

ECW v ECW [2018] QDC 166 (3 August 2018) – Queensland District Court

‘Child welfare’ – ‘Family law issues’ – ‘Hearing of the variation application according to law’ – ‘Lack of preparation’ – ‘Protection order’ – ‘Variation of a temporary protection order’

Appeal type: appeal against variation to temporary protection order.

Facts: A temporary protection order was issued against the applicant (Mr ECW) for the benefit of the respondent (Ms ECW) and the couple’s three children. A protection order was later made before Mr ECW applied to remove two of the children as named persons protected under the order and vary, among others, orders 3 and 8. The acting Magistrate made variations to orders 3 and 8 while dismissing the variation to the persons named in the order. Mr ECW appealed against this decision.

Issues: did the acting Magistrate fail to hear and determine Mr ECW’s application for a variation to the protection order according to law?

Decision and reasoning: the appeal was allowed and the matter was remitted to the Magistrate’s Court, to be heard and determined, according to law.

Horneman-Wren SC DCJ revealed a number of issues with the way in which the acting Magistrate heard and determined Mr ECW’s application.

As observed by his Honour, s 91(2)(a) of DFVPA provides that before a Court can vary a protection order, the court must consider the grounds set out in the application for the protection order. However, his Honour recognises that the opening remark of the Magistrate – “Okay. So, whose application is this?” – demonstrates that the Magistrate hadn’t read the grounds for the application or the materials filed by each party prior to the hearing. His Honour further noted that a plain reading of the transcript would highlight that the Magistrate didn’t read the application or affidavit materials at any stage during the hearing.

Horneman-Wren SC DCJ also recognises that the Magistrate erred in dismissing the proposal to remove the two children from the order on the basis that they were matters for the Family Court and not for her Honour (see [32]). His Honour clarifies that the matter was not a matter for the Family Court but for her Honour (see [33]).

The matter was remitted to the Magistrate's court, as opposed to Horneman-Wren SC DCJ conducting the appeal as a fresh hearing, since his Honour was of the opinion that Mr ECW was entitled to have his application heard and determined in the Magistrates Court and to have appeal rights. Conducting the appeal as a fresh hearing would mean, by virtue of s 169(2) of the DFVPA, that Mr ECW would not have any such appeal rights (see [38]-[39]).

His Honour did not set aside the Magistrate's variation of orders 3 and 8 since the parties agreed that those variations ought to remain in the interim ([41]).