DISTRICT COURT OF QUEENSLAND

CITATION:	*Tysoe v. Tysoe* [2000] QDC 410
PARTIES:	**MICHAEL TYSOE (Applicant)** **v.** **TAMMY TYSOE (Respondent)**
FILE NO/S:	Appeal 11,12 of 2000 DV 992803 DV 992805
DIVISION:	
PROCEEDING:	Appeals
ORIGINATING COURT:	Magistrates Court Noosa
DELIVERED ON:	21 November 2000
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2000
JUDGE:	McGill DCJ
ORDER:	**Appeals dismissed**
CATCHWORDS:	INFERIOR COURTS – Magistrates Court – appeal – whether protection order justified – *Domestic Violence (Family Protection) Act 1989* ss 11, 20, 21 PRACTICE – adjournment – party seeking to call witnesses not available – whether refusal to adjourn justified
COUNSEL:	Both parties appeared in person
SOLICITORS:	Both parties appeared in person

[1] This is an appeal from the decision of a Stipendiary Magistrate at Noosa on 14 April 2000 in relation to two applications under the *Domestic Violence (Family Protection) Act 19898* ("the Act"). The appellant is the husband of the respondent, and there was one application by the respondent and one by the appellant. The Magistrate made a protection order in favour of the respondent and two other persons, against the appellant, which included provisions that the appellant was prohibited from going to within 50 metres of, entering or remaining in premises where the respondent or any aggrieved person resided or worked, except for the purpose of having contact with his children, but only at such times and in such a manner as was agreed between the parties in writing, or as was permitted by an order made under the *Family Law Act*, and the appellant was prohibited from having, or attempting to have, any contact (including telephone or written correspondence except through a solicitor) or approaching within 50 metres of the

respondent or any aggrieved person, except when attending legal proceedings or Family Court proceedings or approved counselling or mediation, or for the purpose of having contact with his children under the same restriction as in the previous order. The application by the appellant was dismissed.

[2] By these appeals, the appellant seeks to have the order made on the respondent's application varied by omitting those two provisions to which I have referred, and seeks a protection order in the usual terms (that is, one without orders like the orders to which I have referred) against the respondent. The appeal is brought under Part V of the Act; by s.65, the appeal is by way of rehearing on the record. The order made on the respondent's application was not stayed pending the determination of the appeal.

[3] By s.20, on an application by an aggrieved spouse, a court may make an order (including a protection order) against a respondent spouse, if the court is satisfied that the respondent spouse has committed an act of domestic violence against the aggrieved spouse, and that the respondent spouse is likely to commit an act of domestic violence again, or, if the act of domestic violence was a threat, is likely to carry out that threat. By s.11 "domestic violence" is any of the following acts that a person has committed against his or her spouse –

(a) wilful injury;
(b) wilful damage to the spouse's property;
(c) intimidation or harassment of the spouse;
(d) indecent behaviour to the spouse without consent;
(e) threat to commit an act mentioned in paragraphs (a) to (d).

[4] The order was made following a hearing when evidence was taken on 18 February 2000 in the Magistrates Court at Noosa. On 14 April both sides made submissions and the Magistrate gave his decision. The appellant appeared in person; the respondent was represented by a police officer, I assume a police prosecutor. The Magistrate found that acts of domestic violence had been committed by both parties against the other with or without justification, authorisation or excuse. However, he was of the opinion that there was an important difference between the parties, in that the respondent was anxious to bring the relationship to an end and to have as little contact as possible with the appellant in the future, whereas the appellant's position was that he wanted to maintain the family relationship. For this reason, the Magistrate concluded that there was a threat of further domestic violence by the appellant, if he were able to maintain the relationship.

[5] The appellant had been particularly concerned about the whereabouts of his children, the residence and control by whom have been the subject of proceedings in the Family Court. The appellant said in the course of his submissions before the Magistrate that the main reason for making the application was to protect his children. He was concerned, as he said in the attachment to the Notice of Appeal, that the children were being subjected to verbal, psychological and physical abuse

on the part of the respondent and her associates. The appellant complained of threats to him that he would be prevented from having contact with the children in the future, about the children being deprived of their right to reside with or contact their father, which was what he identified as psychological abuse, and also spoke of occasions when one of the children had been struck by the respondent in a way which he said was inappropriate. He also alleged that the children had, after the separation between himself and the respondent, been living with children who had been previously subjected to sexual abuse, and that this had led to complaints against him of sexual abuse, which he denied and which he said had subsequently been withdrawn.

[6] One of the matters complained of by the appellant was that he was not able to call certain witnesses since an application for an adjournment to enable this to be done was refused. Two of the witnesses proposed were apparently people who had been involved in an investigation of a complaint of sexual abuse against him. The application by the respondent did not rely on any allegation of sexual abuse against a child as part of the case against the appellant, and in these circumstances it was not necessary for the respondent to call evidence to support a case that any complaint of sexual abuse was false, or to confirm that it had been withdrawn. Indeed, had the matter not been raised voluntarily by the appellant, there was no reason why the fact that there ever had been a complaint of sexual abuse against him would have come to the notice of the Magistrate hearing the application.

[7] The other potential purpose of calling those witnesses was to attempt to elicit evidence to support the proposition that the complaint was made as a consequence of the girl having been brought into contact with children of an associate of the respondent. Even if such evidence were available from those witnesses, it would not assist in establishing either of the matters which, under s.20, were necessary to be established on the part of the appellant in order to obtain a protection order against the respondent, nor would it be relevant to whether or not orders restricting contact on the part of the appellant should be included in the protection order made against him. The proposed evidence was therefore evidence which would, in my opinion, been entirely unhelpful in relation to the issues which were before the Magistrate for determination, even assuming that the proposed witnesses would have given evidence consistent with the propositions being advanced by the appellant. The absence of these witnesses was therefore of no consequence.

[8] There was also apparently a police witness who had been involved in investigating telephone calls to the appellant. It was not suggested by the appellant that all these calls had been made by the respondent personally. Although an abusive phone call for which the spouse is responsible may well amount to domestic violence for the purposes of s.11 of the Act, if the call is in substance an act committed (although not personally) by the spouse, proving that people who were friends or associates of the respondent had made hostile telephone calls to the appellant would not have proved that those calls were made by those people acting on behalf of the respondent; there was nothing in the evidence given about those calls by the appellant which would have suggested that (assuming the calls occurred) they were not simply the independent acts of those people, motivated by sympathy for the

respondent. That, in my opinion, would not have been sufficient to make them the acts of the respondent for the purposes of s.11. Although the Magistrate was not bound by the rules of evidence and might inform himself of such matters as he thought fit, as provided by s.84(2) of the Act, in my opinion, that did not make acts of third parties apparently carried out in support of or out of sympathy for the respondent her responsibility, so as to make them acts of domestic violence by her for the purposes of the act. Accordingly, the inability to call that police officer was of no consequence since his evidence would not have assisted the appellant. So far as I can see, the respondent was not cross-examined about whether she had made telephone calls to the appellant, and the appellant did not himself give evidence of those calls, so it is understandable that the Magistrate would not treat this as a basis for a finding that the respondent was likely to commit domestic violence on the appellant.

[9] The appellant also spoke of neighbours who he said had complained about the language of the respondent. When pressed with this under cross-examination however he refused to reveal the names of these people, on the ground that they did not wish to get involved. In these circumstances, it is unlikely that an adjournment to enable him to call them as witnesses would have achieved anything, but in any case the respondent admitted in the course of her evidence that she had sworn at the appellant, and, in the light of such indication of what such witnesses might have been able to say had they been present and cooperative that I was able to glean from reading the transcript, I cannot see that the absence of those witnesses would have hurt the appellant's case. At most they might have provided some support for the proposition that there had been acts of domestic violence by the respondent against the appellant, but the appellant has the benefit of a finding to that effect by the Magistrate anyway. There was nothing in that evidence which would have touched on the crucial issue, that the appellant was not prepared to leave the respondent alone voluntarily, whereas the respondent gave every indication that given the choice she would have nothing further to do with the appellant. Plainly, if that is the respondent's attitude, then a failure to find that the respondent was likely to commit an act of domestic violence in the future was justified, and not one which I would set aside on appeal.

[10] The appellant also complained of an inability to call witnesses to the abuse of the children. Unless this is a reference to these neighbours, it was not clear from the course of the proceedings what witnesses he had in mind, but there is a further difficulty about establishing acts of domestic violence towards the children. A court may make an order against a respondent spouse under s.20 only if satisfied of the likelihood of an act of domestic violence again, that is, violence against the spouse: s.11. If an order is made for the benefit of an aggrieved spouse, the court may include the name of a relative or associate of the aggrieved spouse if s.21 is satisfied, but it does not seem that there is a power to make an order to protect persons other than an aggrieved spouse in circumstances where the statutory requirements for making an order against a respondent spouse under s.20 are not made out. In other words, it does not assist the appellant's attempt to obtain a protection order in his favour for him to prove merely that there have been acts of violence against the children and that those acts are likely to continue. He needs to prove that there have been acts of violence against him, and that that is likely to

continue, in order to obtain a protection order for his benefit, before the question arises whether that protection order should be extended to protect the children as well.

[11] In the present case, the appellant did not establish that there was a likelihood of further domestic violence against himself, and in those circumstances it would not assist his position to be able to prove a likelihood of violence against the children. In so far as his application was really an attempt to protect the children, it was misconceived, since it seems to me on my reading of the Act that it cannot be used effectively for that purpose unless a court is first justified in making the protection order in his favour; that is, to protect him personally. It would therefore not have assisted his case to be able to prove that there had been violence shown by the respondent to the children, or that there was a threat of further such violence, and the absence of witnesses directed to proving that was therefore not of critical. I should say that I am not expressing any conclusion that the respondent had been or was likely in the future to be violent to the children. The position is simply that, unless the appellant could establish the basis for a protection order in his favour, that issue really did not arise, and the appellant did not get to that point.

[12] For this reason the appellant was not prejudiced by the refusal of the adjournment sought in order to enable him to secure the attendance of these potential witnesses. The Magistrate dealt with the application for the adjournment on the basis that the trial date had been fixed for some time and the appellant had sufficient opportunity to arrange for the attendance of witnesses, so that it was not appropriate to adjourn the hearing simply because he had, for whatever reason, not taken advantage of that opportunity. It is important, for there to be a proper trial on the merits of any issue, for parties to be able to call witnesses, but ordinarily trial dates are fixed well in advance and it is then the responsibility of the parties to arrange their witnesses to be available at that time. The business of courts would become impossible unless this approach were ordinarily followed. There is perhaps some scope for some flexibility, particularly in circumstances where a witness becomes unavailable on short notice and without any default on the part of the party wishing to call that witness, but ordinarily a party is given the opportunity to call witnesses by a trial date being fixed and the party being informed of that a reasonable time in advance. The Magistrate was entitled to take the view that it was up to the appellant to get his witnesses to court on the trial date.

[13] The one feature of the matter which gives me some concern, however, is that the trial was not completed on the day set down for it, and was adjourned to a later date for the purpose of submissions and judgment. At the end of the first day the Magistrate made it clear that he would not take further evidence on the adjourned hearing, in circumstances which would have deterred the appellant from bringing witnesses to court on that adjourned hearing. My impression from the transcript however is that all of the first day was occupied with the evidence of the respondent and the appellant, so that if the appellant's witnesses had been at court, their evidence could not have been heard that day, and they would have had to attend again on the second day anyway. Besides, if the trial is being adjourned to a second day anyway, for practical purposes a party has that further opportunity to secure the

attendance of witnesses. I think it would have been better, given that the trial had to be adjourned to a second day anyway, for the appellant not to have been told that further evidence would not be taken on that second day; this would have given him a further opportunity to secure the attendance of witnesses if he could do so. However, I will not decide this point on this ground; I prefer to decide the point on the ground that, if the witnesses had been secured and had given evidence as foreshadowed by the appellant, they would not have assisted the appellant's case.

[14] Another point, the appellant sought an adjournment on the ground that he had no legal representation, which was also rejected. There was no particular reason for thinking that granting an adjournment would facilitate the provision of legal representation, and the absence of the legal representation on the part of the respondent is no reason why an application under the Act should not proceed to trial.

[15] Having read the transcript, it seems to me that the findings of the Magistrate were open on the evidence, and there is no basis upon which I could on a rehearing interfere with the decision. The Magistrate had a very difficult task because of the failure of the appellant to appreciate the issues which were relevant, his failure to present his case in a clear and organised fashion, and his attempts to use the proceedings to justify his position and debate issues which were really more appropriately raised in the Family Court.

[16] One of the matters sought to be raised by the appellant was that these proceedings would prejudice the conduct of proceedings in the Family Court. Plainly they cannot do so. Any order made by the Family Court would necessarily override any order made under the Act, and it seems to me that the order made by the Magistrate was carefully expressed to avoid any risk of conflict with anything done under the *Family Law Act*. In my opinion, the order cannot be criticised on that basis.

[17] It is clear from the evidence before the Magistrate, including on the appellant's version, that the relationship between the appellant and the respondent has been stormy at times, at least since 1993. There were periods of reconciliation, but it seems the relationship has generally deteriorated. There were previous protection orders made, including at least one order in favour of the appellant. The appellant alleges that the respondent has been consistently violent to both himself and the children. There was conflict in the evidence between the appellant and the respondent at the trial, to the extent to which each had been violent to the other, and I do not propose drawing any conclusions of my own as to whether there was any and what violence shown by the respondent to the appellant. For the purposes of analysing the appellant's argument, however, I will assume that his proposition, that there had been persistent violence shown towards him by the respondent and that any violence on his part has been prompted by self defence, is correct. There is no reason to think that, if the relationship continues, that is going to change, particularly because previous protection orders have not saved the relationship and prevented a continuation of violence. If the parties continue to live together therefore there is every likelihood that there will be further domestic violence in the

future, whereas if the parties separate and leave each other alone then there should be no further violence. If the respondent is willing to have nothing more to do with the appellant, that is likely to prevent him from being exposed to further violence, but if the appellant is not prepared to adopt a similar approach to the respondent then persistent attempts on his part to re-establish the relationship could be seen as likely to lead to further violence between the parties. In my opinion, the logic of the approach adopted by the Magistrate is unanswerable. In particular, it is not answered by the appellant's desire to preserve the relationship. My impression is that this is based heavily on a desire to preserve his relationship with his children, but whatever the basis for it, a relationship cannot be preserved unless both parties are willing to continue it, and if the respondent is not willing to continue it, that is the end of the matter. The appellant will just have to accept that the relationship is over.

[18] There is a good deal more material in the outline of arguments on behalf of the appellant, but it is largely directed to issues involving residence of and access to the children of the marriage, and the relationship between the parties in relation to the children. These are matters which are properly to be determined by the Family Court. As I have said, issues involving the children are essentially peripheral to the matters which arise on an application under the Act, the matters identified in s.20.

[19] I think that the appellant is very upset by the loss of his family, particularly by the loss of his children, which is quite understandable, and it would also be natural for the children to miss him and want some contact with him. It does appear that there were periods where he had no contact with the children, and more recently his contact with the children has been very limited. This however is a matter for the Family Court, and it is not something which could be effectively resolved in proceedings under the Act. The Family Court is much better equipped to investigate the position of the children, who I take it are separately represented in the Family Court proceedings.

[20] For these reasons the appeals are dismissed.