***GKE v EUT* [2014] QDC 248 (27 August 2014) – Queensland District Court**

'Costs' – 'Domestic violence order' – 'Emotional and psychological abuse' – 'Family law' – 'Following harassing, monitoring' – 'Harassing' – 'Intimidation' – 'Necessary or desirable' – 'Systems abuse'

Appeal Type: Appeal against the making of a domestic violence order.

Facts: A domestic violence order was made in the Magistrates' Court against the appellant in favour of the respondent. There had already been orders made in the Family Court in relation to arrangements for their three children. The appellant filed for enforcement of these orders in the Family Court. He attended the respondent's home for the purpose of serving court documents. When the respondent opened the door, she closed it immediately because she felt frightened. This incident and other prior incidents led to the application for the order.

Issue/s:

1. Whether the appellant's commencement of proceedings in the Family Court and the personal service of documents on the respondent constituted intimidation or harassment sufficient to meet the definition of emotional or psychological abuse and therefore domestic violence within the meaning of the *Domestic and Family Violence Protection Act 2012* (Qld) (the Act).
2. Whether a protection order was necessary or desirable to protect the respondent from domestic violence.
3. Whether costs should be awarded against the respondent.

Decision and Reasoning: The appeal was upheld.

1. McGill DCJ upheld the Magistrate's finding that the incident at the respondent's home constituted domestic violence. His Honour considered the definition of 'emotional and psychological abuse' in s 11 of the Act. He noted that the issue is whether the behaviour is subjectively intimidating or harassing to the other person. Therefore, evidence of the subjective response of the aggrieved is relevant (see at [21]). His Honour noted at [22] that while examples in the Act refer to persistent conduct, intimidation within the meaning of s 11 could arise from a single incident. However, harassment cannot arise from a single incident. His Honour stated that there has to be 'some element of persistence' such that, 'It is not just a question of whether the aggrieved finds something upsetting' (see at [23]). As such, while the incident at the house amounted to domestic violence, the Family Court application itself was not an example of domestic violence –

'*I suspect it would be possible for the making of repeated applications to the Family Court without justification to amount to "harassment", though it would have to be a clear case; it would certainly not be harassment simply because from time to time the respondent denied the appellant access to the children and he made an application to the Family Court to obtain it'* (see at [20]). The mere fact the appellant takes steps to enforce Family Court orders does not and cannot constitute domestic violence. Conversely, the respondent unjustifiably withholding the children cannot justify domestic violence by the appellant.

2. McGill DCJ noted that this question is concerned with the future. Another relevant consideration was that while the respondent did not want to see the appellant at all, the terms of the Family Court order and the presence of the children dictated that there had to be some continuing contact between the parties.

   See at [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…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….'*

   The evidentiary basis for this risk must amount to more than the mere possibility of such conduct occurring (See at [33]). It is also relevant to consider the seriousness of the violence that is threatened, the credibility of the threat and the practical consequences of the order on the person against whom the order is made. For example, a no contact order ought not be made where some contact is necessary in relation to children (see at [42]-[43]). In applying these principles, his Honour found that it was not necessary or desirable to make an order. His Honour noted that while it was possible that circumstances could arise which amount to intimidation, the issues relating to the children remain in the Family Court. It would not be appropriate to make a protection order to interfere with the appellant's right to enforce his rights in that jurisdiction. There was no real risk of domestic violence as long as the respondent complied with the Family Court orders (see at [67]).

3. Costs were not ordered in favour of the appellant. Section 157 of the Act provides that each party must bear their own costs unless the court decides that their application was malicious, deliberately false, frivolous or vexatious. It is not clear whether this section applies to an appeal. However, his Honour concluded that while the general power to award costs under s 15 of the *Civil Proceedings Act 2011* has not been expressly excluded by the Act, that power should be exercised having regard to the specific costs provision in s 157. Therefore, it is not simply a matter that costs follow the event for this type of proceeding. In any case, an adverse costs order against the respondent was not appropriate.