IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Revised
Not Restricted
Suitable for Publication

ELLIOT MALLOYE (A PSEUDONYM) Appellant

v

ALEXANDREA MALLOYE (A PSEUDONYM) Respondent

JUDGE:	JUDGE PILLAY
WHERE HELD:	Melbourne
DATE OF HEARING:	5 December 2019
DATE OF RULING:	5 December 2019
CASE MAY BE CITED AS:	Malloye (a pseudonym) v Malloye (a pseudonym)
MEDIUM NEUTRAL CITATION:	[2019] VCC 2104

REASONS FOR RULING

Subject:	Family Violence Intervention Order
Catchwords:	Intervention order appeal – costs – whether exceptional circumstances exist – meaning of exceptional circumstances
Legislation Cited:	*Family Violence (Protection) Act* 2008
Cases Cited:	*Stevens v Baxter* [2009] VSC 257; *Quinlivan v Spectrum Imaging Pty Ltd* [2015] FWC 4750*; Douglas v Dole & Ors* [2019] NTSC 80
Ruling:	Appeal allowed.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr M Dempsey	Tony Hargreaves & Partners Lawyers
For the Defendant	Mr D Martin	KCL Lawyers

HIS HONOUR:

1 On 8 May 2019, Alexandrea Malloye[1] made application for an Intervention Order ("IVO") pursuant to the *Family Violence Protection Act* 2008 (Vic). An interim IVO was made. As part of that interim order application, Ms Malloye alleged Elliot Malloye[2] had perpetrated economic abuse against her within the meaning of s.6 of the Act. Mr Malloye has at all times denied those allegations.

2 Pursuant to s.78 of the Act, on 7 August 2019, Ms Malloye and Mr Malloye agreed by consent to IVO orders of two years' duration without admissions as to the underlying allegations of economic and other abuse.

3 The parties remained in dispute as to whether costs should be paid by Mr Malloye in favour of Ms Malloye. Contested arguments then occurred. In the result, Magistrate Bott ordered Mr Malloye pay Ms Malloye's costs and fixed an amount. Mr Malloye now appeals from this order of Magistrate Bott, as to costs. The parties otherwise agreed that the IVO orders for two years' made by consent and without admission, should remain in force.

4 This court considers Mr Malloye's appeal on the issue of costs as a hearing de novo.

5 The parties positions were put by way of submissions and tendered material. Counsel for both parties made further oral submissions.

6 For the appellant, Mr Dempsey, made the following points.

7 First, the Act at s.154 makes it explicit that each party must bear their own costs. This expresses a clear legislative intent, he said, by use of mandatory language.

---

1 A pseudonym
2 A pseudonym

8 Secondly, such a mandatory command could only be departed from where there are exceptional circumstances, or, I interpolate, bad faith; a point which was not pressed by Ms Malloye.

9 This is where the real debate between the parties arose. Mr Malloye submitted that a consideration of exceptional circumstances would not involve looking at the subject matter of the substantive IVO application.

10 It was submitted that this was in line with the principles of *Stevens v Baxter* [2009] VSC 257 and the similar principles underpinning s.85J of the *Sentencing Act* 1991 (Vic) and the crimes compensation scheme generally as set out from s.85B to s.85J.

11 In contrast, Ms Malloye submitted through her counsel, Mr Martin, that there is no reason the court ought not look at the substantive matters raised in the IVO application in considering the term "exceptional circumstances". He relied on *Quinlivan v Spectrum Imaging Pty Ltd* [2015] FWC 4750 and *Douglas v Dole & Ors* [2019] NTSC 80.

12 Alternatively, Mr Martin submitted that the behaviour of Mr Malloye, other than that which formed the basis of the IVO application and set out at paragraph 20 of his submissions, constituted exceptional circumstances. He identified Mr Malloye's texts, financial dealings, and alleged lack of candour in his affidavit, as such matters.

13 Having considered the material, I find in favour of the appellant, Mr Malloye, and I will set aside the learned magistrates' order as to costs only. I do so for the following reasons.

14 First, there is a clear legislative presumption in s.154 of the Act, that costs must not be awarded. This is, no doubt, to dissuade disputes as to costs, complicating a process which is often difficult for aggrieved parties to negotiate, particularly in family disputes. It stops, in particular, costs being

used as a weapon in litigation.

15 Secondly, and as a corollary to the first point, it promotes resolution of exactly this kind, the making of consent orders, without the need for speedy consensual resolution to be caught up in litigation over costs.

16 Thirdly, in considering the issue of whether exceptional circumstances permit regard to be had to the substantive behaviour alleged to be the basis for the IVO, I consider it would be wrong to look at that material usually. I consider it will sometimes be a consideration, as the term "exceptional circumstances" should be given a broad and flexible meaning.

17 In this regard, I rely on the like reasoning of His Honour Forrest J. in *Stevens v Baxter*.[3] Though s.85J is not an identical provision, I consider the principles underlying the scheme set out at s.85B to 85J, the same as those in issue here.

18 Further, consideration of the very subject matter of the IVO would lead to an undermining of the ability to reach agreement and settle IVOs, as was done here, without additional trauma and stress to the parties, if the issues were just to be litigated again during a costs argument.

19 That is, in my opinion, inconsistent with the broad legislative intent set out at s.2(8) of the Act. Such intent can be seen also in s.78 which was introduced by Act 18 of 2010.

20 When regard is had to the terms of that section, it may be asked rhetorically, why permit resolution by consent and on a no admissions basis, and then have the parties agitate the very issues in dispute, just for the sake of costs? This to me, seems inconsistent, with the intent of s.78 and supports Mr Malloye's proposition.

[3] [2009] VSC 257

21 Fourthly, and if I am wrong about whether I can consider the substantive matters alleged in the IVO, I consider they do not rise to a level which could be considered to constitute exceptional circumstances.

22 Mr Malloye put in his submissions that “exceptional” ought be given the meaning His Honour Redlich JA took from the Oxford English Dictionary Second Edition, as meaning, "Unusual, special, out of the ordinary course". Ultimately, Mr Martin accepted this formulation.[4] I would agree with him that this does not mean "exceptional" imposes a higher burden than might be imposed if the word "special" was used.

23 Applying that meaning to the current case, I am unable to determine that it warrants determination as "exceptional circumstances".

24 First, none of the behaviour is admitted; rather denied, and the denial was the basis for the settlement.

25 Second, and even if I accepted the alleged behaviour occurred, both leading to the IVO application, to the date of settlement, and until today, I would classify that behaviour into the following categories.

(a) The usual subject matter of such IVO applications.

(b) The usual course of litigation in IVO matters in the magistrates' court and on appeal; and

(c) The affidavit material as being compliant with orders of His Honour Judge O'Neill, such that it is not out of the ordinary.

26 I consider paragraphs 3 to 5 of the affidavit of Mr Malloye do no more than raise issues in dispute which may be the subject of argument and, even if found in Ms Malloye's favour, would not lead to a finding of being matters out of the ordinary.

[4] *R v Ioannou* [2007] VSCA 277 at 16

27 In summary, therefore, I uphold the appeal.