# PQR v Sundram [2020] TASSC 21: a case note

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On 3 June 2020, the Chief Justice delivered reasons in *PQR v Sundram*, in which he quashed convictions of breach of Police Family Violence Order.[4]

This judgment is a timely reminder that Family Violence orders and Police Family Violence orders cannot operate to diminish or override the effect of parenting orders.

We are all used to "do not approach" restraints being made "subject to any order for time or communication with children made by a Court of competent jurisdiction." This case supports the contention that it does not matter if the restraining order states that or not – it is still inherently subject to a parenting order to the extent of any inconsistency. It is certainly authority for the proposition that the standard "must not approach" order is a principal order; and subsequent orders, such as not approaching the children's school, being adjunct or ancillary orders. Regardless of whether the ancillary order contains the "exception" or not, it thus cannot override a parenting order.

What will override a parenting order? Bail conditions will, but they are temporary and usually not part of the facts of the case.[5] Family Violence orders cannot.

**How ought this influence our practice?**

- The wrong advice (or lack of advice) can expose clients to criminal sanction. We all need to view the State order and cross reference it against any existing parenting order, and give our clients advice. A "must not approach" provision will have no effect, for example, whether or not exceptions are noted, if the parenting order enables one parent to collect from outside the other parent's home.
- Chairpersons of conferences and mediations need to ensure that they have a copy on file.
- Practitioners must be conversant with sections 68P and 68Q of the *Family Law Act* 1975, section 33 of the *Family Violence Act* and section 106GE of the *Justices Act* 1959. We must recall that the opposite applies with respect to orders made pursuant to the *Children, Young Persons & their Families Act* 1997.[6]
- Practitioners should ensure a copy of existing parenting orders are annexed to an application for a family violence order or full details are provided in the relevant space on the forms (paragraph 8 of forms).
- Criminal lawyers must always alert their clients to the relationship between parenting and violence orders and must refer clients to a family lawyer or to a family law advice service if any inconsistency exists.
- The exceptions for parenting plans, court events, mediations etc are unaffected and ought still be included when desired.

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[4] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASSC//2020/21.html
[5] *Kavanagh & Kavanagh* [2016] FamCAFC 233
[6] Section 69ZK *Family Law Act*

**Facts of *PQR v Sundram***

Mr PQR ('the Father') has two daughters. An order made by Judge Baker on 4 July 2014 provides for him to spend time with them each alternate week from Thursday to Monday. Another order made on that day provides for the Father to collect and return the children from their respective schools.

Four years later, on 3 July 2018, a police sergeant made a police family violence order against the Father for the protection of his former partner and his two girls. Order 3 of that order prohibited the Father from being within 50 metres of his former partner and his daughters, save in accordance with..."an order of a court of competent jurisdiction."

Further, Order 11 of the PFVO prohibited the Father from being within 50 metres of the girls' schools, "where [the children] may be present from time to time."

The agreed facts were that the Father went to or within 50 metres of the school on nine occasions between July 2018 and February 2019. On three of those occasions, his daughter was not at school at the time. All but one of those occasions fell within the time the Father was supposed to be spending time with his daughters pursuant to the parenting order.

The Father was charged with several counts of breaching the PFVO by going within 50 metres of his daughter. He was charged with several other counts of breaching the PFVO by going within 50 metres of the school, plus one breach of bail.

**Magistrates Court**

Chief Magistrate Geason heard the case in October 2019. Her Honour noted that section 33 of the *Family Violence Act* 2004 reads,

> An FVO, an interim FVO, an external family violence order and a PFVO operate subject to any Family Court order [defined as any order made under Part VII of the *Family Law Act*].

Her Honour dismissed the charges relating to the Father coming within 50 metres of his daughter but did find him guilty on the charges relating to him coming within 50 metres of the school, and the associated charge of breach of bail. Her Honour concluded that the PFVO and the parenting order were capable of co-existing. Her Honour noted that the Father would have to drop the children off at least 50 metres from the school, but that the order did not prevent him from spending time with the children.

**Supreme Court**

On appeal, Chief Justice Blow found that Chief Magistrate Geason was right in dismissing the charges relating to the Father approaching his daughter at times when he was supposed to be spending time with her. However, he also found that the

charges of approaching within 50 metres of the school should also have been dismissed.

For a start, three of the charges related to times when neither of the children were at the school. Given the qualification in the order "where [the children] may be present from time to time," those convictions could not stand.

More fundamentally, however, the Chief Justice found that the 50-metre prohibition was inconsistent with the parenting order. That inconsistency arose, the Chief Justice found, because of the purpose of the prohibition, being the protection of partners, former partners, and children.

**The court order exception – does it actually do anything?**

You will recall that Order 3, which prohibited the Father from approaching within 50 metres of his children, had an "order made by a Court of competent jurisdiction" (parenting order) exception attached to it. Order 11, which forbad the Father from approaching within 50 metres of the school, had no exception. Contrary to Chief Magistrate Geason's conclusion, Blow CJ determined Order 11 was an ancillary order and acted as an adjunct to Order 3. Consequently, owing to section 33 of the *Family Violence Act* 2004, as there were inconsistencies between the PFVO and FCC Orders, the FCC Orders prevailed.[7]

The Chief Justice found that as the parenting order provided for the children to be in the Father's care from Thursday to Monday each alternative week, and the 50-metre school prohibition in the PFVO purported to operate at all times, it was clear that there was an inconsistency between the two orders, at least when the children were meant to be in the Father's care.

Are restraining orders which do not contain the "court order exception" equally as subject to parenting orders as those which do contain such an exception? Following the reasoning of the Chief Justice, the answer must be yes, and the 'court order exception' clause must be otiose,[8] although perhaps a good reminder to all those reading the order.

**What about equal shared parental responsibility?**

The only conviction which was upheld related to one occasion when the Father went to the school at a time when he was not meant to be spending time with his daughter pursuant to the parenting order. Mr PQR argued that the 50-metre prohibition was, in

[7] No mention was made by either judicial officer of Division 11 of Part VII of the *Family Law Act*, in particular section 68Q. That is because that section deals with the situation whereby a parenting order is made which is inconsistent with a pre-existing family violence order. In this case, the parenting order was made first.

[8] It is important to note that section 33 of the *Family Violence Act* 2004 only operates in relation to Part VII of the Family Law Act (parenting orders) and therefore would not cover a situation where a Family Court or FCC judge made an order for a party to attend the former matrimonial home to collect items as part of their financial proceedings.

fact, inconsistent with his equal shared parental responsibility for his daughter. The Chief Justice rejected that argument and said,

> [The 50 metre prohibition] may create an impediment to communication with teachers and school authorities, but such an impediment does not detract from a parent's duties, powers, responsibilities and authority."

**Further reading**

*P v P* [1994] HCA 20; (1994) 181 CLR 583

*Juries Against Illegal Laws Incorporated v The State of Tasmania* [2010] FCA 578

*Kavanagh & Kavanagh* [2016] FamCAFC 233

*AA v BB* [2013] VSC 120; (2013) 296 ALR 353

*Dunne v P* [2004] WASCA 239; (2004) 29 WAR 232

*State of New South Wales v Cruse (No. 2)* [2014] NSWSC 128

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