

07/88

## FAMILY COURT OF AUSTRALIA AT MELBOURNE

**MINAS v MINAS****Frederico J****15, 18 January 1988**

**FAMILY LAW – ACCESS ORDER MADE BY FAMILY COURT – EX PARTE INTERVENTION ORDER MADE – ONE PARTY DEPRIVED OF ACCESS – APPLICATION TO ENFORCE ACCESS – WHETHER APPROPRIATE TO GRANT APPLICATION: FAMILY LAW ACT 1975, SS64, 114AB; CRIMES (FAMILY VIOLENCE) ACT 1987, S8.**

Prior to the Christmas period, a magistrate made (in favour of the wife) an *ex parte* intervention order to remain in force for six weeks. This effectively suspended an order previously made by consent in the Family Court whereby the husband was entitled to access to the children for three consecutive weeks during each Christmas school holidays. After the making of the intervention order, the wife took the children away for a holiday to an undisclosed destination. During the currency of the intervention order, the husband sought the issue of a warrant to enforce access to his children.

**HELD: Application refused.**

**As there was no evidence explaining the circumstances leading to the making of the intervention order, and the wife's whereabouts were unknown, it was inappropriate to order the issue of a warrant during the currency of the intervention order.**

**FREDERICO J:** [1] The husband is entitled to access to the four children of his former marriage pursuant to an order of this Court made by consent pursuant to the *Family Law Act* 1975 on 11th March 1983. In addition to alternate weekend and other periods, the order provided for access for "three (3) consecutive weeks during each Christmas school holidays". The four children are in the custody of the wife. On 18th December 1987 the wife obtained orders *ex parte* from Mr Griffiths SM in the Magistrates' Court at Heidelberg pursuant to the recently proclaimed *Crimes (Family Violence) Act* 1987 (Vic.). Such order provided as follows:

- "1. THAT the Defendant ZISSIS JACK MINAS be prohibited from approaching within half a kilometer of the home of the Complainant, FREDA CHARLOTTE MINAS at 39 Severn Street, North Balwyn in the State of Victoria, or within half a kilometer knowingly of the Complainant and her family members.
2. FURTHER more the Defendant is prohibited from contacting, harassing, threatening or molesting the Complainant and her family members and the Defendant is prohibited from causing any other person to engage in such conduct.
3. THE Defendant is to be served with a copy of this Order forthwith.
4. THIS Order is to remain in effect until the 29th day of January, 1988."

The wife was advised by her solicitors that the Magistrate's order effectively suspended any access to which [2] the husband was entitled until the date specified in the Magistrate's order, the 29th January 1988. She took the children away for a holiday to an undisclosed destination.

On 13th January 1988 the husband instituted proceedings in this Court for a warrant pursuant to section 64(10) of the *Family Law Act* for the Australian Federal Police to take possession of the children and deliver them to him to enable him to exercise the access to which he is entitled under the order of the Family Court of Australia. Service was effected by delivering sealed copies of the application and supporting affidavit to the wife's solicitors on the record. Being unaware of the whereabouts of the wife they have been unable to obtain instructions from her.

I have a discretion as to the issue of a warrant to enforce access. In the circumstances of this case it does not appear to me appropriate that I should order the issue of the warrant, at

least during the currency of the Magistrate's order, which remains in effect until 29th January 1988.

"Family member" is defined in the *Crimes (Family Violence) Act* to include spouse or former spouse and children. The Act empowers a Magistrates' Court to make a wide range of intervention orders against a person if satisfied on the balance of probabilities that the person has assaulted a family member or caused damage to property of a family member and is likely to do so again, or has threatened to assault a family member or cause damage to property and is likely [3] to do so or has harassed or has behaved in an offensive manner to a family member – and is likely to do so again.

The intervention orders which the Magistrate may make include restraint from approaching or being in the vicinity of family members, premises, or a locality specified in the order. An intervention order remains in force for a period not exceeding twelve months. Appeal is by way of rehearing in the County Court of Victoria. The circumstances which led to the complaint being brought before the Magistrate do not appear from the evidence before me. Nor am I aware of the evidence which was given orally before the Magistrate. Indeed, as the application was made *ex parte*, neither is the husband.

The evidence before me does disclose, however, that the Magistrate was made aware by the wife's counsel of the access order of this Court in favour of the husband, and took the view that his order, by its terms, would override the husband's entitlement to Christmas holiday access. In the circumstances I must assume that the Magistrate acted responsibly in making the order. I must assume that the oral evidence before the Magistrate justified him in effectively depriving the husband of Christmas holiday access.

The access order in this Court was made having regard to the welfare of the children as the paramount consideration and the other considerations under s64 of the *Family [4] Law Act*. In considering the complaint under the *Crimes (Family Violence) Act* the Magistrate was not so constrained. None the less, I must assume that the Magistrate properly found that there were circumstances which rendered it inappropriate for the husband to have contact with the children prior to 29th January 1988.

The wife's whereabouts are unknown. Acting on legal advice she has taken the children away to an unknown destination and has not yet returned. She, through her solicitors, is unable to place before me the evidence which persuaded the Magistrate to make the order on 18th December 1987. Thus, *prima facie*, there are factors which are unknown to me which make it inappropriate for the husband to have access prior to 29th January 1988. In these circumstances I consider it inappropriate to issue a warrant requiring the Australian Federal Police to take possession of the children and deliver them to the husband.

On that ground, in the exercise of my discretion, I decline to issue the warrant. There are other factors, not the least that whilst the Australian Federal Police would be obliged to give effect to any warrant pursuant to an order of this Court, the Victorian Police would be obliged to enforce the order of the Magistrate, of which the husband would be in breach were he to be in possession of the children. Such a head-on conflict is to be avoided.

[5] Mr Udorovic, on behalf of the husband, has sought to raise the constitutional issue, that so far as the provisions of the *Crimes (Family Violence) Act* purport to override the provisions of the *Family Law Act* they are *ultra vires* the State of Victoria. He so submits notwithstanding the provisions of section 114(AB) of the *Family Law Act* which preserve certain prescribed State legislation, the *Crimes (Family Violence) Act* being a prescribed law pursuant to Regulation 19 of the *Family Law Regulations* 1984. There are difficulties in accepting his submission. Could it be said, for instance, that the legislation whereby a person is committed to prison for a criminal offence is *ultra vires* the State if the sentence of imprisonment has the effect of frustrating an order for access made by the Family Court?

Section 78(B) of the *Judiciary Act* 1903 requires that upon the constitutional issue being raised, the hearing should be adjourned whilst notification is given to the Attorney-General for the Commonwealth and for the State. Whilst I propose to direct that a copy of these reasons be

forwarded to those authorities, the order of the Magistrate would have expired by effluxion of time well before the constitutional issue raised by Mr Udorovic could be determined, and the proceedings would thus be abortive. In any event I am dismissing the husband's application for other reasons, and I am entitled to do so having regard to the urgency of the matter, and in the interests of justice, under section 78(B)(5) of the *Judiciary Act*.

[6] The husband's possible ground of complaint is that the Magistrate has made an order in his absence without his having the opportunity of being heard and that thus there has been a denial of natural justice. It would appear that the Magistrate acted under section 8 of the *Crimes (Family Violence) Act* which provides as follows:

"(1) A court may make an interim intervention order whether or not a copy of the complaint for the intervention order has been served on the defendant if the court is satisfied that it is necessary to ensure the safety of the aggrieved family member pending the hearing and determination of the complaint.

(2) A court must not make an interim intervention order unless the complaint is supported by oral evidence.

(3) An interim intervention order made in the absence of the defendant only operates until the time specified in the order or the further order of a court."

Unfortunately the Magistrate's order, on its face, is in the terms of a final order, rather than an interim order. Nor does it provide for the husband to come in and be heard at short notice. It would be of concern if, as alleged from the bar table, the Clerk of the Magistrates' Court has informed the husband that he cannot obtain a hearing prior to 29th January 1988 when the order lapses and his entitlement to Christmas holiday access has expired in any event. The Judges of this and other courts have continually stressed the care which should be taken in making and formulating *ex parte* orders.

[7] In these circumstances, if the husband cannot obtain a hearing before the Magistrate the appropriate course is either to appeal to the County Court of Victoria, or to apply by way or prerogative writ to the Supreme Court of Victoria. The time element would render the first course impracticable and the husband has not chosen to follow the second alternative. As it seems likely that further cases will arise as to apparent conflict between orders for custody, access, or occupation of property made in this Court under the *Family Law Act* and orders made by magistrates under the *Crimes (Family Violence) Act*, in addition to directing that copies of these reasons be forwarded to the Attorney-General of the Commonwealth and of the State of Victoria, I will direct a further copy to the Chief Stipendiary Magistrate of the State of Victoria. The order of the Court is that the application of the husband filed on 13th January 1988 is dismissed. I direct that copies of these reasons be forwarded forthwith to the Attorney-General for the Commonwealth of Australia and the Attorney-General for the State of Victoria and the Chief Stipendiary Magistrate of the State of Victoria.