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**IN THE FAMILY COURT
AT AUCKLAND**

**FAM-2012-044-000545
FAM-2013-044-001589
[2016] NZFC 3764**

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| IN THE MATTER OF | DOMESTIC VIOLENCE ACT 1995 and CARE OF CHILDREN ACT 2004 |
| BETWEEN | STACEY BAILEY Applicant |
| AND | DAMIAN LYLE Respondent |

Hearing: 18 - 22 April 2016

Appearances: L Kenny for the Applicant
M Flannagan for the Respondent
C Elliott Lawyer for Child

Judgment: 7 June 2016

RESERVED JUDGMENT OF JUDGE D M PARTRIDGE

[1] Stacey Bailey and Damian Lyle first met [details deleted]. They began a relationship in 2009 and Ms Bailey became pregnant approximately six weeks later. Their precious daughter, Harlow, was born on [date deleted] 2010. She is now six years old.

[2] Their relationship faced a number of obstacles as a result of their different family experiences, parenting styles and belief systems. Mr Lyle's diagnosed anxiety and the [details deleted] were additional complications. None of these were insurmountable on their own, but together they created a tornado of difficulties in the relationship which led to the parties' separating in 2012, and the first round of parenting applications being filed. Such was their commitment to raising Harlow in a two parent family; the parties attended counselling and reconciled, only to separate for a second and final time on 8 July 2013, a few days after [details deleted].

[3] This separation marked the start of a very distressing time for the parties and Harlow, which included allegations of unsafe parenting, alcohol abuse, mental health issues, and sexual abuse of Harlow. The latter resulted in Harlow being subjected to an evidential video interview and a medical examination. Mr Lyle had fractured contact with Harlow as a result of the various allegations.

[4] On 1 August 2013 Ms Bailey applied without notice for an order granting her Harlow's day to day care and supervised contact with Mr Lyle. The application was placed on notice and was opposed by Mr Lyle. On 21 October 2013 Mr Lyle filed an application for a protection order against Ms Bailey, which she opposed. A five day hearing was allocated to determine both applications.

[5] An extensive number of affidavits have been filed. Three social worker's reports¹ under s132 of the Care of Children Act 2004 (COCA) and two reports under s133² were obtained. During the course of the hearing I heard evidence from the parents, three social workers, a pharmacist and Dr Calvert.

¹ Dated 31 January 2014, 13 April 2015 and 27 July 2015.

² By Dr Sarah Calvert dated 5 May 2014 and updated on 30 March 2015.

[6] The following issues arise:

- (a) Should a protection order be made against Ms Bailey?
- (b) What must the Court consider when making parenting orders?
- (c) How does the Court assess a child's safety?
- (d) Did Mr Lyle sexually abuse Harlow?
- (e) Are there any other safety issues for Harlow in the care of either parent?
- (f) Should the CYRAS notes be amended?
- (g) What parenting orders should be made for Harlow?

[7] I will first consider whether a protection order should be made as the outcome of that application will impact the other issues to be considered.

(a) Should a protection order be made?

[8] Mr Lyle seeks a protection order against Ms Bailey. He alleges psychological abuse in the form of harassment. This is denied by Ms Bailey.

The law – Domestic Violence Act 1995 (DVA)

[9] The object of the Act is to reduce and prevent violence in domestic relationships by recognising that all forms of domestic violence is unacceptable behaviour; and by ensuring that there is effective legal protection for victims when domestic violence occurs.³

[10] The Court must be satisfied of three matters before making a protection order:

1. There is a domestic relationship between parties.⁴

³ Section 5.

⁴ Section 7.

2. Domestic violence has occurred within the meaning of s 3.⁵
3. A final order is necessary for the protection of the applicant or a child of the applicant's family.⁶

[11] If the three grounds are made out, the Court retains a residual discretion whether or not to make an order.

[12] Section 3 defines domestic violence as physical abuse, sexual abuse or psychological abuse. Psychological abuse includes, but is not limited to, intimidation, harassment, damage to property, threats of abuse, financial or economic abuse and, in relation to children, allowing a child to be exposed to domestic violence.

[13] Section 14(3) requires the Court to consider whether behaviour that may appear minor or trivial when viewed in isolation, or appears unlikely to recur, forms part of a pattern of behaviour which the applicant, or a child of the applicant's family, or both, need protection from.

[14] Section 14(5) sets out the matters which the Court must have regard to when determining whether or not to make a protection order. Those are:

- (a) The perception of the applicant, or a child of the applicant's family, or both, of the nature and seriousness of the behaviour in respect of which the application is made; and
- (b) The effect of that behaviour on the applicant, or a child of the applicant's family, or both.

[15] The Court of Appeal in *Surrey v Surrey*⁷ considered the principles to be applied. The Court found the summary of legal principles outlined by Priestley J in *K v G*⁸ to be useful. These principles are as follows:

1. Whether a protection order is necessary requires consideration of all relevant factors.

⁵ Section 14(1)(a).

⁶ Section 14(1)(b).

⁷ [2008] NZCA 565, [2010] 2 NZLR 581.

⁸ [2009] NZFLR 253, referred to at [118] of *Surrey v Surrey*.

2. It is an error to use the mandatory s 14(5)(a) requirement as a fulcrum for a case.
3. Despite s 14(5)(a), the Court needs to assess the reasonableness of the subjective perception of an applicant.
4. Whether or not a protection order is necessary is an objective exercise, informed by a number of factors, including the subjective perception of an applicant. That perception, however, is not the only relevant factor.
5. It is not always sufficient to ground a protection order on the fact that such an order will give an applicant peace of mind. It is not Parliament's intention that protection orders should be used to protect people from unrealistic and unreasonable fears.

[16] The Court qualified this by saying that where an applicant's subjective fears are reasonable, it would not necessarily be an error to use the mandatory s 14(5) requirement as a fulcrum for a case.

[17] The Court also endorsed the list which Judge Walsh compiled in *Colledge v Hackett*⁹ of factors the Court may take into account when deciding if an order is necessary. The factors include:

1. Did the violence occur so long ago in the past that its effect is spent? The time that elapsed since the violence occurred is relevant.
2. Was the violence a one off event with no lasting threat of future abuse?
3. Was the violence simply symptomatic of the breakdown of the relationship? If the parties have since separated the threat of violence may have dissipated.
4. Is the character of the applicant such that it is hard to see why that person should need protection?
5. What is the perspective of the applicant and the effect on the applicant? Arguably the Court must take this into account.
6. What are the views and wishes of any child who is involved in the situation?
7. Have other protective matters been taken with the result that the applicant does not need the protection of an order?
8. Has the respondent disappeared, gone overseas, etc, so the protection of a Court order is superfluous?

⁹ [2000] NZFLR 729 (FC) at p 13, referred to at [121] of *Surrey v Surrey*.

Evidence

[18] It is not disputed that the parties were in a domestic relationship.

[19] Mr Lyle alleges that Ms Bailey has psychologically abused him by harassing him in the following ways:

1. At his property - Entering his property; attempting to enter his home; taking his dog; shouting at him when jogging past; and watching the property to see if he had someone there.
2. Gathering information about him - checking his and his friend's car registration numbers through LTA; taking photos of a boat on the property; talking to his neighbour; looking up his friend's business Facebook page; and using this information to formulate a complaint to the Legal Services Agency to investigate his entitlement to legal aid.
3. [Details deleted].
4. Making allegations against him - to the police that he had a gun on the property; to Child, Youth and Family (CYFS) that he had sexually abused Harlow; and to lawyer for child that he had burgled his mother's home.

[20] These behaviours are alleged to have occurred before and since Mr Lyle filed his application for a protection order.

[21] For the most part Ms Bailey does not deny the allegations but seeks to justify her behaviour, although she does deny entering Mr Lyle's property to photograph the boat. She states that she took the photo from the neighbouring park. Mr Lyle produced a photo to demonstrate that the boat could not be seen from the park. Ms Bailey stated that she had taken the photo from a different part of the park. In light of Ms Bailey's admissions of the other allegations, I am satisfied that she would have acknowledged taking the photo on the property if she had done this.

[22] Ms Bailey justifies entering the property because she used to live there and he had retained her items that she wanted to recover. She justified informing the Police that Mr Lyle had a gun because Harlow had told her this.¹⁰ She told lawyer for child that he had burgled his mother's address, because his mother told her he had.¹¹

[23] She acknowledged checking Ms Beu's licence plate through LTA and looking at her Facebook page. She did this because she wanted to find information to prove Mr Lyle had a girlfriend and had breached the agreement by introducing Harlow to her. She gave Legal Aid information about Mr Lyle because she did not think he should receive legal aid if he did not fulfil the financial criteria. She was aware that his legal aid could be withdrawn as a consequence.

[24] Ms Bailey confirmed [details deleted].

[25] Ms Bailey believed her actions were justified and takes no responsibility for the consequences. It is clear that she is motivated by a strong need to prove that Mr Lyle tells lies and is not to be trusted.

Decision

[26] I am satisfied on the balance of probabilities that Ms Bailey has psychologically abused Mr Lyle by harassing him in the ways alleged. These are, for the most part, acknowledged by Ms Bailey.

[27] Whilst each of the incidents appears relatively minor and trivial in isolation, the number and variety clearly forms a pattern of abuse. Mr Lyle believes he requires the protection of an order as he fears that Ms Bailey's behaviour will not cease unless an order is made. Her behaviours continued after she was warned, after he filed his application for a protection order, and leading up to the date of the hearing. His perception is that the behaviour is serious and he is wary and concerned because he does not know what she will do next. These concerns led to him being reluctant to answer questions about Ms Beu in evidence because he was concerned that she would be subjected to harassment by Ms Bailey.

¹⁰ Mr Lyle denied this, his house was searched, and no gun was found.

¹¹ There is no evidence that he did this.

[28] Mr Lyle has a diagnosis of generalised anxiety disorder. Ms Bailey is aware of this. This diagnosis means that Mr Lyle is additionally vulnerable and the impact of Ms Bailey's behaviour is greater as it increases his anxiety, which could potentially impact his ability to parent Harlow.

[29] Ms Bailey's position is that an order is not necessary and she will not behave in this way in the future. I regard that with some scepticism, given her adamant belief that Mr Lyle tells lies and this must be proved. There is no cogent evidence before the Court that Ms Bailey accepts that her actions were wrong, or that she would not continue to behave in a similar manner in the future if she believed this was justified.

[30] In the circumstances I consider Mr Lyle's fear of future abuse is reasonably held. I believe there is a high risk that Ms Bailey will continue to harass him in the future. I am satisfied that a protection order is necessary for the protection of Mr Lyle.

[31] When making a protection order the Court must direct the respondent to attend a non-violence programme unless the Court considers there is a good reason not to do so.¹³ I see no reason at this time why Ms Bailey should not be directed to attend an individual programme specifically designed for persons who have behaved in the manner she has. Dr Calvert has recommended that Ms Bailey undergo a psychiatric assessment and psychoeducational therapy. If Ms Bailey undertakes this, she may seek a variation of this direction for the programme to be provided by her therapist.

[32] If Ms Bailey's therapy progresses well and she gains insight into her behaviour, the Court may consider an application to discharge the protection order at a later date.

(b) *What must the Court consider when making parenting orders?*

The law – Care of Children Act 2004

¹³ Section 51D(2)(b) DVA.

[33] When making decisions about children's care arrangements, s 4 requires the Court to consider the welfare and best interests of a child in their particular circumstances as the first and paramount consideration. In doing so, the Court must take into account the principle that decisions affecting a child should be made and implemented within a timeframe appropriate to the child's sense of time, the principles set out in s 5, and any views the child expresses.¹⁴

[34] Section 5(a) mandates that a child's safety must be protected and, in particular, a child must be protected from all forms of violence. The other s 5 principles provide that there should be continuity in a child's care, development and upbringing, which is primarily the responsibility of their parents and guardians and should be facilitated by ongoing consultation and cooperation. There should be continuity in their relationships with their parents, and relationships with their family group, whānau, hapū and iwi, and their identity should be preserved and strengthened.

(c) How does the Court assess a child's safety?

The law – Care of Children Act 2004

[35] Sections 5(a), 5A and 59 provide guidance to the Court when assessing a child's safety.

[36] As noted above, s 5(a) requires the Court to ensure that a child is protected from all forms of violence. Because a protection order is in place, the Court must consider the circumstances and the reasons the order was made pursuant to s 5A.

[37] Under s 59 the Court may order supervised contact if it is not satisfied that a child will be safe.¹⁵ The Court has a broad discretion to determine whether supervision should be ordered. The section does not specifically refer to safety from violence. Therefore, an assessment of a child's safety, including emotional and psychological safety, is required.

¹⁴ Section 6.

¹⁵ Section 59(1)(b).

[38] Prior to the amendments to COCA on 31 March 2014, ss 60 and 61 provided a statutory guideline of factors to be considered when assessing a child's safety. It was long recognised that the sections codified the approach of the Court of Appeal in *M v Y*.¹⁶ While those sections have been repealed, it is clear from the case law that the matters to be considered remain the same.

[39] In *M v Y*, Hardie Boys J stated¹⁷:

Where an allegation of sexual abuse is made — and the same is no doubt true of any allegation of misconduct bearing on the welfare of the child — the Court's task is twofold. First, it must deal with the allegation; and secondly, it must determine the application before it in the light of all the circumstances that are relevant to the child's welfare, including its findings upon the allegation. The second aspect, involving as it does a much wider issue than the first, is the Court's primary function, and the result is not necessarily dependent on the outcome of the first. ...

In dealing with the allegation, the Court should apply the civil standard of proof, commensurate with the gravity of the allegation. Applying that standard, it may be satisfied that the abuse has occurred. But I respectfully agree with the caution expressed in *M v M* at p 77; p 77,081 that “there are strong practical family reasons why the Court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so”. The Court may, on the other hand, be satisfied that the abuse has not occurred, as Temm J was in this case. It is then right that the allegation should be expressly rejected. In many cases, perhaps most, the Court will be unable to reach a conclusion with any confidence. It is in that situation that an assessment of risk must be made. That assessment may lead to the conclusion that there should be no contact between parent and child, or to the conclusion that there should only be access that is monitored or supervised or otherwise controlled or limited. At this point the two aspects of the Court's task begin to merge but the distinction between them is important and must not be lost sight of.

... A risk is unacceptable if it is one to which the child should not responsibly be exposed. That in turn can be measured only in terms of possibility. If the possibility that abuse will occur or has occurred (for if it has occurred the risk that it will recur is obvious) is great, then it may be an unacceptable risk to allow any access at all. If the possibility is slight, then the risk involved in even unrestricted access may be acceptable. Within these extremes, the magnitude of the risk may depend very much on the kind of access that is to be allowed. It is a matter of balancing the competing interests — in each case primarily the child's interests — of continuing parental association against the risk of harm resulting from that association.

[40] In *LDP v KLP*¹⁸, Fogarty J summarised the applicable principles in this way:

¹⁶ [1994] 1 NZLR 527

¹⁷ At p 533 – 534

[37] It seems to me that Parliament has adopted the three options posed by the Court of Appeal in *Y v M* and *S v S* by enacting 60(1) and (6). This has resolved the tension between s 60(1) and s 60(6). They are:

- (i) requiring a determination that it has been proved, before finding that a parent has sexually abused a child;
- (ii) leaving it open to the Judge to utterly clear the parent of any finding of violence if the complainant is baseless, when applying s 60(1)(b);
- (iii) making no finding under s 60(1), but rather relying on subs (6) to make a risk finding when neither of these clear cut outcomes can be made with confidence.

[38] ...where allegations [*of sexual abuse*] are as serious as this with enormous consequences ... the test is one of proof beyond reasonable doubt. Only then can there be a determination that the allegation be ‘proved’ as required by s 60(1)(b).

[41] Given the gravity of sexual abuse allegations, I accept that the standard of proof to be applied is beyond reasonable doubt. That is, I can only conclude that Harlow has or has not been sexually abused by Mr Lyle if I am certain about this. Otherwise, I will conclude that I cannot make a finding. I must then assess whether there are risks to Harlow’s safety in the unsupervised care of one or both parents having regard to the evidence and ss 5(a), 5A and 59, and determine what orders should be made.

(d) Did Mr Lyle sexually abuse Harlow?

[42] There are three allegations of sexual abuse of Harlow by Mr Lyle which were reported to CYFS:

First allegation: 2 September 2013

[43] After the first supervised contact visit on Father’s Day, Harlow put two fingers in her vagina. Ms Bailey asked why she was doing that, and Harlow responded “so daddy won’t be busy anymore”.¹⁹ Ms Bailey had earlier told Harlow that daddy was busy when she was upset at the end of the contact visit and wanted to know why she could not see him.

¹⁸ [2012] NZFLR 278

¹⁹ Section 132 report dated 24 April 2014, page 7, final paragraph.

[44] While investigating this report, the social worker was informed that a year earlier Harlow's maternal grandmother saw her poking her finger at her teddy bear's genital area. When she was asked what she was doing, Harlow said "I'm fucking the hole".²⁰ The social worker concluded that sexual abuse was not substantiated.²¹

Second allegation: 18 August 2014

[45] The day after a contact visit Ms Bailey saw Harlow touching her vagina, and asked her whether daddy does that to her. Harlow responded "yes" and said with his "willy". Harlow was referred for an evidential video interview (EVI) which occurred on 26 August 2014, and for a medical assessment at Te Puaruruhau.

[46] The specialist EVI interviewer informed Ms Bailey and the social worker allocated to investigate the report of concern that Harlow had disclosed sexual abuse. On that basis the social worker substantiated sexual abuse.

Third allegation: 24 November 2015

[47] Ms Bailey reported statements that Harlow had made in November 2014, March 2015, and April 2015, which caused her concern. Harlow was not having any contact with her father at the time the statements were made, as contact had ceased following the second allegation in August 2014.

[48] The investigating social worker read the CYRAS notes²² and the second s 133 report.²³ She formed the view that it would be abusive to interview Harlow or refer her for EVI. She concluded that sexual abuse was not substantiated.

The EVI and investigation

[49] The allegation on 18 August 2014 is the most serious of the three allegations. It prompted the allocated social worker to consult with colleagues, Police and specialist interviewers and make a referral for EVI and a medical examination.

²⁰ Ibid, page 8, paragraph 1.

²¹ Ibid, page 10, paragraph 3.

²² A computer-based record of social worker notes and reports.

²³ This was released by the Court to the Ministry of Social Development in December 2015.

Following the EVI the specialist interviewers reported that Harlow had disclosed sexual abuse. The social worker did not view the EVI.²⁴ Only the specialist interviewer and monitor knew the details of what was said. A written EVI summary report was subsequently provided to the social worker and placed on CYRAS.

[50] Based on this information the social worker substantiated sexual abuse and recommended that contact was supervised pending Police investigation. The Police took no steps. CYFS took no further action. The medical examination found no evidence of sexual abuse. The medical report recorded “no specific genital findings were identified, which does not refute the allegation.”²⁵ Mr Lyle had no contact with Harlow for sixteen months. Supervised contact resumed in December 2015.

[51] In the course of Ms Bailey’s evidence it became evident that she had not viewed the EVI. It transpired that although counsel and the Court had seen it, the parties and the social workers had not viewed it. Arrangements were made for it to be played in Court at the start of the second day of hearing in the presence of counsel, the parties and the social workers who would be giving evidence.

[52] This was important because it was readily apparent when viewing the EVI that an important piece of information about Harlow’s ‘disclosure’ was missing from the information provided to the social worker by the specialist interviewers. Dr Calvert had viewed the EVI in the process of completing her second s 133 report, and also noted this discrepancy.

[53] The interviewers omitted to report that Harlow had said that when her father touches her on the foot, knee and arm with his “willy”, both he and Harlow are fully clothed. Each of the three social workers who saw the EVI in Court and subsequently gave evidence acknowledged that this was a key piece of information which had been omitted from the EVI report.

[54] The social worker who substantiated sexual abuse gave evidence that if she had seen the EVI at the time she was investigating the allegation, she would not have

²⁴ I understand the protocol is that the social worker does not view the EVI but relies on the summary provided by the specialist interviewers.

²⁵ Section 132 report dated 22 July 2015, page 2 of report of Te Puaruruhau, paragraph 6.

concluded that sexual abuse was substantiated. Whilst the EVI outcome was only one piece of information that led her to that conclusion at the time, it was a crucial piece of information – and it omitted an important fact.

[55] Ms Bailey's belief that Harlow has been sexually abused by Mr Lyle was not diminished after viewing the EVI. She stated that she was more concerned for Harlow, and more convinced that she had been sexually abused by Mr Lyle based on Harlow's ability to recall specific details in the EVI about other things, such as her visit to Butterfly Creek, and wearing a particular t-shirt. She did not believe it congruent that Harlow accurately recalled details about seemingly benign things but that her details about other matters, such as being made to touch a deer carcass and being sexually abused by her father, may not be accurate.

What is the likely cause of Harlow's behaviour?

[56] In Dr Calvert's opinion none of the allegations of sexual abuse diagnostically support a finding that sexual abuse has occurred.

[57] Dr Calvert described Harlow's behaviour as self-soothing and most likely associated with anxiety, not indicative of sexual abuse. She explained that it is perfectly normal for children from the age of one to touch their genitalia. It is also normal for a child of her age to give an answer, whether accurate or not, when asked a question by someone in authority or of importance in their lives. Therefore, Harlow's answer "so daddy won't be busy anymore" does not indicate abuse. Nor does Harlow's language, as children pick up on interesting language, such as swear words, when they are exposed to other children and adults.

[58] Dr Calvert explained that Harlow is aware of the escalation of her mother's anxiety about her father, and therefore when she did something that she perceived her mother did not like, she would be likely to say it is something to do with her family. Dr Calvert described this as:

... an excellent example of what we call a maintaining cycle here. The more the difficulties in this family system cause stress, the more Harlow provided

information that her mother interpreted a certain way, the more the situation became more distressed and the more behaviour.²⁶

[59] In respect of the substantiation of sexual abuse, Dr Calvert's view was that CYFS should have adopted a more thoughtful approach to the notification, given that proceedings were before the Family Court. She stated it was:

... not unusual to see a social worker record in CYRAS that there has been some form of abuse, despite there never having been a proper or formal investigation, based on the statement of a person that the social worker believes is a credible witness to events that are said to have happened to a child. It is helpful in this case that having reviewed the evidence that might've been available to them had they chosen to access it, they have determined that in fact that no evidence substantiates the allegations.²⁷

[60] Dr Calvert expressed concern that repeat notifications and repeated interviewing puts Harlow's safety and protection at risk. It makes her extremely vulnerable in the event that something unpleasant does happen to her because her evidence may not be accepted or may be considered compromised because of her previous interviews. This will also disrupt her relationship with her father, if he is the alleged perpetrator.

[61] Having carefully considered the evidence I am satisfied beyond reasonable doubt that Mr Lyle has not sexually abused Harlow.

(e) Are there any other safety issues for Harlow in the care of either parent?

[62] Both parents allege that Harlow is at risk in the other parent's care. In addition to the allegation of sexual abuse considered above, Ms Bailey believes that Harlow is at risk of physical and psychological abuse and neglect with Mr Lyle. She alleges that he:

1. Allowed Harlow to be physically abused by Hally Beu.
2. Has psychologically abused Harlow by - leaving her unattended; exposing her to a dead deer; threatening to kill Ms Bailey and the dog; and leaving Harlow and Ms Bailey alone in a park.

²⁶ Notes of Evidence, page 451, line 28.

²⁷ Notes of Evidence, page 415, line 5.

3. Abuses alcohol.
4. Has unstable mental health, including mood swings; and uses alcohol while taking medication.

[63] In affidavit evidence Ms Bailey alleged that Mr Lyle had pushed her onto the bed and threw a laundry basket at her in July 2013²⁸. Mr Lyle denied this. There is no evidence that Harlow was present during this alleged incident. This allegation was not tested in evidence. I infer from that that Ms Bailey does not seek to rely on it. Ms Bailey's affidavit is inconsistent with her other evidence. On the evidence available to me, I am not satisfied that Mr Lyle has been physically abusive to Ms Bailey. I further note that Ms Bailey subsequently consented to Mr Lyle having unsupervised contact with Harlow after this incident.

[64] Mr Lyle believes that Harlow is at risk of psychological abuse in Ms Bailey's care. He alleges that she psychologically abuses Harlow by exposing her to her anxiety; her behaviour towards Mr Lyle and lack of insight; making complaints to CYFS with the potential that Harlow may be subjected to further interviews or examinations; videoing Harlow while questioning her; and by gatekeeping Harlow's contact with Mr Lyle which impacts on their relationship.

Did Mr Lyle allow Harlow to be physically abused?

[65] Ms Bailey alleges that on 8 June 2014 Ms Beu hit Harlow on the knuckles. She said that at changeover Harlow showed her her knuckles and told her that "Jelly" had hit her when she tried to grab her book. Ms Bailey believed she must have been hit hard because her knuckles were red. Harlow said that her father ran her hand under cold water.

[66] Ms Beu filed an affidavit denying that she had hit Harlow. She was not available to give evidence and I therefore put little weight on her affidavit.

[67] Mr Lyle acknowledged that Ms Beu was present that day but said that she had never been alone with Harlow. Harlow was within his hearing at all times. He

²⁸ Affidavit of Stacey Bailey dated 1 August 2013 at para 21.

could not recall anything of concern that happened to Harlow that day and she did not tell him she was hit. He denied putting Harlow's hand under a tap.

[68] Mr Lyle denies calling Ms Beu "Jelly" or "Jelly Belly" as alleged.²⁹ This denial led to Ms Bailey making two videos where she unwisely questioned Harlow specifically about the incident and "Jelly".

[69] Dr Calvert's report records that Mr Lyle told her he called Ms Beu "Jelly". She acknowledged that she may have recorded this incorrectly. It was submitted that an issue of credibility arises about whether this incident occurred. I do not consider Harlow's reference to "Jelly" to be of any significance because the identity of the alleged perpetrator (Ms Beu) is not disputed. Nor do I accept that matter adversely affects Mr Lyle's credibility to the extent that his evidence cannot be believed, particularly when faced with an abundance of other evidence.

[70] I am not satisfied that Harlow was hit by Ms Beu. I prefer Mr Lyle's evidence, noting that he was present throughout the contact period. The allegation is incongruent with the evidence. If Harlow had been hit which resulted in her knuckles being red some time later, it is likely that would have caused her significant distress and she would be unlikely to have been placated by her hand being held under a tap. I also do not accept that Mr Lyle would have permitted someone to hit Harlow when his evidence is that he would not hit her himself.

Has Mr Lyle psychologically abused Harlow?

[71] Ms Bailey alleges that Mr Lyle lacks the ability and insight to parent Harlow and has subjected her to psychological abuse by leaving her pram to smoke a cigarette a short distance away; not adequately supervising Harlow, during which she picked up a knife; and leaving Ms Bailey and Harlow in the park at dusk for approximately 10 minutes. The s 132 reports record that these allegations were investigated and social workers concluded that no care or protection issues arose.

²⁹ He maintained this in evidence.

[72] Ms Bailey alleges that Mr Lyle told Harlow that he was going to kill Ms Bailey and her parents' dog with a sword. Mr Lyle denies these allegations and stated that he has no reason to harm someone's animal.

[73] Ms Bailey alleges that when Harlow returned from contact on 15 August 2014 her clothes and hands smelled pungent and like meat. Harlow told her she had "reindeer" for dinner; she had seen the deer's head; her father made her touch the deer's fur; and she had eaten the fur. Harlow confirmed this in the EVI. Mr Lyle denied this. He said he cut up a piece of venison³⁰ to put in containers. Harlow assisted him by washing out the containers. There was no fur on the meat and at no time did she touch the meat or blood. The deer carcass and head were left on the farm where it was caught. When they finished, he took Harlow for a swim at the pools prior to returning her to her mother's care.

[74] The parties have very different sets of values and beliefs. Mr Lyle hunts and Ms Bailey saves animals. Harlow has a significant and age-appropriate imagination, which includes fantasy. Dr Calvert stated that Harlow's comments about the deer are hallmarks of Harlow's imagination and trying to understand how this fitted into the world.

[75] I find that Mr Lyle has not psychologically abused Harlow.

Is Mr Lyle's alcohol use a risk to Harlow?

[76] Ms Bailey alleges that Mr Lyle has an alcohol problem which impacts his ability to care for Harlow. Her concerns are the amount he drinks, and that he drinks while taking prescribed medication for anxiety.

[77] Mr Lyle described a pattern of alcohol use that was within accepted guidelines. He said he consumes up to three Jim Beam mixers three or four nights a week. He had not consumed alcohol when Harlow had been in his sole care. Ms Bailey conceded that his consumption is within alcohol advisory guidelines. She acknowledged she has no personal knowledge of his current alcohol use.

³⁰ About the size of a leg of lamb.

[78] Ms Bailey's belief that Mr Lyle should not consume alcohol because he takes medication led to [details deleted].

[79] There is no evidence before the Court that Mr Lyle is unable to consume alcohol whilst taking his prescription medication. The medication packages clearly record that alcohol should be limited. This does not mean prohibited. Ms Crofts is a pharmacist who has dispensed Mr Lyle's medication in the past. She gave evidence confirming that Mr Lyle's reported level of alcohol consumption would not have any adverse effects on his medication. Despite this, Ms Bailey continues to maintain that Mr Lyle should not consume alcohol while he is taking his prescribed medication. I do not find that Mr Lyle's current alcohol use is of concern.

Does Mr Lyle's mental health pose a risk to Harlow?

[80] Mr Lyle's mental health is relevant when assessing whether this impacts on his ability to safely parent Harlow. Mr Lyle has a diagnosis of general anxiety disorder. He is compliant with his prescribed medication. His mental health is reported as stable. He was discharged from his psychiatrist over a year ago and is monitored by his GP. Ms Crofts confirmed that the medication Mr Lyle is prescribed is consistent with a diagnosis of an anxiety disorder.

[81] Ms Bailey does not accept this diagnosis. She believes that Mr Lyle suffers from depression. In evidence she also described him as a sociopath based on her research of some of his characteristics. Dr Calvert reviewed some of Mr Lyle's medical information in the course of preparing her reports. She confirmed that he had not been diagnosed with antisocial personality disorder, which is the formal diagnosis for someone who is a sociopath.³¹

[82] Whilst it would have been useful for the Court to have some updated information about Mr Lyle's mental health, the absence of this is not crucial in light of other evidence available. The reality is that Mr Lyle has anxiety which he has lived with for some time. He has had panic attacks in the past and has learned strategies to control this. His last panic attack was one to two years ago.

³¹ Notes of Evidence, page 469, line 9.

[83] Ms Bailey refers to Mr Lyle having mood swings, being hard to wake, and referred to an incident in 2012 when Mr Lyle arrived at her parents' home having cut his wrists. She inferred that this was a self-inflicted injury and relied on this to illustrate his unstable mental health, and the need to protect Harlow from this. Mr Lyle could not recall the latter incident but stated that he had cut himself many times in the past, sometimes quite badly, when working with steel. The parties' evidence is disparate, and there is no corroborative evidence.

[84] It is noteworthy that the parties reconciled briefly after this incident, and that Ms Bailey consented to Mr Lyle having unsupervised contact with Harlow following Dr Calvert's first report. I conclude that Ms Bailey accepted that there were no concerns or risks to Harlow at that time arising from Mr Lyle's mental health. There is no evidence of any significant concern since that time.

[85] Dr Calvert was questioned about the impact of Mr Lyle's mental health on Harlow. Her answer provided some useful insights into Mr Lyle's condition³²:

Mr Lyle will have a lifelong likelihood of having periods of having increased anxiety and periods of decreased anxiety. He has a diagnosis of a generalised anxiety disorder, so that is what we call the aetiology. Anxiety disorders, like any other form of mental disorder, do not preclude people from being parents or from parenting effectively and well and engaging happily in family systems. In fact, it's a breach of the Human Rights Code in New Zealand to consider that mental illness precludes people from normal activities within or society. And that is because there is no evidence that suggests that, in of themselves, a mental illness makes somebody somehow less than the rest of us, as a participant in all aspects of our society. Mr Lyle has a long history of excellent engagement with mental health services. That is an advantage, of the length of time that these proceedings have been before the Court, is that we can see that Mr Lyle continues to engage with mental health services when he perceives himself to be having difficulties. He engages with psychiatrists, he takes his medication, he goes to see psychologists. All of that would, in my view, give the Court some comfort in considering his presentation because that's not necessarily usual for people with mental health difficulties to be as cooperative in maintaining their wellness, as Mr Lyle has clearly been.

[86] In the circumstances, I do not consider that Mr Lyle's mental health poses an unacceptable risk to Harlow.

Has Ms Bailey psychologically abused Harlow?

³² Notes of Evidence, page 429, line 16.

[87] Mr Lyle believes that Ms Bailey has psychologically abused Harlow by exposing Harlow to her behaviour as a result of her own anxiety. This is evidenced by her videoing Harlow while questioning her in respect of the allegation she was hit; her ongoing allegations to CYFS; her campaign to prove that Mr Lyle is not truthful; and her gate-keeping of Harlow's contact with him because he is unsafe. She further demonstrates lack of insight of the impact of these on Harlow.

[88] Ms Bailey said that she videoed Harlow while questioning her about being hit by Ms Beu so her lawyer would believe her. That behaviour only served to reinforce to Harlow that Ms Bailey thought something bad had happened to her in her father's household. Taking three videos within a short time, two of these when Harlow was in the toilet, raises concern about Ms Bailey's insight into her behaviour. This is also evidenced by the lengths she went to try to prove that Mr Lyle had a girlfriend and had been untruthful, and her justifications for her behaviour which are centred on her need to prove that Mr Lyle lies and cannot be trusted.

[89] The consequences of Ms Bailey's actions have a direct impact on Harlow which she fails to appreciate. The most significant is the impact on Harlow's relationship with Mr Lyle as their contact was disrupted and restricted.³³ Dr Calvert stated that this has had a detrimental effect on the father/daughter relationship. Mr Lyle must also bear some responsibility for the relationship disruption as he has not readily availed himself of the supervised contact, and did not attend some visits when Harlow was expecting to see him.³⁴

[90] I find that Ms Bailey has psychologically abused Harlow.

(f) Should the CYRAS notes be amended?

[91] I have been invited to comment in respect of the EVI process and amendment to the CYRAS notes in light of the social worker's evidence that, having seen the EVI, her view has changed and she now does not believe that sexual abuse is substantiated in respect of the notification in August 2014.

³³ Including time, venue and supervision restrictions.

³⁴ One of these was because of a miscommunication about the time of the visit.

[92] It is of concern that the process adopted by CYFS in cases where children have made an allegation of sexually inappropriate behaviour which results in an EVI is that the allocated social worker does not view that EVI, but relies on the interviewer's report of the EVI. Whilst this is only one piece of information to be considered, social workers regard this as crucial information to formulate their conclusion of whether or not sexual abuse is substantiated.

[93] It may be that this process is adopted because the time constraints and workloads of social workers do not allow the luxury of thoroughly examining every piece of information, and social workers should be entitled to rely on reports of specialist interviewers. However if this process fails, as it has in this case, serious consequences can follow.

[94] The crucial piece of information omitted from the specialist interviewer's report in the context of the 'disclosure' was that at the time the sexual abuse was alleged to have occurred, both Harlow and her father were fully clothed. This detail was not known to the social worker. After viewing the EVI, the social worker stated that she no longer considered that sexual abuse was substantiated.

[95] The consequence to Harlow of a finding that sexual abuse was substantiated was that her contact with her father was effectively suspended. The social worker recommended supervised contact pending the Police investigation, however Ms Bailey was reluctant to agree to anything but supervised contact even after the Police decision not to take matters further. It is perhaps understandable after a finding of sexual abuse, that she wanted supervisors who would protect Harlow from further abuse. It is also understandable that Mr Lyle did not agree to supervised contact and wanted unsupervised contact once the Police investigation was concluded. The tragic consequence for Harlow was that she had no contact with her father for the sixteen months between August 2014 and December 2015, while she waited for her parents to resolve the issue of contact.

[96] I am of the view that an addendum should be added to the original CYRAS notes to record that after viewing the EVI the social worker no longer believes that sexual abuse is substantiated. Counsel were unclear about how this can be done. If

the original entry is flagged and cross-referenced to another part of the file which records the correction, this has the potential to be missed by those subsequently viewing the notes. It seems preferable that an addendum is added to the original notes.

[97] Counsel for MSD sought a copy of this decision to enable her to make enquiries about how the CYRAS notes can be updated with this information.

[98] How any future notifications about Harlow should be investigated is a matter for CYFS. I simply record that further risks to Harlow may be limited if a social worker familiar with this file is allocated to investigate any future notifications.

(g) What parenting orders should be made for Harlow?

[99] Ms Bailey seeks day to day care of Harlow and for Mr Lyle's contact with Harlow to be supervised, ideally at a supervised contact centre. Mr Lyle seeks unsupervised contact with Harlow, with the ultimate goal of shared care.

[100] Harlow's views have been provided through lawyer for child's memoranda and the reports of Dr Calvert. Ms Bailey acknowledges that Harlow enjoys spending time with her father and misses him when contact does not occur.

[101] I am satisfied that no safety issues exist for Harlow in the care of either parent which requires her care to be supervised at this time. However, in light of the fragmented and irregular contact that Mr Lyle has had with Harlow to date, it is important that she has a period of settled supervised contact before contact progresses to unsupervised.

[102] Both parties require further education in order to parent Harlow at an optimum level. Dr Calvert raises concern that Ms Bailey also suffers from anxiety, which impacts on Harlow. She recommends that she undertakes a psychiatric assessment and psychoeducational therapy. She also recommends that Mr Lyle completes the Incredible Years parenting programme.

[103] Given what has occurred, Dr Calvert considers it is essential that Harlow engages with an experienced psychologist as a priority to address her own anxiety and for psychoeducation about her family and education to keep herself safe. She points out that as both of Harlow's parents exhibit anxious behaviours, and one has a diagnosed anxiety disorder, Harlow has a genetic pre-disposition to developing anxiety which increases her vulnerability. She currently exhibits 'tick' behaviour which may well be anxiety-based. It is important for Harlow that both parents support her therapy. The Court has no jurisdiction to fund this, and her parents are not in a financial position to do so. Harlow is not eligible for ACC funding. Lawyer for the child proposes that MSD funds Harlow's therapy. Whilst I cannot direct them to do so, I consider this would be an appropriate step in the circumstances, and in the absence of any other suitably qualified alternative.

[104] Both parents must understand that if they do not undertake the tasks that have been identified as required, this may impact on their ability to care for Harlow.

[105] The parties distrust and are suspicious of the other. This does not bode well for a positive co-parenting relationship moving forward. However, as Harlow's guardians they are required to work together in her best interests. It is probable that they will require the assistance of an experienced psychologist. I am not minded to direct counselling under s 46G of the COCA at this stage as each parent has other matters to focus on at this time. If a referral is subsequently sought, this request can be referred to me.

[106] In the circumstances, I intend to make interim parenting orders which will be reviewed in six months when the Court can reassess Harlow's situation in light of the progress both parties and Harlow have made, and having regard to her care arrangements. An updated report from Dr Calvert will be essential to assess whether, and to what extent, the required changes have been made, and the resulting impact of this on Harlow.

Conclusion

[107] A protection order is necessary to protect Mr Lyle from Ms Bailey's harassment.

[108] I am satisfied beyond reasonable doubt that Mr Lyle has not sexually abused Harlow. I find that there are no safety issues for her in his care. I am further satisfied that Harlow will be safe in Mr Lyle's unsupervised care, following a short period of settled supervised contact. It is important that Mr Lyle undertakes the Incredible Years parenting programme.

[109] Although there are risks for Harlow's psychological safety in the care of Ms Bailey, at this stage they are not at a level which prevents her from having Harlow's day to day care, or requiring supervision. However, it is crucial that Ms Bailey undertakes the assessment and therapy recommended by Dr Calvert.

[110] It is also essential that Harlow engages with an experienced psychologist as a priority for psychoeducation about her experiences and assessment of her anxiety. It is imperative that this is arranged as soon as possible for Harlow given her current presentation of 'tick' and other behaviours.

[111] Interim parenting orders will allow Harlow's care arrangements to be reviewed in light of the therapy and programmes to be undertaken. An updated s 133 report will be obtained to assist the Court for the review.

[112] The CYRAS notes should be amended to reflect the social worker's updated conclusions of the August 2014 notification after viewing the EVI.

Orders

[113] I make a protection order against Ms Bailey in favour of Mr Lyle.

[114] Ms Bailey is directed to attend an individual non-violence programme. She may apply to vary the programme direction if she undertakes psychotherapy to address these issues. Any application filed is to be referred to me for consideration.

[115] I make an interim parenting order granting Ms Bailey the day to day care of Harlow.

[116] I further make an interim parenting order granting Mr Lyle contact with Harlow as follows:

- (a) *Stage 1* - For four consecutive weekly visits supervised by Therativity or such other agency agreed between the parties. Any visits which Ms Bailey cancels are not to be included in the calculation of consecutive visits. By consent Ms Bailey will fund the first three hours of contact.
- (b) *Stage 2* - Provided that Mr Lyle has commenced the Incredible Years programme, contact shall be unsupervised after the four stage 1 visits, and will occur each Saturday from 9.00 am to 6.00 pm for four visits.
- (c) *Stage 3* - After four stage 2 visits, contact will occur each week from 9.00 am Saturday to 5.00 pm Sunday for eight visits.
- (d) *Stage 4* - Provided that Mr Lyle has completed the Incredible Years parenting programme, after eight stage 3 visits, contact will occur each week from 3.00 pm Friday to 5.00 pm Sunday for eight visits.
- (e) *Stage 5* - Thereafter, contact will occur on a two-weekly cycle being:
 - i. Week one – from after school Friday to before school Monday.
 - ii. Week two – from after school Wednesday to before school Thursday.

School Term Holidays

- (f) Term time contact will be suspended during the school holidays and Christmas holidays.

- (g) In the September 2016 and April 2017 school holidays, contact will occur from after school on the last day of the school term to the first Wednesday at 5.00 pm.

Christmas Holidays

- (h) From 5.00 pm 24 December 2016 to 1.00 pm 25 December 2016.
- (i) In the 2016 Christmas school holidays, from 5.00 pm on the Friday of the week school closes to the following Wednesday at 5.00 pm in weeks one, three and five of the school holiday period.

[117] These interim orders are on the following conditions:

- (a) All changeovers that do not occur at school shall occur on the roadside of each of the parties' driveways. Mr Lyle will collect Harlow at the beginning of contact and Ms Bailey will collect her at the end of contact.
- (b) The parties will consult with each other by email about all guardianship matters, except for emergency medical matters, when the parties will contact each other by telephone or text.

[118] Leave is reserved to lawyer for child to bring the matter back before the Court for further orders or directions on three days' notice.

Directions

[119] Both s 133 reports are to be released to the therapists for Harlow and Ms Bailey to assist them in their therapeutic role.

[120] A copy of this decision and the notes of Dr Calvert's evidence are to be released to counsel for MSD.

[121] Dr Calvert shall prepare an updated s 133 report by 16 December 2016. That report is to update Harlow's situation generally, including the progress of her therapy; the outcome of the parties' therapy and/or programmes; whether any

concerns exist for Harlow in the care of either parent; and comment on whether the care arrangements in place are meeting her needs.

[122] Both parties are to file updated affidavits no later than 18 November 2016 annexing confirmation of their attendance at therapy/programmes; and detailing how the care arrangements have been working for Harlow from their perspective, and their proposals for final parenting orders.

[123] A 30-minute conference is to be scheduled before me in the week of 19 December 2016 for further orders and directions to be made at that time.

[124] A teleconference is scheduled at 9.30am on 22 June 2016 for counsel to advise the Court whether unsupervised contact has commenced, and to enable the directions in respect of the s 133 report to be varied if required.

D M Partridge
Family Court Judge

Signed 7 June 2016 at 5.00 pm