

# Feedback from the Bench to Women Barristers

## Moot Problem<sup>1</sup>

### SUPREME COURT OF VICTORIA

### COURT OF APPEAL

S EAPCI 2023 0123

SYLVIA PLATT

Appellant

v

JANE AUSTIN

First Respondent

and

MAGISTRATES' COURT OF VICTORIA

Second Respondent

1 As at March 2023, Sylvia Platt and Jane Austin had been in a relationship for about three years. Not long after they met, Ms Platt moved into Ms Austin's two bedroom apartment. One of the bedrooms is now Ms Platt's music studio and houses her extensive guitar collection.

2 The lease remained in Ms Austin's name, but the monthly rent was paid from a shared bank account. Although Ms Austin was earning a good salary as a solicitor in a boutique law firm, and Ms Platt had an intermittent income from her work as a music therapist, the cost of living was high and the couple were having trouble making ends meet.

3 On 12 March 2023, Ms Platt applied to the Magistrates' Court of Victoria for a family violence intervention order against Ms Austin, under the *Family Violence Protection Act 2008* (**FVP Act**). Ms Platt made the application online, by completing the application form on the Magistrates' Court's website and

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<sup>1</sup> The moot problem is based mainly on *Myers v Satheeskumar (Judicial Review)* [2024] VSC 12. *Myers* cannot itself be cited as an authority, but any submission made or reasoning undertaken in the judgment can be used in the moot.

signing a 'declaration of truth'.<sup>2</sup>

4 In the application form, Ms Platt provided details of her claim that Ms Austin had been emotionally, psychologically, and economically abusive towards her. The most recent incident of family violence that Ms Platt described on the form was a huge row with Ms Austin the previous night. Ms Platt said that Ms Austin had become furious on learning that Ms Platt had bought a new guitar, and had smashed the guitar, called Ms Platt a talentless leech, and threatened to change the locks and leave Ms Platt's belongings on the footpath outside the apartment. Ms Platt said on the form that she was feeling unsafe and needed immediate protection, and so she sought an interim order. The conditions that Ms Platt sought on the order included conditions that Ms Austin not approach or remain within 200 metres of Ms Platt, and a condition preventing Ms Austin from going to or remaining within 200 metres of the apartment. Ms Platt had not reported the incident to the police, and so she left those parts of the form blank.

5 On 15 March 2023, a magistrate made an interim family violence protection order against Ms Austin, on the basis of Ms Platt's application form and her declaration of truth.<sup>3</sup> The hearing was very brief and Ms Platt did not give evidence. The interim order included conditions that had the effect of excluding Ms Austin from the apartment, and from contacting or communicating with Ms Platt by any means. The first mention date of Ms Platt's application was listed at the Magistrates' Court at Melbourne for 5 April 2023.

6 Police served Ms Austin with the interim order at her workplace on the night of 15 March 2023, where Ms Austin was working late on an urgent injunction

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<sup>2</sup> See *Family Violence Protection Act 2008 (Vic) (FVP Act)*, s 43.

<sup>3</sup> Under s 53 of the FVP Act.

application. Ms Austin had not previously been aware of the application, and had no notice of the hearing at which the interim order was made.

7 Ms Austin briefed counsel to appear on her behalf at the hearing on 5 April 2023. She applied for leave to revoke the interim order, or alternatively to vary it so that Ms Austin could live in the apartment with appropriate conditions.<sup>4</sup> Ms Platt opposed the application. The magistrate refused leave for Ms Austin to apply to vary or revoke the interim order, saying that she was not satisfied that it was in the interests of justice to do so because the evidence in support of the interim order was so compelling that it would have made no difference if Ms Austin had been present at the hearing.

8 Ms Austin made an urgent application to the Supreme Court of Victoria, seeking judicial review of both the interim order and the magistrate's order refusing leave. Her grounds of review were:

- (1) The Magistrates' Court had no power to make the interim order, because the application was not supported by oral evidence or an affidavit, as required by s 55(1) of the FVP Act, and the magistrate did not waive that requirement.
- (2) It was legally unreasonable for the magistrate not to be satisfied that it was in the interests of justice to grant leave under s 109(1).

9 Ms Austin succeeded at first instance. The trial judge held that the evidence requirement in s 55(1) of the FVP Act had not been met, and that as a result the interim order was invalid. Her Honour held further that it was legally unreasonable for the magistrate to refuse leave to apply to vary or revoke the order under s 109(1), on the basis that Ms Austin had not been present at the hearing on 15 March 2023 and it was plainly in the interests of justice to give her an opportunity to be heard in relation to the interim order.

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<sup>4</sup> Under s 109(1) and (2A) of the FVP Act.

- 10 Ms Platt sought leave to appeal to the Court of Appeal. A single judge granted leave to appeal with respect to two grounds of appeal:
- (1) The primary judge erred in holding that non-compliance with the evidence requirement in s 55(1) of the FVP Act resulted in invalidity of the interim order; and
  - (2) The primary judge erred in holding that the magistrate's decision to refuse Ms Austin leave to apply to vary or revoke the interim order was legally unreasonable.
- 11 The appeal has now been listed for hearing in the Court of Appeal before a Bench of three judges.

## ANNEXURE

### *Family Violence Protection Act 2008*

1. The purposes of the *Family Violence Protection Act 2008* are set out in s 1:

#### **1 Purpose**

The purpose of this Act is to—

- (a) maximise safety for children and adults who have experienced family violence; and
  - (b) prevent and reduce family violence to the greatest extent possible; and
  - (c) promote the accountability of perpetrators of family violence for their actions.
2. The Act aims to achieve its purposes as set out in s 2, including providing an effective and accessible system of family violence intervention orders (s 2(1)).
  3. Section 11 defines ‘family violence intervention order’ to mean a final order or an interim order.
  4. Section 43 provides:

#### **43 How application is to be made**

- (1) An application for a family violence intervention order must—
  - (a) include the information prescribed by rules made under this Act; and
  - (b) if the applicant is a police officer, be made on oath or by affirmation or by affidavit or certified in accordance with subsection (2); or
  - (c) if the applicant is not a police officer, be made on oath or by affirmation or by affidavit or by declaration of truth.
- (2) For the purposes of subsection (1)(b), an application certified by a police officer must—
  - (a) be signed by the police officer; and

- (b) include the police officer's name, rank and station.
- (3) Unless the rules of court otherwise provide, the application may be made by telephone, fax or other electronic communication.
- (4) A declaration of truth –
  - (a) must include the applicant's full name and date of birth; and
  - (b) must include an acknowledgment that the content of the application is true and correct to the best of the applicant's knowledge and belief; and
  - (c) must include an acknowledgment that the applicant knows that making a declaration of truth that the applicant knows to be false is an offence with a penalty of 600 penalty units or 5 years imprisonment or both; and
  - (d) must otherwise comply with any requirements of the rules of court (if any); and
  - (e) is not required to be witnessed by, or executed before, any other person.

5. Section 53 provides:

**53 Court may make an interim order**

- (1) The court may make an interim order if –
  - (a) a person has applied to the court for a family violence intervention order and the court is satisfied, on the balance of probabilities, that an interim order is necessary pending a final decision about the application –
    - (i) to ensure the safety of the affected family member; or
    - (ii) to preserve any property of the affected family member; or
    - (iii) to protect an affected family member who is a child who has been subjected to family violence committed by the respondent; or
  - (b) a person has applied to the court for a family violence intervention order and the parties to the proceeding have consented to, or do not oppose, the making of an interim order

for the application; or

- (c) a family violence safety notice has been issued for an affected family member and the court is satisfied, on the balance of probabilities, there are no circumstances that would justify discontinuing the protection of the person until a final decision about the application.

**Note**

See Division 5 which provides for the inclusion of conditions in a family violence intervention order, including an interim order. See also Division 5 which provides for the inclusion of conditions suspending a firearms authority, weapons approval or weapons exemption in the case of an interim order and cancelling a firearms authority, weapons approval or weapons exemption in the case of a final order.

- (1C) The court may make an order under subsection (1)(b) –
  - (a) without being satisfied as to any matter referred to in subsection (1)(a) or (1)(c); and
  - (b) whether or not the respondent admits to any or all of the particulars of the application.
- (2) In deciding whether to make an interim order the court is not to take into account whether or not the respondent is or has been the subject of a direction, or detained, under Division 1 of Part 3.
- (3) The court may make an interim order whether or not –
  - (a) some or all of the alleged family violence occurred outside Victoria, so long as the affected family member was in Victoria at the time at which that alleged family violence occurred;
  - (b) the affected family member was outside Victoria at the time at which some or all of the family violence alleged in the application for the family violence intervention order occurred, so long as that alleged family violence occurred in Victoria.
- (4) The court may make an interim order at any time after the making of an application for a family violence intervention order and before the final decision about the application is made, and may do so whether or not the court has previously made or refused to make an interim order.

6. Section 55 provides:

**55 Evidentiary requirements for making interim orders**

- (1) The court must not make an interim order, other than an order referred to in section 53(1)(b), unless –
  - (a) the application is supported by oral evidence or an affidavit; or
  - (b) the court waives the requirement under paragraph (a); or
  - (c) the application is made by the issue of a family violence safety notice that was certified in accordance with section 153(1).
- (1A) The court may waive the requirement that the application be supported by oral evidence or an affidavit if –
  - (a) the applicant is a police officer and the application is made by electronic communication –
    - (i) provided that the court has considered whether it is practicable to obtain oral evidence or an affidavit before making the interim order; or
    - (ii) the application is made before 9 a.m. or after 5 p.m. on a weekday or on a Saturday, Sunday or a public holiday and the application was certified in accordance with section 43(2); or
  - (b) the applicant is not a police officer and the application is made by a declaration of truth, provided that the court has considered whether it is practicable to obtain oral evidence or an affidavit before making the interim order.
- (2) Nothing in subsection (1)(a) or (3) obliges the affected family member to give evidence before the interim order is made.
- (3) If the application is made by issue of a family violence safety notice that was certified in accordance with section 153(1), the court, if deciding under section 65(3) whether to refuse to admit or limit the use to be made of the family violence safety notice, must first consider whether it is reasonably practicable to obtain oral evidence or affidavit evidence.

7. Section 108 provides:

**108 Who may apply to vary, revoke or extend family violence intervention order**

- (1) An application to vary, revoke or extend a family violence intervention



order may be made to the court by –

- (a) a party to the proceeding in which the order was made; or

**Note**

See the definition of *party* in section 4 which provides that the protected person is a party to the proceeding, whether or not the person is the applicant for the proceeding.

- (b) if the protected person is a child –
    - (i) a parent of the child, other than the respondent for the order; or
    - (ii) any other person with the written consent of a parent of the child, other than the respondent for the order; or
  - (c) if the protected person is a child who is 14 years of age or more, the protected person with the leave of the court; or
  - (d) if a police officer was not a party to the proceeding in which the family violence intervention order was made, a police officer; or
  - (e) if the protected person has a guardian and the guardian was not a party to the proceeding in which the family violence intervention order was made, the guardian.
- (2) For the purposes of subsection (1)(a), if a party to the proceeding in which the family violence intervention order was made was a police officer or an officer of another organisation –
- (a) the application may be made by any other police officer or officer of the organisation; and
  - (b) that police officer or officer is taken to be a party to the original proceeding.

8. Section 109 provides:

**109 Application made by respondent for variation or revocation of family violence intervention order**

- (1) For the purposes of section 108(1)(a), the respondent for a family violence intervention order may apply for the variation or revocation of the order only if the court has given leave for the respondent to make

the application.

- (2) Except as provided by subsection (2A), the court may grant leave under subsection (1) only if the court is satisfied that—
  - (a) there has been a change in circumstances since the family violence intervention order was made; and
  - (b) the change may justify a variation or revocation of the order; and
  - (c) in the case of an interim order, it is in the interests of justice that the application be determined immediately, rather than waiting for the hearing of the application for the final order.
- (2A) In the case of an interim order made when the respondent was not present—
  - (a) the court may grant leave under subsection (1) if the court is satisfied that it is in the interests of justice to do so, having regard to the reasons the respondent was not present when the order was made; and
  - (b) if the court grants leave, it may, instead of varying or revoking the order, set aside the order if the court is satisfied that there are exceptional circumstances that justify setting aside the order.
- (2B) Subsection (2A) applies only if the respondent seeks leave within 21 days after the day on which a copy of the order was served on the respondent.
- (2C) The court may extend the time referred to in subsection (2B) if the court is satisfied that there are exceptional circumstances.
- (3) This section does not apply to an application by the respondent to vary or revoke a recognised DVO.