

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

**NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS](http://www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications)**

**IN THE FAMILY COURT  
AT TAURANGA**

**FAM-2015-070-000515  
[2016] NZFC 4032**

IN THE MATTER OF      THE DOMESTIC VIOLENCE ACT 1995  
  
BETWEEN                      LALLY LOVELL  
   Applicant  
  
AND                              ALAN SUDWORTH  
   Respondent

Hearing:                      20 January 2016  
  
Appearances:                P Bromiley for the Applicant  
   F Mackenzie for the Respondent  
   D Blair Lawyer to Assist  
  
Judgment:                    20 January 2016

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**JUDGMENT OF JUDGE S J COYLE  
[as to removal of counsel to assist]**

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[1]      On 3 November 2015 Her Honour Judge Binns, as duty Judge, made a Temporary Protection Order against Mr Sudworth.

[2]      In para [11] of Her Honour’s minute she directed the appointment of lawyer to assist the Court and noted “see s 81(1)(a) DV Act to represent the interests of the children”. Mr Blair was duly appointed by the Court.

[3] This matter has now been set down for a hearing on 25 January next to determine whether the temporary protection order is to be made final or not. Mr Blair by email has raised with the Registry an issue as to whether his appointment is to remain as counsel to assist. I have looked at the issue, and I have reached the view that his appointment as counsel to assist is *ultra vires* and this minute sets out my reasons for reaching that view.

[4] Section 81 of the Domestic Violence Act 1995 (“the DV Act”) provides for the appointment of counsel to assist, and the appointment of the lawyer to represent the children. However the circumstances in which lawyer for children can be appointed are limited to when an application is made on behalf of a child in a representative capacity (see s 81(1)(b)).

[5] Section 81(1)(a) clearly provides the Court with a statutory basis to appoint a lawyer to assist the Court. However that section must be read in conjunction with ss 9B and 9C of the Family Courts Act 1980 (“FCA”). Those sections provide as follows:

**9B Role of lawyer appointed to represent child or young person in proceedings**

- (1) The role of a lawyer who is appointed to represent a child or young person in proceedings is to—
  - (a) act for the child or young person in the proceedings in a way that the lawyer considers promotes the welfare and best interests of the child or young person:
  - (b) ensure that any views expressed by the child or young person to the lawyer on matters affecting the child or young person and relevant to the proceedings are communicated to the court:
  - (c) assist the parties to reach agreement on the matters in dispute in the proceedings to the extent to which doing so is in the best interests of the child or young person:
  - (d) provide advice to the child or young person, at a level commensurate with that child's or young person's level of understanding, about—
    - (i) any right of appeal against a decision of the court; and
    - (ii) the merits of pursuing any such appeal:
  - (e) undertake any other task required by or under any other Act.

- (2) To facilitate the role set out in subsection (1)(b), the lawyer must meet with the child or young person and, if it is appropriate to do so, ascertain the child's or young person's views on matters affecting the child or young person relevant to the proceedings.
- (3) However, subsection (2) does not apply if, because of exceptional circumstances, a Judge directs that it is inappropriate for the lawyer to meet with the child or young person.
- (4) A lawyer appointed to represent a child or young person in proceedings may—
  - (a) call any person as a witness in the proceedings:
  - (b) cross-examine witnesses called by any party to the proceedings or by the court.]

**9C Role of lawyer appointed to assist court**

- (1) The role of a lawyer who is appointed to assist the court in proceedings is to—
  - (a) provide independent legal advice to the court on any complex factual or legal issue requested by the court:
  - (b) offer an impartial perspective in relation to any issue arising in the proceedings:
  - (c) undertake any other task required by or under any other Act.
- (2) A lawyer appointed to assist the court in proceedings may—
  - (a) call any person as a witness in the proceedings:
  - (b) cross-examine witnesses called by any party to the proceedings or by the court.

[6] Section 81 of the DV Act and ss 9B and 9C of the FCA complement each other in that s 81 provides jurisdiction for the appointment of counsel, while ss 9B and 9C of the FCA define counsel's role in either capacity. Section 9B specifically provides for the role of lawyer appointed to represent children or young persons in the proceedings, and that is a distinct role under the FCA from that of counsel to assist.

[7] The role of counsel to assist is proscribed and very limited; the role is defined in s 9C(1)(a) to (c) inclusive. The direction of Judge Binns was for counsel to assist

to represent the interests of the children. That brief does not align with any of the proscribed functions in s 9C(1)(a) to (c) inclusive. In effect Her Honour has, with the greatest of respect, circumvented the express limitations imposed by the legislation and in a de facto sense, appointed a lawyer to represent the interests of the children under the DV Act under the guise of counsel to assist. That approach is entirely inconsistent with s 81(1)(b) which specifically provides for the appointment of lawyer for children only in circumstances where a representative application is made in respect of a child or children. There is no such application in this case.

[8] In this case the Court has clearly not required counsel to assist to provide independent legal advice on a complex factual legal issue. While it is arguable that offering an “impartial perspective” (the voice of the child) could be inferred from Judge Binns’ brief, such an interpretation is only open if s 9C(1)(b) is construed narrowly and in isolation from s 9B and s 81(1)(b) of the DV Act. However such a narrow interpretation of 9C(1)(b) is at odds with the surrounding provisions in the FCA and s 81 itself; it is a fundamental principle of statutory interpretation that one section must be read in light of the surrounding and other sections of the Act, and cannot be interpreted in isolation.

[9] Nor does s 83 of the DVA assist. This section defines those who may be present at a hearing under the DVA, and includes officers of the Court, parties, media representatives, and lawyer for children appointed under s 7 of the Care of Children Act 2004 (COCA). That section, in my view, does no more than what it states; proscribes who may attend a hearing. It does not confer rights of audience or standing, and does not define role. Thus lawyer for the child, appointed in relation to COCA proceedings may attend a hearing under the DVA, and do no more than observe pursuant to s 83. If Parliament had intended that children could be represented in DV proceedings in the same manner that they are represented in COCA proceedings, then the Act would have provided for the appointment of Lawyer for the Child under the DVA.

[10] That being my view it is accordingly an improper use of the resources of the State to continue Mr Blair’s appointment in circumstances where his appointment is without proper lawful foundation. He should be paid for his fees to date as he has

taken the appointment in good faith. But having been alerted to the issue by Mr Blair, I am duty bound to terminate his appointment to prevent future call upon the State's funding. Therefore Mr Blair's appointment as counsel to assist the Court is terminated with the thanks of the Court.

S J Coyle  
Family Court Judge