

AAA v County Court of Victoria & Ors [2023] VSC 13

[Simon Kelly, Barrister](#)

A consideration by the Common Law Division of the Supreme Court as to the manner in which Intervention Order appeals are to be determined.

Facts

On 4 December 2020, a Final Family Violence Intervention Order was extended indefinitely at the request of the applicant; and refused the respondent's cross-application. This decision was appealed to the County Court – where on 26 August 2021, a Judge allowed the appeal and varied the Magistrates orders to impose and expiration date of the Order.

The appellant (respondent to the first application) sought a Judicial Review of the Appeal Judge's orders on 3 bases – only one of which was ruled upon.

Judicial Review

J. Dixon, J upheld the review. The Court ruled that an appeal to the County Court under the *Family Violence Protection Act* is not a de novo hearing.

The Court found that:

“...an appeal under s119 is a broad appeal by rehearing that allows for new evidence...”¹

However, a Court's jurisdiction to hear a 'broad appeal by rehearing' was only enlivened when the appellant demonstrated:

“...having regard to all the evidence now before the appellate Court, the Order that is the subject of the appeal is the result of some legal, factual, or discretionary error. The appellate Court is not confined to the record of evidence led at the original hearing. However, a rehearing is not a retrial and the Court's power to receive further or fresh evidence is limited to that provided by the statute creating the right of appealing and may hear new evidence and applies the law as it applies when the appeal is heard...”²

¹ *AAA v County Court of Victoria & Ors* [2023] VSC 13 at [63]

² *Ibid.*, at [51]

Case Note – Criminal Law & Family Law

Key principles

The County Court, in hearing such an appeal may determine the appeal at the time of the appeal. In other words, new evidence may be led – for example, evidence of more recent acts of family violence. However, the protected person does not have to give evidence and be cross examined again.³

What this means in practice is that two important factors should be considered when running an intervention order matter at first instance:

1. All relevant witnesses should be called, and all relevant evidence should be put before the Court. The evidence led by a party, and the cross-examination of witnesses, should be thorough. All relevant submissions should be made.
2. Should the matter proceed to an appeal, a transcript will need to be ordered from the Magistrates Court, as that may be the totality of the evidence that the appeal Court relies on to determine the matter.

One of the bases for this finding of the Court is “...the obvious desire to mitigate trauma to victims of family violence” and that a hearing de novo would be inconsistent with that legislative intention.⁴

Interestingly, the County Court (on the original appeal) found that the following behaviours amounted to family violence – in doing so, applied a broad meaning of emotional and psychological abuse.:

1. The respondent looking down at his phone at changeover (of their shared child), ignoring his vulnerable and confused daughter. The appellate Judge found this ‘very disturbing’ behaviour to be emotional and psychological abuse given the respondent was more concerned about gaining ‘strategic advantage in litigation’.
2. A complaint about family violence by the respondent where the complaint was given the lie by CCTV footage, amounted to family violence itself. Lying to Police in the first instance, then further lying on oath amounted to emotional and psychological abuse.
3. When the respondent took his daughter to a Police Station for the purposes of making a statement about the asserted family violence, where it had in fact not occurred, was also emotional and psychological abuse.

³ Ibid., at [66]

⁴ Ibid



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Admitted: 26/05/2015

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Simon is a barrister practicing principally in crime, intervention orders, family law and guardianship law.

Simon appears regularly in the Magistrates Court, County Court of Victoria, Federal Circuit and Family Court of Australia, and VCAT regarding child and property disputes, intervention orders and crime.

Simon has a particular interest in intervention orders with associated criminal matters and their relationship to family law parenting matters.

Simon is the holder of a Victorian Bar Indictable Crime Certificate and has lectured in Evidence at Victoria University.

Immediately prior to coming to the bar, Simon was employed as a solicitor in the community legal service sector. Simon appeared for a range of clients in a variety of criminal, regulatory and traffic matters including as duty solicitor in family violence matters.

Previously, Simon was a senior solicitor at the Victorian Government Solicitors Office in the Regulatory Compliance and Enforcement team and appeared on behalf of a range of state and commonwealth departments in a broad range of matters.

Prior to admission as a lawyer, Simon was engaged as a prosecutor with Victoria Police and subsequently with the Department of Transport.

Case Note – Criminal Law & Family Law

Simon is available to consult on complex criminal and regulatory investigations, having been engaged as a consulting investigator with the Australian Health Practitioner Regulation Agency.

Simon has worked In East Timor with the UN and in the Solomon Islands, mentoring and monitoring local police.

Simon read with Mr R B Hammill.

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Practice Areas:

Family Law — Property Disputes, Parenting Orders. Family Provision, Alternative Dispute

Criminal Law — Intervention Orders

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