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IN THE FAMILY COURT
AT TAURANGA

FAM-2017-070-000008
[2017] NZFC 4493

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995
BETWEEN	[ROY] Applicant
AND	[BARKER] Respondent

Hearing:	9 June 2017
Appearances:	P Eagle for the Applicant R Sutton for the Respondent
Judgment:	13 June 2017

RESERVED JUDGMENT OF JUDGE E B PARSONS

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[1] Mr [Roy] has a temporary protection made in his favour against Ms [Barker][1]. Ms [Barker] opposes that order becoming a final order under the Domestic Violence Act 1995 pursuant to section 47 of the Domestic Violence Act 1995 ("the Act", "DVA").

[2] This hearing is to determine whether the temporary protection order made in Mr [Roy]'s favour is made final or not. Mr [Roy] alleges that Ms [Barker] has been psychologically abusive towards him. Ms [Barker] denies there is any necessity for the temporary order to become final.

[3] Mr [Roy] and Ms [Barker] are the parents of one child:

- **[Elliott Roy]** born [date deleted] August 2009 ("[Elliott]") now aged 7 years 10 months old.

[4] To determine the application I have to consider (a) whether the parties were in a domestic relationship, (b) whether domestic violence has been used, and if yes to these first two questions, then (c) whether the making of a final order is necessary or not.

History of Care of Children Act Proceedings including allegations of abuse raised by Ms [Barker] against Mr [Roy]

[5] Given the nature of the psychological abuse alleged by Mr [Roy] against Ms [Barker], it is important that I set out a brief history of the previous Family Court proceedings to provide a context to those allegations.

[6] Mr [Roy] and Ms [Barker] had proceedings relating to their son's care before the Court from 2012. [Elliott] was placed in Mr [Roy]'s care by Ms [Barker], and in January 2013 the parties resolved [Elliott]'s care by way of a consent memorandum being filed. This provided for [Elliott]'s shared care – predominantly in Mr [Roy]'s care with regular contact to Ms [Barker].

[1] Temporary order granted on a without notice basis on 9 January 2017.

[7] Before orders were made on the basis of that consent memorandum, however, Ms [Barker] alleged that Mr [Roy] had been physically and sexually abusive of [Elliott]. These proceedings were not easily resolved. After a 3-day defended hearing before the Family Court[2] the matter was taken to the High Court[3] and Court of Appeal[4] by Ms [Barker] before being concluded.

[8] Both the Family Court and the High Court (on appeal) found that there was no evidence of abuse of [Elliott] by Mr [Roy] established. Both Courts also found that either consciously or unconsciously, Ms [Barker] had influenced [Elliott] in thinking he had been abused by Mr [Roy].

[9] The High Court upheld the Family Court decision and the findings that [Elliott] had not been abused by Mr [Roy], and the requirement for [Elliott]'s contact to his mother to be supervised. The Court of Appeal refused leave to appeal the High Court decision.

[10] The outcome of those proceedings results in [Elliott] continuing to be in the primary day to day care of Mr [Roy] with supervised contact reserved to Ms [Barker] – a position that was to continue until counselling had been undertaken. Ms [Barker] has not undertaken that counselling. Ms [Barker] does not exercise the supervised contact reserved to her. There is no therefore no contact between [Elliott] and Ms [Barker] other than occasional telephone contact.

[11] The Family Court order that is in force at present provides for Mr [Roy] to have day to day care of [Elliott] and for Ms [Barker] to have supervised contact at an authorised activities centre or as approved by lawyer for the child.[5]

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[2] Reserved judgment of Judge A Wills dated 31 January 2014.
[3] Decision of 30 October 2014
[4] Decision of 10 March 2016 - application to bring leave to appeal and to bring that application out of time dismissed

[5] Variation Order dated 18 March 2013. Further order dated 3 September 2014 provides for supervised contact between [Elliott] and Ms [Barker] to be funded "*by the Court under s60*" (minute of Judge Wills dated 3 September 2014). Ms [Barker] then discontinued her application for parenting orders by way of application dated 25 February 2015.

Were the parties in a domestic relationship (s4)?

[12] The parties met in 2008. They never lived together but they have had a son together.

[13] The respondent does not accept that they were ever in a *domestic relationship*. Mr [Roy]'s evidence was that they were in a relationship for 6 weeks. This evidence was not challenged or denied by Ms [Barker].

[14] The issue is therefore whether a relationship of 6 weeks, where the parties never lived together but where they did have a child together, constitutes a *domestic relationship* in terms of s4 of the Act.

[15] Section 4 provides disjunctive definitions of what constitutes a domestic relationship – a spouse or a partner[6], a family member[7], someone who ordinarily shares a household[8], or someone who has a close personal relationship[9] with the other person. The section also sets out what does not amount to sharing a close personal relationship[10]. The focus of the analysis is whether the parties were *partners* or had a *close personal relationship*.

[16] I do not need to go beyond the interpretation section of the DVA[11] to have the matter clarified. The term "*partner*" means persons who are the biological parents of the same child. Jurisdiction to make the application is established – the parties being the biological parents of their only child together, [Elliott].

Has there been domestic Violence (s3)?

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[6] Section 4(1)(a)
[7] Section 4(1)(b)
[8] Section 4(1)(c)
[9] Section 4(1)(d)
[10] Section 4(3)
[11] Section 2

[17] The judge considering the without notice application found that the evidence before him established that there had been psychological abuse[12].

[18] While a number of the allegations made by Mr [Roy] are denied, what is accepted by Ms [Barker] is that she has:

(a) Sent abusive texts[13] to Mr [Roy] on 1 January 2017 and earlier[14] (date unconfirmed);

(b) posted statements on Face book (anonymised and under a pseudonym, but accepting they refer to Mr [Roy] including as a "*fuckwit child abusing rapist* (who) *has my son*");

(c) in 2014, visited Mr [Roy]'s landlord (who wasn't there at the time) to advise of concerns about methamphetamine use by Mr [Roy] in his home – she spoke to a neighbour about this in the absence of the landlord being available;

(d) notified CYFS (as it then was) in 2015 of concerns that Mr [Roy] was using methamphetamine;

(e) placed an edited version of the child focussed interview of [Elliott] on Face book without any identifying features;

[19] Ms [Barker]'s lawyer accepts that the texts alone amount to domestic violence. He does not accept that, in the absence of findings of other abuse, there is

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[12] Minute of Judge de Jong dated 9 January 2017 "Threshold met due to the nature, extent and history of alleged violence in the form of psychological abuse; ongoing telephone calls; high risk of further violence; order is necessary."

[13] "*Did it feel good to rape my son u piece of shit did it feel good 2 have him brutally kidnapped u controlling lieing piece of shit did it feel good 2 punch him in the head! U compulsive lying child abusing piece of shit a lot of people don't like child raists and abusers like u*"

"*Did it feel good putting ur finger up him and punching him in the head u piece of shit child abusing rapist mite send all the evidence 2 ur family so they can c exactly what u r a piece of shit*"

[14] Annexure "G" of affidavit of Mr [Roy] dated 6 January 2017 – including "… I hope u get ur head punched in and beaten up and raped in prison as u did 2 to my son u sick evil twisted human being…… I hate you with an everlasting vengeance that wil never stop 2 u get what u deserve when justice wil catch up with u".

independently of that an established pattern of behaviour of domestic violence. He does, however, accept that the matters conceded by his client alone are sufficient to enable the court to move to the third step inquiry of necessity.

[20] While Ms [Barker] acknowledges that she phoned Mr [Roy] on 1 January 2017, she denies having made threats including threatening to send people around to kill Mr [Roy] or send people around who don't like child rapists. Ms [Barker] accepted that she has said to Mr [Roy] that it was not going to be his year, but explains she meant that was because she was going to get contact to their son.

[21] Ms [Barker] said in her affidavit that the parenting order provides for telephone contact between her and her son. She explained that she had phoned Mr [Roy] to talk to her son not to talk to him. The final parenting order does not however provide for telephone contact between Ms [Barker] and the parties' son.

What Constitutes Domestic Violence

[22] "Domestic Violence" is defined in s 3(1) of the Act as violence against the applicant by a person the applicant has been in a domestic relationship with.
"Violence" is defined in s 3(2) and is:

- physical abuse;
- or sexual abuse; or
- psychological abuse.(Psychological abuse includes but is not limited to intimidation, harassment, damage to property, threats of physical, sexual or psychological abuse, financial or economic abuse. Psychological abuse may include behaviour which does not involve actual or threatened physical or sexual abuse (s 3(5)).

[23] A single action may amount to abuse, or a number of actions which form a pattern of behaviour may amount to abuse even though some or all of those acts in isolation would not amount to abuse (s 3(4)).

[24] Psychological violence is often hard to name or describe. While there is no one exhaustive list of what does constitute psychological abuse, some of the characteristics of it have been identified as follows[15]:

> Behaviour which chips at a person's confidence or is designed to "put a person down" or humiliate that person;
>
> Abuse of power, which by degrees makes another person apprehensive and unsettled;
>
> Exploiting an emotional of psychological vulnerability of another party
>
> Indulging in behaviour designed to unsettle, antagonise, offend or annoy, provoke or worry another party;
>
> Implicit or explicit threats.

[25] I find that domestic violence has occurred and has been perpetrated by the respondent against the applicant. There have been comments made by the respondent which clearly humiliate, unsettle, antagonise, and/or put the applicant down. There have also been offensive and antagonistic remarks made to him and about him.

[26] I also find that there has been a pattern of behaviour amounting to domestic violence above and beyond the specific texts set out above and as specified in paragraphs [27]-[33] below.

[27] The calling of Mr [Roy] a rapist in texts to him, and on Face book postings using a pseudonym ([pseudonym deleted]) acknowledged by Ms [Barker] to be referring to him specifically but without names/identifying features, combined with threats to provide his family with "the evidence", complaints to CYFS about alleged methamphetamine usage by Mr [Roy] that was not from her direct knowledge, talking to Mr [Roy]'s neighbour (because the landlord was unavailable) amount to both specific abusive behaviours as well as a pattern of behaviour from at least 2014 to early 2017 that is abusive.

[28] Mr [Roy] has been found not to have abused his son. I am satisfied that the ongoing and unrelenting accusations of abuse, and name calling (which has triggered

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[15] ***G v C*** (1997) 17 FRNZ 201, Judge Walsh

responses of violence from others on Face book[16]), does amount to a pattern of psychological abuse. The argument that it is not abusive towards Mr [Roy] because he is not named in the postings by Ms [Barker] and because he didn't know about the postings until they were drawn to his attention is disingenuous in circumstances where Ms [Barker] confirms the postings and name calling and threats do relate specifically to Mr [Roy]. As noted in the legislation, while isolated incidents in and of themselves may not amount individually to abuse, within the broader context of the evidence of direct text abuse in the same tenor the postings do amount to a pattern of abusive behaviour by Ms [Barker] towards Mr [Roy]. I do not accept Ms [Barker]'s position that by applying for a protection order Mr [Roy] is trying to restrain her from expressing her views and opinions[17]. Her expression of views and opinions is more sinister than that. It is well beyond mere expressions of views when it is occurring within a context of direct abuse towards Mr [Roy] of the same nature, and when it includes name calling, and hopes of Mr [Roy] being beaten and raped.

[29] I find that it is more likely than not that Ms [Barker] also made the threats during the phone call to Mr [Roy] on 1 January 2017 as set out in his affidavit including threatening to kill him and send people round to get him. These threats are consistent with postings on the internet, the texts sent to him by her and her attitude towards him.

[30] While Ms [Barker] denies having made the threats, I prefer the evidence of Mr [Roy] on this point. His evidence was presented in a straight forward manner. He conceded points such as the depth of relationship when put to him by Ms [Barker]'s counsel and did not seek to over play the evidence. In contrast, Ms [Barker] was argumentative and combative in her responses. She often avoided answering questions directly, preferring to return to a rehearsed narrative of the evidence she felt had never been adequately considered in relation to the abuse of [Elliott] which she continues to very firmly believe occurred at the hands of Mr [Roy].

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[16] A posting from a [name deleted] "*one determined man with a 303 and a scope took out Kennedy mate*"

[17] Paragraph [36] of Ms [Barker]'s affidavit of 7 April 2017

[31] Ms [Barker] could not tell counsel that she did not still wish the most horrific deaths to the lawyers social workers and others involved in the consideration of the allegations of abuse as posted on the internet[18]. Her views are entrenched and implacably held.

[32] Independently of the allegations of threats made on the telephone however, there is in my view ample evidence to establish a pattern of behaviour as well as abuse and name callings to amount to domestic violence individually and as a pattern of behaviour.

[33] I am satisfied that on the basis of the concessions made by Ms [Barker] and the findings I have made above that there has been domestic violence by way of specific abuse and a pattern of abusive behaviour demonstrated by Ms [Barker] against Mr [Roy].

Is the order necessary?

[34] Once there is a finding of domestic violence *and* a reasonable subjective fear of future violence, the respondent has the onus of showing the protection order is not necessary[19]. Once I have determined that the respondent has used domestic violence against the applicant and/or a child of the applicant's family and the order is necessary, there is otherwise no discretion to decline making an order.[20]

[35] The assessment of necessity requires an assessment of the need for a protection order in the future having regard to the objects of the Act, the s14 factors[21] and any other relevant factors.[22]

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[18] Annexure "C" to affidavit of [Mr Roy] dated 6 January 2017. "To my son I am sorry you were kidnapped and beaten up and raped may the people that did this to you suffer the most horrific death there ever was."
[19] ***Surrey v Surrey*** at [77]
[20] ***Surrey v Surrey*** [2010] 2 NZLR 581 (CA) at [71]
[21] S 14 factors include s14(5)(a) the perception of the applicant of the nature and seriousness of the behaviour and (b) the effect of that behaviour on the applicant
[22] ***Surrey v Surrey*** at [38]

[36] The objects of the Act which I am required to consider are contained in s 5(3) of the DVA. Justice Priestley has made comment upon this in ***K v G***[23]:

> The s3 definition of 'domestic violence' covers a wide range of abuse. It is also important to ensure in any proceedings under the Act that the s5 objects are not diluted. Of particular importance is the s5 (1) (a) object, to the effect that all forms of domestic violence are unacceptable. The Act has a further object, as s5 (1) (b) makes clear, of ensuring effective legal protection to the victims of domestic violence where it occurs.

[37] The test required in terms of ongoing necessity is a broad evaluative one having regard to both the objects of the Act, s 14 factors and any other relevant factors – as has been discussed above.

[38] It does not have to only be the high level serious violence that is protected from. I adopt the following passage in this regard from the High Court matter of ***D v D***[24]:

> I agree with the comments of Judge Flatley when he described the utility and effectiveness of protection orders to prevent lower level domestic violence, He said[25]:
>
> > It is reasonable to say that to some extent protections work best to prevent that lower level domestic violence, the psychological and emotional abuse, because the prospect of being breached and potentially spending time in prison for such offending is a sufficient deterrent to prevent that behaviour from occurring. This is the type of behaviour that is difficult to describe report, prosecute and generally guard against; It is opportunistic, without corroborating evidence and insidious in nature.

[39] When deciding whether an order is necessary, the Court must consider:

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[23] ***K v G*** [2009] NZFLR 523 where the High Court summarised the legal test:

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

(b) It is an 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, however, is not the only relevant factor.

(e) 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.

[24] ***D v D*** [2016] NZHC 209 at paragraph [45]

[25] ***Tyler v Tyler*** [2014] NZFC 5173 at [50]

a) whether the behaviour forms part of a pattern of behaviour from which the applicant and/or a child of the applicant's family need protection (s 14(3)); and

b) the perception of the applicant and/or the child of the applicant's family of the nature and seriousness of the respondent's behaviour and the effect of the behaviour on the applicant and/or a child of the applicant's family (s 14(5)).

[40] Part of the consideration of necessity is whether or not there are any countervailing factors to warrant not making an order. Mr [Roy] gave evidence of being fearful of ongoing and unrelenting abuse and accusations from the respondent. He said in his affidavit in support of his application that he can no longer cope with the psychological abuse because he does not know how to stop [Ms Barker] and keep himself and [Elliott] safe from her – he said he saw no end in sight and sought assistance from the Court[26]. His views are reasonable given the period of time over which he has been subjected to repeated episodes of abuse, together with the level of abuse which is not insignificant name calling and threats.

[41] While the abuse cannot be classified as constant in that there are periods whether there is no contact or abuse from Ms [Barker] towards Mr [Roy], it can properly be classified as chronic given it has continued over a period of years off and on.

[42] Having found domestic violence occurred and that the applicant holds a reasonable subjective fear of future violence, I am not satisfied that the respondent has discharged the onus of showing the protection order is not necessary.

[43] There has been no countervailing evidence produced by her beyond her assurances provided during evidence at this hearing that she now accepts her behaviour was unreasonable and will stop. I am not satisfied that there can be any confidence that without the order in force, this will be so. Her late assurances were in contrast to her affidavit filed in support of her notice of intention to appear dated 7

[26] Affidavit of [Mr Roy] dated 5 January 2017, page 7, paragraph [7](b)

April 2017, where Ms [Barker] stated that "*I do believe that [Elliott] was sexually abused in [Mr Roy]'s care. I further believe that I am entitled to express that view without fear that the view will be considered as a breach of protection order*".

[44] I am not satisfied that Ms [Barker]'s assurances to the Court that she no longer wants to engage in negative behaviour such as postings on Face book will prevent the risk of further abusive behaviour towards Mr [Roy] in the future. I am satisfied that in the words of Ms [Barker] herself she hates Mr [Roy] with an everlasting vengeance that will never stop.[27]

[45] The fact that Ms [Barker] has not engaged in similar behaviour since the temporary protection order was granted demonstrates that the order is working as it ought to protect the applicant from the abuse he has previously subjected to.

[46] The strength and depth of conviction held by Ms [Barker] that Mr [Roy] has abused [Elliott] despite the clear evidential findings to the contrary by the Family Court and upheld in the High Court presents a real and ongoing risk of further abuse by her against Mr [Roy].

[47] The temporary order is discharged and a final order in favour of Mr [Roy] against Ms [Barker] is granted.

[48] I do not impose the special condition sought by Mr [Roy] to prevent internet postings about him and [Elliott]. As Judge de Jong has earlier pointed on in his January 2017 minute, the provisions of ss11B-D of the Family Courts Act 1980 restrict publication of this information and provide for the possibility of criminal prosecution. There may also be jurisdiction under the Harmful Digital Communications Act.

E B Parsons
Family Court Judge

[27] Refer to paragraph [18] above.