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

NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995 AND S 139 OF THE CARE OF CHILDREN ACT 2004, 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.

IN THE FAMILY COURT
AT MANUKAU

FAM-2014-096-000521
2014-096-000522
[2016] NZFC 7386

IN THE MATTER OF	the Domestic Violence Act 1995 and the Care of Children Act 2004
BETWEEN	AMANDEEP KAUR Applicant
AND	VISHRAM KAUR Respondent

Hearing:	14 January 2016
Appearances:	Sao Timaloa for the Applicant Judith Moore for the Respondent Fiona Cowen as agent for Sarah Vyle - Lawyer for Children
Judgment:	18 March 2016

RESERVED DECISION OF JUDGE A G MAHON

Background

[1] The applicant was granted temporary protection order and interim parenting orders without notice on 2 October 2014. The applicant now seeks a final protection order.

[2] Counsel had different views about whether the hearing was also to address parenting issues as:-

(a) In her submissions dated 13 January 2016 Ms Cowan notes her understanding that "the parenting and protection proceedings are set down for hearing on 14 January 2016"[1].

(b) By contrast in their submissions counsel for both parties record that the hearing was solely to determine the domestic violence proceedings.

(c) In his minute of 11 November 2015 Judge Neal directs that the hearing is for "both parenting and protection proceedings".

It therefore appears that the hearing was to address both applications. In these circumstances I also address parenting issues in this decision but have determined it is not appropriate to make a final parenting order, as lawyer for the children invites me to do, as the evidence is insufficient for me to do so.

[3] The parties met in 2003 and married in November 2005. They have two children, who were at the time of the hearing [age details deleted]:-

Arya Kaur born [date deleted] 2006 and
Kamala Kaur born [date deleted] 2014

[4] The parties separated shortly after an incident of alleged violence on 1 September 2014.

[1] Paragraph 10 memorandum dated 3 January 2016

[5] The applicant alleges there were prior incidents of violence, one in June 2014 and previous incidents in 2013.

[6] It is relevant to this case that the parties have several businesses together, one of which operates a [business details deleted]. There has been a significant difference of opinion between them about the way in which the [business details deleted] has been managed since employment of Nilam Darzi as the business accountant. The respondent has applied to the High Court to wind up two companies of the parties as a result. The other business is a [business details deleted] which the respondent continues to manage.

The Evidence

[7] The applicant describes a marriage in which she was subject to psychological and physical abuse by the respondent.

[8] The respondent denies he has been physically or psychologically abusive to the applicant. He does however agree that there have been many arguments during the marriage but it his evidence that they only started when Mr Darzi started working for them. The respondent believes that the applicant and Mr Darzi were having an affair which the applicant denies.

[9] It is the respondent's evidence that any psychological abuse has been from the applicant to him.

Incident June 2014 ("Queens Birthday Incident")

[10] The applicant alleges that on Queens Birthday 2014 there was an incident of violence following an argument because the respondent's mother would not agree to members of the applicant's family bringing a puppy with them from Wellington to stay at the parties' home in Auckland.

[11] It is the applicant's evidence that the following day she and the respondent had a heated argument. The applicant was sitting on the sofa with Arya and the respondent tried to kick her (the applicant was 25 weeks pregnant). A family

member intervened and tried to remove the respondent from the home. As he was being escorted out of the home the respondent yelled verbal abuse at the applicant, threatened to remove her as a shareholder of the company and threw a phone at the applicant which missed her.

[12] Arya witnessed the attack and was "visibly upset" about what she saw. The respondent then noticed Arya was struggling with her breathing so she took her to Emergency Medical Centre. On advice of the medical centre staff, she went immediately to Starship hospital for medical attention to address Arya's wheezing and fever. Arya was not discharged until about 11pm that night.

[13] While the applicant alleges that the respondent threw a mobile phone (or in her report to the Police a remote) at her, the respondent's evidence is that during an argument with the applicant, he kicked a glass of milk over and dropped his mobile phone onto the ground. He describes a different version of events leading to Arya being admitted to Starship hospital but accepts that Arya was present during the argument.

Incident September 2014 (Cafe Incident)

[14] The parties met at a cafe to discuss issues in their business. Also present were the business accountant Nilam Darzi, other family members and friends.

[15] The discussions were already heated because of the challenge to Mr Darzi about his management of the business finances and in particular his professional charges. The respondent then became very angry when someone brought up the issue of the applicant's relationship with Mr Darzi.

[16] The respondent got up from his seat, came over to where the applicant was sitting, pulled her aggressively by the shoulder and tried to hit her in the face. The applicant's father intervened and the respondent then tried to hit him and Mr Darzi before he was forced to leave the restaurant.

Historical Violence

[17] The applicant also alleges that there has been a pattern of violence by the respondent to the her over previous years including:-

(a) The respondent punching the applicant in February 2014 when she was pregnant.

(b) The respondent slapping the applicant on the face and on her head when she was pregnant.

(c) Five occasions when the respondent pushed the applicant on the bed and to the ground.

(d) One occasion when the respondent whipped the applicant with a belt (February 2010).

(e) Another occasion when the respondent pulled the applicant's hair (August 2007).

(f) Constant denigration of the applicant by the respondent (psychological abuse and control).

[18] The respondent denies that he has ever been physically or psychologically abusive of the applicant or the children. He alleges that the applicant became violent and argumentative with him not long after the birth of Arya in 2010. He did not however respond to her aggression.

The Law

[19] Section 14 of the Domestic Violence Act 1995 ("the Act") provides a two-step process before the Court may grant a Protection Order. It must first be satisfied that the respondent has used domestic violence against the applicant. Secondly the Court must be satisfied that it is necessary to protect the applicant and/or children by making the order sought. The onus is on the applicant to satisfy both tests.

[20] Section 3 of the Act defines "domestic violence" as physical, sexual and/or psychological. Psychological abuse may include intimidation, harassment, property damage and threats of abuse. Section 4 goes a step further to provide that not only can a single act of violence amount to abuse but that a number of acts may amount to a pattern of violence, despite appearing minor or trivial when viewed in isolation.

[21] The application of the law in domestic protection applications was reviewed by the Court of Appeal in the landmark decision of *Surrey v Surrey* [2010] NZFLR 1. The Court of Appeal held that the applicant has to prove there has been violence and a reasonable objective fear of future violence. The evidential burden then passes to the respondent to demonstrate factors weighing against the necessity for an order.

[22] The Court also approved the approach of Hammond J in the case of *Takiriari v Kolmar* [1997] NZFLR 538, on the proper definition and application of the word "necessary". In that case, Hammond J said:

> "Whether a protection order "is necessary for the protection of the applicant" requires the consideration of all relevant factors. "Necessary" must be determined having regard to the objectives of the Act, as set out in s5 of the Statute and particularly the meaning of "domestic violence" in s 3 of the Statute. "Violence" there has an extended meaning, covering physical, sexual and psychological abuse. But those characterisations are merely incidents; the Act is clearly a remedial Statute; it is to be given a wide and liberal construction. The central feature of the Statute, properly understood, is that protection from domestic violence is directed towards the elimination of abuse of power and control in domestic relations".

[23] In *K v G* [protection order] [2009], NZFLR 253, Priestley J distilled the following principles from existing case law as:

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

(b) It is in error to use the mandatory s 14(5)(a) requirement as a fulcrum for a case.

(c) Despite s 14(5)(a), the court needs to assess the reasonableness of the subjective perception of an applicant.

(d) 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 is not however the only relevant factor.

[24] Priestley J confirmed that it was not always sufficient to base an application on the fact that an order will give an applicant "peace of mind" as it was not Parliament's intention protection orders would be used to protect an applicant from unrealistic and unreasonable fears.

Discussion

Queen's Birthday incident

[25] I found the respondent an unreliable witness. He minimised his role in the conflict with the applicant. Yet he acknowledges there was an argument and that objects were damaged during the Queen's birthday incident, when he says in his affidavit evidence[2] "I do recall kicking a glass of milk and dropping my mobile on the floor. I most certainly did not kick the applicant and I did not use the abuse that she says I did. It is true that Sati's husband suggested that we have some space between us and that I go outside, which I did. He did not grab me and try to remove me as is suggested".

[26] I do not accept this evidence of the respondent and prefer the applicant's evidence.

[27] I find that the respondent "acted out" his anger on this occasion as the suggestion that objects "fell" to the floor during a heated argument are simply not credible and I prefer the applicant's description of the incident.

Cafe incident

[2] Paragraph 11 affidavit of respondent sworn 29 October 2014

[28] I found the evidence from the parties on the 1 September 2014 incident significant to my findings on the application.

[29] The commencement of the hearing was delayed to give parties and counsel the opportunity to view the CCTV footage of the meeting (exhibit "B" to the affidavit of the applicant's sworn 18 March 2015).

[30] The respondent "emphatically" denied the incident as described by the applicant in her affidavit evidence. In his response[3], the respondent describes an incident which is different to what was recorded on CCTV. In paragraph 21 the respondent states:-

> "I deny emphatically I ever pulled the applicant aggressively by the shoulder as has been alleged or attempted to hit her in the face. Although I was frustrated, I used no violence whatsoever and in fact my uncle realised that we were making no progress and suggested that I leave straight away, which I did". *(my emphasis)*

[31] When faced with the CCTV footage showing that the respondent reacted in anger and had to be restrained, the respondent suggested the CCTV footage had "been altered" and did not show all participants at the meeting as part of the group were obscured. He suggested this was relevant to what occurred.

[32] After carefully viewing the footage I reject this explanation. While the applicant's affidavit evidence on the incident contains some exaggeration, the footage does support the report to the police on 1 September 2014 when she reported the event as follows:-

> Vishram and Amandeep attended a meeting at [location deleted] along with their accountant, and some family and friends. The focus of the meeting was Vishram accusing his accountant of fiddling the books somehow.
>
> During the meeting Vishram got upset at their accountant over some money he wanted for his business. At that moment he lost his temper, stood up and shouted at Nilam saying that he was "going to get you!". Furious he has turned to his wife Amandeep for support. Amandeep has not wanted to get involved and she has remained silent and unmoving.
>
> Vishram has tried to get her attention by pulling at her jacket and by calling her name over and over. When she didn't respond he stood up to go over to

[3] Affidavit of Applicant sworn 29 October 2014

> her, however Amandeep's father stepped in between them and stopped Vishram from approaching her. Other family members have restrained Vishram as he has continued shouting at the accountant and in turn yelling his wife's name. Family members took Vishram out of the [location deleted] to cool down and told him to go home".

[33] In reaching my conclusions I also considered the affidavit evidence of Ganesh Chaudri and the respondent's late mother Kalyani Misra. I am not assisted by Mr Chaudri's evidence and note this witness is a friend of the respondent. Nor is his evidence consistent with the CCTV footage. Ms Misra does not go into detail about the incident but rather addresses the motives for it being raised by the applicant as an example of allegations of physical violent against her son. Ms Misra states that she had not seen her son be abusive to the applicant. While I accept that Ms Misra may not have witnessed physical abuse between her son and the applicant while all three were living together, that does not mean such abuse did not occur.

[34] There were further inconsistencies in the respondent's evidence. For example the respondent denies the applicant's allegation that he threatened to close the businesses down unless she paid him $800,000. Yet he acknowledged under cross-examination that he was angry over business matters because of what he saw as the loss of value to the businesses as a result of mismanagement and even dishonesty by the business accountant, and instructed his lawyer, Paul Chambers, to state in a letter to the applicant's lawyer:-

> "The notion that your client was told by mine that he would shut the businesses down unless he received $800,000 is, quite simply, nonsense[4].

[35] Then when it was suggested to the respondent in cross examination that he directed his anger over business affairs to the applicant, the respondent replied "no I am not angry, I told her clearly, if she wants to go, she can go, pay my money back, she can go. That's why I said, "pay me $800,000 you can go. Don't involve my name in it"[5].

[36] Finally applicant's evidence that there were constant arguments over business matters and money at changeovers was supported in:

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[4] Paragraph 3 Letter of Paul Chambers to Swayne MacDonald Solicitors for Applicant 3 March 2015 Exhibit "A" to affidavit of respondent sworn 12 March 2015

[5] Lines 17 -19 page 57 Notes of Evidence

(a) comments Arya had made to her lawyer Sarah Vyle shortly before the hearing. Yet the respondent simply denied there were any arguments at changeover and he also denied making derogatory comments to applicant in front of the children (except on one occasion).

(b) the social worker's observation in the s132 report of 18 June 2015 that "Arya said that she had seen mum and dad argue often and had seen dad hit her mum although she did not wish to elaborate on this subject. She then became evasive and appeared to be on the verge of becoming upset so the issue was not pursued".

[37] There were some occasions when the applicant has appeared to exaggerate her evidence. For example in the restaurant there was some exaggeration about the extent to which the respondent allegedly assaulted her but I do not find this evidence changes my decision that on the balance of probabilities the incidents in June and September 2014 occurred as described above. I am particularly assisted in this finding by the respondent's rejection of independent evidence on the September incident which was contrary to his own evidence.

[38] As far as the historical evidence and violence is concerned, I find it probable that the respondent has been domestically violent to the applicant on previous occasions. I do not have sufficient evidence to determine whether this violence included use of a belt as alleged by the applicant.

[39] What does concern me about the ongoing financial dispute between the parties is the likelihood the dispute will continue for some time, given they are involved in litigation in the High Court and possibly also in future relationship property proceedings in the Family Court. The applicant therefore continues to be at risk of domestic violence from the respondent while the respondent is in denial as to his responses to the applicant. I am not saying that the applicant does not need to also examine her own behaviour when communicating directly or indirectly with the respondent.

[40] I have found that the respondent has as recently as 2014 used physical violence against the applicant, and he continues to be verbally abusive to her at changeovers. I also take into account his breach of the temporary order.

[41] The respondent's denial of any violence gives me no confidence that his behaviour towards the applicant will change when he is under pressure in the future.

[42] In summary I find:-

(a) The respondent has used domestic violence against the applicant.

(b) There has been a pattern of domestic violence from the respondent to the applicant in the relationship of the parties.

(c) The respondent has little insight into his use of domestic violence in addressing relationship issues with the applicant and his abusive behaviour is not minor or trivial.

[43] In these circumstances a final order is necessary for the protection of the applicant. I find the children do not need protection from the respondent but by law any final protection order in favour of the applicant also applies to the children.

[44] I find an order "necessary" because of the respondent's lack of awareness of his behaviour to the applicant. The parties needed to "navigate" the significant differences between them on financial matters in the future which could quite easily lead to a further incident of domestic violence from the respondent to the applicant. The applicant continues to therefore need protection.

[45] In all these circumstances I discharge the temporary protection order and make a final protection order in its place.

Parenting Proceedings

[46] Often when a short cause defended hearing involves both domestic violence and parenting issues, the domestic violence evidence consumes most of the hearing time as has occurred with these proceedings.

[47] I heard some evidence about changeover arrangements and the breakdown of an agreement facilitated by lawyer for child on 12 August 2015 when the applicant s withdrew her consent to the terms of a consent memorandum after she had given her written consent to the terms.

[48] In her report of 3 January 2016 Ms Vyle records her understanding of the current parenting situation:-

(a) The children are living in the day-to-day care of their mother in Manukau.

(b) The children's father also lives in Manukau and is having contact with the children on an unsupervised basis each week:-

(i) From 10.30am Saturday until 1pm Sunday with Arya; and from 10.30am until 5pm that same day with Kamala.

(ii) Changeover is direct between the parties at Ms Kaur's work (often with a staff member present).

[49] It is the view of the social worker who prepared the s132 report and also Ms Vyle that Arya is happy and secure when in her father's care. Arya has also told Ms Vyle that she is happy about staying overnight with her father but she would not want to stay more than the one night she currently does. These comments about how long Arya wants to spend with her father are however from a young child in the context of a highly conflicted relationship between her parents.

[50] I do not have enough evidence before me to make a final parenting order as Ms Vyle invites me to make. In those circumstances I make the following order/directions on the parenting proceedings:-

(a) I find that the children are safe in the unsupervised care of their father (s5(e)).

(b) I invite Ms Vyle to convene a round table meeting of the parties to again discuss the terms of a parenting order and if possible prior to the Easter break.

(c) By 4pm Thursday 7 April 2016 the parties are to file either:-

(i) a joint memorandum setting out the terms of an interim or final order agreed between them. Those terms are to include changeover arrangements where the parties are not in direct contact with each; or

(ii) separate memoranda setting out the position of each party on terms of an interim parenting orders and a brief explanation as to why orders should be made on the terms sought by that party.

(d) Lawyer for child is to file a separate updating report if agreement is not reached as a result of the round table meeting.

(e) There is to be a telephone conference before me at 9.15am on Friday 8 April 2016 in which I will make appropriate directions progressing the parenting proceedings to final hearing.

[51] The parenting proceedings are to remain on the standard track but as I have heard evidence from the parties, the case is to be case managed by me.

A G Mahon
Family Court Judge