphs (a) to (e).
>
> (emphasis added)

55. Accordingly, the conduct contained in section 5 will only constitute 'domestic violence' if the defendant and the protected person are in a domestic relationship. Section 18 then provides that 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*". Accordingly, when section 5 is read in conjunction with the test contained in section 18, the test can only be satisfied if the defendant and the protected person are in a domestic relationship.

56. Once a domestic relationship is established, the next step is to apply the test under section 18. A *prima facie* case is not sufficient grounds for an *ex parte* DVO to be made. As was outlined by the Court in *Bonney v Thompson* (as quoted in paragraph 12 above), the Court should only make an *ex parte* DVO if the test found in section 18 is satisfied and the considerations contained in section 19 are taken into account.[21] This is why there can be an expectation that the order will be confirmed

[21] *Bonney v Thompson* [2011] NTSC 81 at 33 and 34.

unless the defendant successfully shows cause as to why the order should not be confirmed.

57. The appropriate approach to the test found 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.

58. Granting leave to proceed *ex parte* and satisfying the test contained in section 18 of the Act establishes that the Court may make a DVO. It does not then require the Court to actually make a DVO. The question of whether a DVO should be ordered and what the terms of the orders should be, is governed by sections 21 to 24 of the Act. Although it is unlikely, it is conceivable that there may be occasions when the Court finds that there are reasonable grounds for the protected person to fear the commission of domestic violence but that the making of an order is not necessary or desirable in all of the circumstances.

59. When considering the orders that may be made, the Court has many options available. The Court could:

    (a) Impose restraints on the defendant as the issuing authority considers are necessary or desirable to prevent the commission of domestic violence against the protected person[22];

    (b) Impose obligations on the defendant as the issuing authority considers are necessary or desirable:

[22] section 21(1)(a)

(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.[23]

(c) Make other orders the issuing authority considers are just or desirable to make in the circumstances of the particular case;[24]

(d) Make an ancillary order that aims to ensure compliance by the defendant with another order made;[25]

(e) Make a premises access order requiring the defendant to vacate stated premises;[26]

(f) Make an order altering a tenancy agreement that the protected person or the defendant are a party to;[27]and

(g) Order that the defendant is required to take part in a rehabilitation program.[28]

60. A further necessary term of any DVO is the duration of the order. As is outlined in paragraphs 12 to 15 of this judgment, an *ex parte* DVO should be made for the full duration which it is proposed the Court will eventually confirm under section 82.[29] I will deal with the duration of the order separately below.

Restraints to be imposed

61. In this matter the applicant seeks orders to restrain the defendant from engaging in certain behaviours for a period of two years. The applicant essentially seeks non-contact orders and non-violence orders with exceptions to allow limited indirect communications between the parents to make arrangements for the children and to allow supervised access to the children. The proposed orders go slightly beyond that, but that this the thrust of the restraint sought. Accordingly, in this matter I must determine what restraints are *'necessary or desirable to prevent the commission of domestic violence against the protected person'* pursuant to section 21(1)(a) of the Act.

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[23] section 21(1)(b)
[24] section 21(1)(c)
[25] section 21(1)(d)
[26] Section 22
[27] Section 23
[28] Section 24
[29] *Bonney v Thompson* [2011] NTSC 81 at 40; *Malogorski v Peart* [2011] NTSC 86 at 32 and *Balchan v Anthony* (2008) NTSC 02 at 14.

62. I have been unable to locate any Northern Territory authorities relating to how the Court should determine what is a *necessary or desirable to prevent the commission of domestic violence against the protected person*. As will be seen below, the term 'necessary or desirable' is a common discretionary test used in various protective legislation throughout Australia. It is therefore useful to look at how Courts in other states have interpreted the term 'necessary or desirable' in their respective legislation.

63. In Queensland the *Domestic Family Violence Protection Act 2012* (QLD) uses a similar test. Section 37 of that Act provides:

> **37 When court may make protection order**
>
> (1) A court may make a protection order against a person (the "respondent") for the benefit of another person (the "aggrieved") if the court is satisfied that—
>
> (a) a relevant relationship exists between the aggrieved and the respondent; and
>
> (b) the respondent has committed domestic violence against the aggrieved; and
>
> (c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.
>
> (2) In deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence—
>
> (a) the court must consider—
>
> (i) the principles mentioned in section 4 ; and
>
> (ii) if an intervention order has previously been made against the respondent and the respondent has failed to comply with the order—the respondent's failure to comply with the order; and
>
> (b) if an intervention order has previously been made against the respondent and the respondent has complied with the order—the court may consider the respondent's compliance with the order.
>
> (3) However, the court must not refuse to make a protection order merely because the respondent has complied with an intervention order previously made against the respondent.
>
> (4) If an application for a protection order names more than 1 respondent, the court may make a domestic violence order

or domestic violence orders naming 1, some or all of the respondents, as the court considers appropriate.

[emphasis added]

64. Section 56 of the Queensland Act also requires the Court to impose various standard orders when making protection orders. These are generally to be of good behaviour and to not engage in domestic violence. However, when it comes to making tailored restraints, section 57 requires the Court to again apply the 'necessary or desirable' test. Section 57 provides:

57 Court may impose other conditions

(1) A court making or varying a domestic violence order must consider whether imposing any other condition is necessary or desirable to protect—

(a) the aggrieved from domestic violence; or

(b) a named person from associated domestic violence; or

(c) a named person who is a child from being exposed to domestic violence.

(2) Without limiting subsection (1) , a court making a domestic violence order must consider whether to impose an ouster condition on the respondent in relation to the aggrieved's usual place of residence.

(3) The principle of paramount importance to the court must be the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.

[emphasis added]

65. The 'necessary or desirable' test under the *Domestic Family Violence Protection Act 2012 (QLD)* has been the subject of some judicial consideration in the Magistrates Court of Queensland as well as the District Court of Queensland.

66. The most comprehensive analysis of the 'necessary or desirable' test was that of Magistrate Costanzo in *Armour v FAC* [2012] QMC 22. His Honour examined the dictionary definitions, the use of the term in domestic violence legislation in all states and territories (including the Northern Territory). He considered the use of the term in other protective legislation and examined how other Courts have approached the matter. His Honour outlined what he considered to be four attributes of the test at paragraphs 14 to 20:

[14] The first thing to observe is that the test is stated in the alternative.

[15] A court may find it desirable to make an order without finding it to be necessary. One example may be where a perpetrator of domestic violence needs to be held accountable.

[16] A court may find it necessary to make an order without finding it to be desirable. One example may be where a court finds it is necessary despite the wishes of an aggrieved who stands opposed to the making of an order.

[17] Secondly, giving these terms their plain English meaning, the following meanings are given to the words 'necessary' and 'desirable' in the Online Oxford English Dictionary:

> ***Necessary:***
>
> "That is needed.";
>
> "Needed to be done, achieved, or present; essential";
>
> "Indispensable, vital, essential; requisite. Also with *to* or *for* (a person or thing)"
>
> "Of an action: that needs to be done; that is done in order to achieve the desired result or effect. if necessary: if required by the circumstances"; and
>
> "That which is indispensable; a necessary thing; an essential or requisite".
>
> ***Desirable:***
>
> "Worthy to be desired; to be wished for"; and
>
> "That which is desirable; a desirable property or thing".

[18] Thirdly, whether the court finds it necessary or finds it desirable, the finding must be made in the context that it is either necessary or desirable that the order be made in order to protect the aggrieved. Logically, this must mean that the necessity or desirability of an order being made must arise or derive from a need to protect the aggrieved with the terms of an order. The necessity or desirability must be predicated upon a finding that there exists a need to protect the aggrieved from domestic violence.

[19] Fourthly, in the absence of authority to the contrary, and on the basis of the authorities I refer to below, I would hold that the need for protection must be a real one, not some mere speculation or fanciful conjecture. Need often arises from risk. The court needs to assess the risk to the aggrieved and assess whether management of the risk is called for.

[20] The risk of further domestic violence and the need for protection must actually exist. There is no stated necessity that the need or the risk be significant or substantial. The need for protection of an

aggrieved must be sufficient, however, to make it necessary or desirable to make the order in all the circumstances.

67. In the matter of *MDE v MLG & Queensland Police Service* [2015] QDC 151, when hearing an appeal of a decision from the Queensland Magistrates Court, Judge Morzone considered the appropriate approach the Court should take when determining whether the protection order is necessary or desirable to protect the aggrieved from domestic violence. At paragraph 52 His Honour found:

> [52] The use of the phrase "necessary or desirable" invokes a very wide and general power, and should be construed in a similarly liberal manner to enable a court to properly respond, and, if appropriate, tailor an order to protect a person from domestic violence. The phrase is not unusual in that appears in both state and federal legislation, including analogous anti-domestic violence legislation.

68. His Honour then cited the following legislation where, at the time, 'necessary or desirable' was used as the test to determine what orders should be made in family violence cases: *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*, ss 35, 96(2)(b), *Family Violence Protection Act 2008 (Vic)*, s 81; *Summary Offences Act 1921 (SA)*, ss 99H & 99AAC; *Domestic Violence and Protection Act 2008 (NT)*, ss 21, 94; *Domestic Violence and Protection Orders Act 2008 (ACT)*, s 48(1); *Justices Act 1959 (Tas)*, s 106B; *Family Violence Act 2004 (Tas)*, s 16.

69. In *MDE v MLG & Queensland Police Service*, the Court considered an earlier approach taken by the Queensland District Court in *GKE v EUT* [2014] QDC 248. His Honour said at 53 to 55 as follows:

> [53] In *GKE v EUT [2014]* QDC 248 McGill S.C. DCJ considered the requirement and said at [32] to [33]:
>
> "[32] In my opinion the focus must be on the issue of protecting the aggrieved from future domestic violence, the extent to which on the evidence there is a prospect of such a thing in the future, and of what nature, and whether it can properly be said in the light of that evidence that is necessary or desirable to make an order in order to protect the aggrieved from that. The Magistrate spoke about this in terms of an assessment of the risk to the aggrieved, and that I think was an appropriate basis for analysis. I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved.
>
> [33] I also agree that there must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring

in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future. Broadly speaking I agree with what the Magistrate said in the passage beginning "fourthly" of his reasons, though I would express the last sentence as "the risk of future domestic violence against an aggrieved must be sufficiently significant to make it necessary or desirable to make an order in all the circumstances." In assessing such a risk, it is relevant to consider the fact that there is going to have to be some ongoing relationship because of the position of the children, and, if as the appellant alleges the respondent has been difficult and uncooperative in the past in relation to the arrangements for him to have the opportunity to spend time with the children, there is a risk that there will be situations arising of a kind which have in the past produced domestic violence."

[54] This is consistent with the explanatory notes of the Domestic and Family Violence Protection Bill 2011:

> The Bill replaces the 'likelihood' element with a requirement that a court be satisfied that an order is necessary or desirable to protect an aggrieved from domestic violence. This change focuses the court on the protective needs of the aggrieved and whether imposing conditions on the respondent's behaviour is necessary or desirable to meet these needs. The court may still consider evidence which suggests that domestic violence may occur again, or a threat may be carried out, however the court does not need to be satisfied that such an event is 'likely'. Further, a court can look at other factors, including whether an aggrieved is in fear, when it is determining this element.
>
> The new grounds also require a court to consider the guiding principles in deciding whether an order is necessary or desirable for the protection of the aggrieved. The priority of the Bill is the safety and wellbeing of the aggrieved and the grounds for making a protection order are directed toward achieving this aim. These measures are also consistent with the objective of ensuring that orders are only made for the benefit of the person who is in need of protection and are intended to reduce inappropriate cross applications and cross-orders.

[55] In my view, the third element of whether "the protection order is necessary or desirable to protect the aggrieved from domestic violence" requires a three stage process supported by a proper evidentiary basis (adduced pursuant to s 145 of the Act):

1. Firstly, the court must assess the risk of future domestic violence between the parties in the absence of any order.

> There must evidence to make factual findings or draw inferences of the nature of, and prospect that domestic violence may occur in the future. This will depend upon the particular circumstances of the case. Relevant considerations may include evidence of past domestic violence and conduct, genuine remorse, rehabilitation, medical treatment, physiological counselling, compliance with any voluntary temporary orders (s 37(2)(b)), and changes of circumstances.
>
> Unlike, its predecessor provision under the now superseded legislation, the court does not need to be satisfied that future domestic violence is 'likely'. However, there must be more than a mere possibility or speculation of the prospect of domestic violence.
>
> 2. Secondly, the court must assess the need to protect the aggrieved from that domestic violence in the absence of any order.
>
> Relevant considerations may include evidence of the parties' future personal and familial relationships, their places or residence and work, the size of the community in which they reside and the opportunities for direct and indirect contact and future communication, for example, in relation to children.
>
> 3. Thirdly, the court must then consider whether imposing a protection order is "necessary or desirable" to protect the aggrieved from the domestic violence.
>
> [emphasis added]

70. As is outlined above, the Queensland Act applies the 'necessary or desirable' test in both the determination of whether an order should be made (section 37) and also in determining the terms of the orders to be made (section 57). Accordingly, as noted by Pinder J in *KAO v DL* [2017] QMC 16 the same matters considered under section 37 would be relevant to consider under section 57.[30] Similarly, in the Northern Territory, many of the same matters considered under section 18 would be relevant to consider under section 21 of the *Domestic and Family Violence Act 2007* (NT).

71. Finally, given the restraint will necessarily interfere with the defendants' rights, as a general rule, the scope of the restraint and the duration of the restraint should go

[30] KAO v DL [2017] QMC 16 at 81 - 85

no further than is reasonably necessary to prevent the commission of domestic violence.[31]

Duration of the *ex parte* DVO

72. As is outlined in paragraphs 12 to 15 of this judgment, an *ex parte* DVO should be made for the full duration which it is proposed the Court will eventually confirm under section 82.[32]

73. The Act does not provide any guidance on what would be an appropriate duration for a DVO either by default or indeed by outlining what matters the Court is to take into account when determining the duration.

74. Section 27 of the Act provides:

> **27 Duration of DVO**
>
> A DVO (other than an interim court DVO) is in force for the period stated in it.

75. Section 21 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;

76. I find that the 'restraints' referred to in section 21(1)(a) must include the duration of the order as the duration itself is a term of the order. Accordingly, the duration is for the period that the Court considers is 'necessary or desirable'.

77. Whilst bench books are not an authoritative statement of the law and as such, they should not be relied upon for judicial determinations, they do serve as a useful guide for judicial officers. The *National Domestic and Family Violence Bench Book*[33] provides some guidance on the appropriate duration of protection orders at Chapter 7.6. In that chapter the authors conclude:

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[31] Costanzo JJ in both *WJM v NRH* [2013] QMC 12 at 58 and *Armour v FAC* [2012] QMC 22 at 58 referring to *Corporate Affairs Commission (NSW) v Walker* 9 (1987) 11 ACLR 884 at 888.
[32] *Bonney v Thompson* [2011] NTSC 81 at 40; *Malogorski v Peart* [2011] NTSC 86 at 32 and *Balchan v Anthony* (2008) NTSC 02 at 14.
[33] www.https://dfvbenchbook.aija.org.au/protection-orders/duration

Most jurisdictions do not prescribe a maximum duration for a final protection order, instead allowing the court to specify an appropriate period of time, or to provide for no expiration date. US research indicates that flexibility is necessary to tailor the order to the totality of the circumstances of the particular case with regard to any aggravating factors such as increased risk of harm or recidivism, rather than adopting a one-size-fits-all approach.

78. In Victoria the *Family Violence Protection Act 2008 (VIC)* provides at section 97:

Court may specify period for which order in force

(1) The court may specify in a final order the period for which the order is in force.

(2) In making a decision as to the period for which the final order is to be in force, the court must take into account—

(a) that the safety of the protected person is paramount; and

(b) any assessment by the applicant of the level and duration of the risk from the respondent; and

(c) if the applicant is not the protected person, the protected person's views, including the protected person's assessment of the level and duration of the risk from the respondent.

(3) The court may also take into account any matters raised by the respondent that are relevant to the duration of the order.

79. The *Family Violence Protection Act 2008 (VIC)* further provides at section 99:

Duration of order

A final order remains in force—

(a) if a period is specified in the order, for the specified period unless it is sooner revoked by the court or set aside on appeal; or

(b) if no period is specified in the order, until it is revoked by the court or set aside on appeal.

80. Although the Victorian Act does provide some considerations when it comes to duration, the *Family Violence Bench Book* as published by the Judicial College of Victoria provides further guidance at chapter 2.2.2.3:

2.2.2.3- Commencement and duration of final intervention orders

The following matters may also be relevant when determining the duration of a final order:

- the history of the relationship, including the duration of the relationship and incidents of violence both during the relationship and after it ended;
- whether the court has made previous family violence intervention orders between the protected person and the respondent;
- evidence of expert witnesses;
- the risk assessment framework;
- the likelihood that the respondent will undertake counselling or respond to behaviour change programs to reduce the risk of committing family violence;
- whether the risk of family violence is heightened by temporary risk factors that may subside, such as pregnancy, separation or drug use.

81. The matters listed are certainly relevant matters for the Court to consider. I would also add to that list:

    (a) Whether the defendant has been subject to previous domestic violence orders with any other person;

    (b) Whether the defendant has a criminal history which include domestic violence related offending concerning the protected person or any other person; and

    (c) the age of a young protected person and whether there is a particular period in which they will remain vulnerable.

82. What is clear is that the Court has a wide discretion when it comes to setting the duration of any DVO and the duration itself should be tailored according to what the Court considers to be necessary or desirable to prevent the commission of domestic violence against the protected person.

Summary of the law

83. Having considered the legislation and the relevant authorities, it appears to me that when a party seeks an *ex parte* DVO under section 32 (an application in the absence of the defendant and without notice to the defendant), the Court should follow the following steps:

    (a) Firstly, determine if leave should be granted to proceed *ex parte* by weighing up the urgency and seriousness of the matter against the hardship and prejudice to the defendant;

    (b) Secondly, determine if the parties are in a domestic relationship;

(c) Thirdly, determine whether on the balance of probabilities, there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant, or if the protected person is a child, 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, and in doing so:

(i) the Court must consider the safety and protection of the protected person as a matter of paramount importance; and

(ii) the Court must consider the matters contained in section 19(2) of the Act.

(d) Fourthly, if restraints are sought, determine what restraints are necessary or desirable to prevent the commission of domestic violence against the protected person;

(e) Fifthly, determine what duration is necessary or desirable to prevent the commission of domestic violence against the protected person;

(f) Sixthly, any order made must be expressed as being 'subject to confirmation', with the defendant to show cause as to why the order should not be confirmed.

The Applicant's case

84. In these proceedings the applicant relied upon her own affidavit affirmed on 23 June 2021 (marked as Exhibit A1). The Applicant also gave brief oral evidence at the hearing. The applicant also relied upon a previous DVO order made in 2015 (marked as exhibit A2).

85. The applicant's evidence provided that the parties were married on 29 July 2012 and that they have two children from the marriage, aged 8 and 6. The children are also listed as protected persons on the application.

86. The applicant gave oral evidence that parties separated in 2016 but remained living together until she was able to secure her own accommodation in 2019. Thereafter she and the children moved out of the former family home to live on their own. The applicant said that there were no family law orders or formal arrangements between the parties regarding the living arrangements for the children. It is alleged that the defendant would see the children from time to time, upon agreement between the parties. The time that the defendant would spend with the children would often depend upon the status of his mental health.

87. The applicant's evidence contained a number of allegations, including allegations of domestic violence. The relevant allegations are summarised as follows:

(a) A non-intoxication DVO was made against the defendant protecting the applicant in 2013;[34]

(b) A non-intoxication and non-violence DVO was made against the defendant protecting the applicant in 2015. The police were the applicant to that application.[35]

(c) The defendant attempted suicide in his motor vehicle in 2016.[36]

(d) The defendant has struggled with mental illness and has been hospitalised for treatment from time to time.[37]

(e) The defendant has struggled with a substance use disorder in which alcohol was primarily the issue but there had also been issues with the mismanagement of his prescription medication. The defendant had spent time in rehab and hospital for treatment.[38]

(f) The defendant kicked open the applicant's bedroom door and caused damage to the door in September 2020.[39]

(g) The defendant sent the applicant text messages on 11 March 2021 of himself with a noose around his neck and another with a rope hanging from a tree.[40]

(h) In early May 2021 the defendant attended the applicant's home uninvited while intoxicated and verbally abused the applicant. He attended on two further occasions and the applicant had to call the police.[41]

(i) On 7 June 2021 the defendant's mother informed the applicant that the defendant had taken an overdose of Valium the night before. Later that day there was an altercation at the hospital in front of the children in which the defendant said to the applicant "*I will never see you and the kids again*", before putting his fingers to his head in a handgun gesture as he

[34] There was no evidence of this DVO before the court.
[35] Exhibit A1, paragraph 11 and exhibit A2.
[36] Exhibit A1, paragraph 12.
[37] Exhibit A1, paragraphs 14 – 17.
[38] Exhibit A1, paragraphs 13 – 17, 23 and 27.
[39] Exhibit A1, paragraph 16.
[40] Exhibit A1, paragraph 17 and attachment SL-1.
[41] Exhibit A1, paragraph 18-20.

left the room. The applicant called the police to do a welfare check on the defendant.[42]

(j) On 8 June 2021 the applicant believed the defendant to be suffering from hallucinations, paranoia by accusing the applicant of "*being with bikies*" and "*having an affair*" with a friend. The defendant had been questioning the parties' son about the applicant's movements. [43]

(k) On 9 June 2021 the defendant jumped the applicant's fence and came into the house. The defendant refused to leave and the applicant called the police. The applicant moved out her own home and into a shelter the following day as she no longer felt safe at home.[44]

(l) On 10 June 2021 the defendant's mother contacted the applicant to inform her that the defendant had put a camera in the applicant's bedroom because he thinks she is sleeping with someone.[45]

Consideration

88. The parties are clearly in a domestic relationship and I find that so proved.

89. In considering whether leave should be granted to proceed *ex parte*, I take into account the evidence of there being a long history of domestic violence and note that despite the passage of time since the parties' separation, the defendant continues to engage in jealous and controlling behaviour. This has included recent unwanted visits, verbal abuse, breaking down her bedroom door and questioning her about her personal life. The behaviour appears to be escalating and not reducing since the parties' separation. When these factors are combined with the allegations regarding the defendant's mental health issues, alcohol and substance abuse and recent threats and attempts at suicide, the current situation is a perfect storm for a major domestic violence incident to occur unless urgent action is taken.

90. Further, as is indicative of her appreciation for these ominous circumstances, the applicant has already taken the drastic steps of leaving her home with the children and seeking refuge in emergency accommodation as she no longer feels safe in her own home.

91. For all of these reasons, I find that there is sufficient urgency and seriousness to grant leave for the applicant to proceed *ex parte*. In doing so, I have considered the hardship and prejudices the defendant would face if a DVO were made. I accept that the order sought would impact on his ability to spend time with his children

[42] Exhibit A1, paragraph 22.
[43] Exhibit A1, paragraph 22 and 23.
[44] Exhibit A1, paragraph 24-25.
[45] Exhibit A1, paragraph 26.

and would impact on any future family law proceedings. However, I find that the risks to the protected persons outweigh the prejudice and hardships that the defendant may face if an order were made.

92. In relation to the test found in section 18, after considering all of the untested evidence before me, I find on the balance of probabilities that there are reasonable grounds for the protected person to fear the commission of domestic violence and that there are reasonable grounds to fear the children will be exposed to domestic violence committed against the applicant. In reaching this conclusion I have considered the safety and protection of the protected persons as a matter of paramount importance.

93. In relation to section 21, I find that it is both necessary as well as desirable to make an *ex parte* DVO restraining the defendant.

94. In making this finding, 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. He will be given that opportunity at the confirmation hearing. The orders made are subject to confirmation and the matter is adjourned for a confirmation hearing.

ORDERS:

95. Subject to confirmation, the defendant is restrained for a period of two years from:

1. Approaching, contacting or remaining in the company of the protected persons 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 or Children's Contact Centre worker for the purposes of these proceedings, making arrangements for the children or property of the parties, or in accordance with a Parenting Plan, or Family Law Order.

    (b) EXCEPT, for the non-adult (children) protected persons, in the presence of a Children's Contact Centre worker or a third party nominated by the Adult protected person, for the purposes of spending time with the children of the parties, or in accordance with a Parenting Plan, or Family Law Order.

2. Approaching, entering or remaining at any place where the protected person/s 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 or Children's Contact Centre worker for the purposes of these proceedings, making arrangements for the children or property of the parties, or in accordance with a Parenting Plan, or Family Law Order.

(b) EXCEPT, for the non-adult (children) protected persons, in the presence of a Children's Contact Centre worker or a third party nominated by the Adult protected person, for the purposes of spending time with the children of the parties, or in accordance with a Parenting Plan, or Family Law Order.

3. causing harm or attempting or threatening to cause harm to the protected person/s

4. causing damage to property, or attempting or threatening to cause damage to property of the protected person/s.

5. intimidating or harassing or verbally abusing the protected person/s.

6. stalking the protected person/s.

7. exposing a protected person or children of the protected person to domestic violence.

Dated this 7th day of September 2021

Kris Norrington
LOCAL COURT
JUDICIAL REGISTRAR