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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2019-004-000641
FAM-2019-004-000642
[2020] NZFC 4288

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[DEIDRE DOYLE] Applicant
AND	[ALISTAIR DOYLE] Respondent

Hearing: 12 June 2020

Appearances: N Quirke for the Applicant
B Smith for the Respondent
J Robertson as Lawyer for Child

Judgment: 13 July 2020

RESERVED JUDGMENT OF JUDGE K MUIR

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[1] [Judah Doyle] was born on [date deleted] 2018 and was 19 months old on the day this matter was heard. There is disagreement between his parents Mr [Alistair Doyle] ([Mr Doyle]) and Ms [Deidre Doyle] ([Mrs Doyle]) about the details of [Judah]'s care and in particular, how much time he should spend in his father's care.

They also disagree about whether a final protection order should be made in [Mrs Doyle]'s favour.

Issues

[1] The issues are:

(a) Should the family violence order be made final? In particular is an order still necessary for [Mrs Doyle]'s protection?

(b) What orders should I make for contact between [Judah] and his father and what conditions, if any, should attach to those orders? In particular when should [Judah] transition to overnight contact with [Mr Doyle] and how frequently should he stay overnight with his father?

Introduction

[2] [Judah] was affectionately described by his parents as a delightful and intelligent boy, chatty and cuddly, he has a wonderful little smile and laugh. Even at his young age can be cheeky, in a good-natured way. He listens beautifully and plays beautifully. It was clear that [Mrs Doyle] and [Mr Doyle] adore their son. He is meeting, indeed exceeding, his developmental goals.

[3] [Judah]'s birth, and the immediate aftermath was traumatic, particularly for [Mrs Doyle]. [Judah] was tongue-tied and had difficulty feeding. [Mrs Doyle] subsequently suffered from post-natal depression and post traumatic stress syndrome. The first few months of [Judah]'s life were a difficult time for both of his parents, notwithstanding the joy that [Judah] was bringing them. In part this case is about how his parents reacted to that stress and it is about the dynamics in that relationship following [Judah]'s birth.

[4] There is some debate about exactly when [Judah]'s parents separated, but they were separated by [date deleted] 2019. That is the date on which [Mrs Doyle] applied for, and was granted on a without notice basis, a protection order under the Family

Violence Act 2018 (FVA) and a parenting order. The order gave her the day to day care of [Judah] and reserved for [Mr Doyle] rights of supervised contact.

[5] [Mr Doyle] initially defended the application. He sought to have the direction to attend a non-violence programme set aside. It is clear from the evidence he gave and the concessions he made that he now accepts that he used language and exhibited behaviour which was violent within the definition that is contained in the FVA. He used psychological violence; principally verbal abuse consisting of foul, belittling and demeaning comments directed at [Mrs Doyle].

[6] The frequency or exact wording of some of those comments are disputed by [Mr Doyle]. However, he has come to accept that his behaviour was inappropriate. He says this is because of things that he has learnt post-separation through courses he has undertaken and through therapy and counselling he has sought. He says that some of his behaviour arose out of a sense of frustration or a belief that his role in his son's life was being diminished. He now acknowledges that does not excuse his behaviour.

[7] [Mr Doyle]'s opposition to final orders being made under the FVA is now principally limited to the issue of whether the orders remain necessary for [Mrs Doyle]'s protection.

[8] [Judah] currently is in the care of his father every Wednesday and Friday from 1.30 pm to 5.30 pm and very Saturday from 9.30 pm to 4.00 pm. He is otherwise in the day to day care of his mother.

[9] [Mr Doyle] seeks an immediate increase in his contact with [Judah]. He wants overnight contact for two nights each week and overnight contact every second Saturday. During the hearing it was conceded by him any change to overnight contact should wait until [Judah] (who is still breastfed) is weaned.

[10] [Mrs Doyle] also agrees that there should be overnight contact between [Judah] and his father once he is successfully weaned, but contact should be less frequent. She asks that [Mr Doyle]'s contact with [Judah] be increased on a staged basis. From October 2020 (when she envisages [Judah] will be fully weaned) she asks that he have

overnight contact from about 2.00 pm on Friday, when [Judah] has woken from his nap, to 11.30 am Saturday before his nap. She then envisages a staged increase so that by the age of five [Judah] would spend a whole weekend every second weekend with [Mr Doyle] and have midweek contact.

[11] Both parties agree with [Judah]'s lawyer that the orders that I make today should be interim orders. This acknowledges [Judah]'s age and stage of life and the rapid developmental changes he will going through.

[12] In the course of the hearing both parties agreed that communication counselling under s 46G of the Care of Children Act 2004 (COCA) would be appropriate and I made that order by consent.

[13] It was agreed by the parties during the hearing that it was unnecessary for me to address the issue of [Judah]'s safety during unsupervised contact with [Mr Doyle] in terms of ss 5(a) and 5A of COCA. That issue had already been determined by Judge Fleming in a decision that she issued on 25 March 2020.

[14] Since the parties separated there have been two round table meetings. At the round table meeting on 19 March 2020 the current contact orders were agreed. There are conditions attached to the current orders. They include protocols for communication using a notebook, provision for an early change over if [Judah] becomes unduly upset while in the care of [Mr Doyle], and stipulations as to where and how changeovers should occur.

[15] Contact has occurred in accordance with that order without any major issues, save for an incident which occurred on 16 May 2020, discussed below.

History

[16] [Mr Doyle] and [Mrs Doyle] met in 2011. They married on [date deleted] 2017.

[17] Following traumatic events around [Judah]'s birth the family moved on 2 December 2018 to live with [Mrs Doyle]'s parents, [Harold Harmon] and [Joan Harmon], who both gave evidence. This was so that [Mrs Doyle] could be supported

while she was recovering from her post-natal depression. Both parties acknowledge that [Mrs Doyle] was then acutely struggling with mental health and was having difficulty coping, while [Mr Doyle] was having to work full-time.

[18] It was [Mrs Doyle]'s evidence that [Mr Doyle] shouted at her, swore at her and "*threatened divorce … on multiple occasions*" while the family with living there. She said that [Mr Doyle] also yelled and swore at her 59-year-old mother Mrs [Harmon].

[19] [Mr Doyle] claimed that he and [Mrs Doyle] had only argued once while living at her parents' house.[1] However [Mrs Doyle] and her parents deposed they had argued on several occasions while living at her parents' house. Mrs [Harmon] specifically recalled overhearing her daughter being called abusive names, being sworn at and being threatened with divorce by [Mr Doyle]. She particularly recalled two occasions, one in November 2018 and one in December 2018, when the language that was used, and [Mr Doyle]'s tone were particularly distressing.[2]

[20] In February 2019 the parties moved back to their own home. It was [Mrs Doyle]'s evidence that [Mr Doyle]'s abuse continued.[3] She said by April 2019 abuse of this kind was occurring on an almost daily basis. [Mr Doyle] in response said, *"the allegation is strongly denied".*[4] He claimed there were *"possibly two arguments over the month of April".* He denied using some of the language [Mrs Doyle] claimed he had used.[5] [Mr Doyle] said that he was working full-time during this period, trying to cope with his mother's decline into dementia and that [Mrs Doyle]'s mental health *"went backwards"*, she was prone to becoming anxious upset and angry with him.

[21] On 16 May 2019 [Mrs Doyle] moved with [Judah] back to her parents' home. She said this was because she could not put up with [Mr Doyle]'s belittling comments and the escalation of verbal abuse. On 21 May there was a family meeting involving Mrs [Harmon], Mr [Harmon], [Mrs Doyle] and [Mr Doyle]. The witness accounts of

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[1] Initially he admitted only that during an argument he had said "*can you just shut the fuck up*".
[2] On one occasion when both [Mrs Doyle] and father were in a bedroom and [Judah] was being breastfed Mrs [Harmon] overheard [Mr Doyle] saying: *"fucking bitch" "crazy bitch"* and *"fucking moron".*
[3] Language used at this time included "*fucking bitch, you are fucking crazy, you are a fucking moron, manipulative bitch, conniving bitch*"
[4] [Mr Doyle] said that he had not called [Mrs Doyle] manipulative or conniving until June/July 2019.
[5] *"I have never called her "a crazy bitch". I also never called her a "fucking moron" but have once said "stop acting like a fucking moron'".*

what occurred at that meeting differed, but it is clear that there was a lengthy and emotional discussion. It was [Mr Doyle]'s evidence that Mr [Harmon] threatened him at one point.[6]

[22] There was evidence of further conflict throughout May. [Mr Doyle] was evidently frustrated, believing that his time with [Judah] was being unreasonably limited or that [Mrs Doyle] was being unnecessarily controlling of this. Incidents discussed in detail by the parties included a confrontation after joint therapy session and an incident where [Mr Doyle] verbally abused [Mrs Doyle] in a telephone call because he believed there were others in the room.[7]

[23] On 28 May [Mr Doyle] travelled to Europe for work returning on 11 June. [Mrs Doyle] moved back in to the home while he was away. There were further angry confrontations between the parties over the subsequent weeks which featured the use of demeaning and abusive language by [Mr Doyle] directed at [Mrs Doyle]. [Mrs Doyle] was distressed that [Mr Doyle] was claiming that she was refusing to put [Judah] on a formula diet which he said was "*a calculated manipulation move".*

[24] Following a further confrontation on [date deleted] 2019 [Mrs Doyle] told [Mr Doyle] that she did not want him coming home but that he was welcome to see [Judah] at any point. [Mr Doyle] reacted with an angry and abusive telephone call. He then came to the house and once again verbally abused [Mrs Doyle] in front of [Judah].[8]

[25] It was following this incident that [Mrs Doyle] applied to the Family Court.

Non-Disclosure Allegation

[26] After [Mrs Doyle] obtained orders under the FVA and COCA on a without notice basis [Mr Doyle] filed an objection to the direction that he attended anger management program. In his affidavit in opposition he alleged that there had been a

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[6] "*I will rip your fucking throat out".* Mr [Harmon] accepted he used those words in the context of his distress that in his view [Mr Doyle] had deliberately lied.

[7] Mrs [Harmon] gave evidence that she had arrived home with groceries to hear [Mr Doyle] loudly swearing while [Mrs Doyle] was highly distressed and in tears.

[8] [Mrs Doyle] said the language used on this occasion included *"just fuck off, why can't you just fuck off. Why do I have to leave, fuck off you slut."*

failure by [Mrs Doyle] to disclose all relevant circumstances in her affidavit in support of the without notice application. The issues that he claimed had not been disclosed included:

- That the parties had agreed to separate, and he had moved out of the home to the home of friends:

- That there was an agreed contact plan:

- That the therapist involved with the parties was organised by maternal mental health and was a maternal mental health social worker:

- That the applicant had been engaged with maternal mental health for almost nine months and:

- *"The mutual nature of verbal arguments, including the applicant's ongoing desire to argue in spark arguments in front of [Judah]"*.

[27] The non-disclosure issue was not pursued with any vigour at the hearing of this matter. By that time [Mr Doyle] was accepting that that he had used foul, abusive and insulting language when angry, and that it was inappropriate that he had. He denied the extent of the language used, and still did not appear to fully appreciate the impact that it had on [Mrs Doyle].[9] However, it was encouraging that he had been able to reflect on his conduct, with the benefit of time passing and the anger management counselling that he had undertaken.[10]

[28] [Mr Doyle]'s counsel submitted that the court ought to take the alleged nondisclosure into account in assessing the need for the FVA orders sought, the credibility of the mother's evidence and the "genuineness of her position". It was

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[9] [Mr Doyle] admitted in cross-examination that he had called [Mrs Doyle] a bitch *"on multiple occasions"* and *"on two or three occasions I used the word slut"*. He said *"I remember calling her a fucking bitch. I deny calling her a fucking moron. I do admit to calling her a moron."* He accepted he had called her *"a crazy bitch"*.

[10] [Mr Doyle] agreed in cross-examination that he had used very abusive language and said, "*Yeah, I learnt that – how abusive my actions were, through the process of the non-violence counselling and also the Parenting Toolbox course, I learnt that what I did was not acceptable*".

submitted it was relevant "in terms of seeking a final protection order". It was also submitted that it was relevant under s 4(2)(b) COCA – that the court should take into account conduct of the person seeking to have the care of the child that is relevant to the child's welfare and best interests.

[29] It is essential, when a without notice application is made, that the applicant frankly discloses all relevant issues. However, I do not find that any of the alleged non-disclosure was likely to have been material to the orders that were made because:

- It was [Mrs Doyle]'s evidence that she did not know that [Mr Doyle] had moved out and was not intending to return home. Her evidence is corroborated by exhibit A to her affidavit of 4 September 2019, which is a note that [Mr Doyle] had left her on the day in question, saying that he would be back tomorrow at 6.00 pm:

- The fact that [Mrs Doyle] was suffering from mental health issues or had engaged with mental health services emphasises how inappropriate the language used by [Mr Doyle] was. At a time when she was entitled to expect support and help from her husband and father of her child, she was instead exposed to insults directed at her mental state:

- As for [Mr Doyle]'s claim that the incidents of abuse were *"mutual arguments"* this is discussed in more detail below, but it is a matter of concern that [Mr Doyle] minimises the circumstances or impact of the abusive language he used by claiming that it was as the result of an argument between he and his wife. It is noteworthy that he did not give any examples of similar insulting or demeaning foul abuse directed at him by [Mrs Doyle].[11]

[30] It follows that the allegations of nondisclosure do not adversely impact the credibility of [Mrs Doyle]'s evidence nor the authenticity of her position. The interim orders were appropriately made. There are no adverse consequences for [Mrs Doyle] under s 4(2)(b) of COCA.

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[11] It is open to question in any event whether there are any male gender equivalents to some of the misogynistic language used by [Mr Doyle] such as "*slut*" and "*bitch*".

Post-Separation

[31] At the hearing [Mrs Doyle] confirmed that there had been no breaches of the protection order. However, she detailed an incident that occurred on 16 May 2020 where she felt intimidated as a result of a conversation or confrontation between her and [Mr Doyle] at a changeover of care.

[32] That incident was the subject of an exchange of correspondence between the parties' lawyers. It evidently arose when [Mr Doyle] enquired as to progress with weaning [Judah], who was still relying on breastmilk for his nutrition. [Mr Doyle] had recorded the discussion on his cell phone. In cross-examination he said that he had recorded virtually every exchange of [Judah] since separation. That illustrated the regrettable lack of trust that still subsists between [Judah]'s parents. I determined that I did not need to listen to the tape. There was little if any material difference between the parties' accounts as to what was said.

[33] What was significant was [Mrs Doyle]'s account of how this event impacted on her. She was visibly and viscerally distressed when recounting the incident. She said:

> "He gets at a point where his whole body, his clenched jaw and it's like he is just not, he doesn't see you, he's just not there anymore and he gets bigger and squarer and you can just see 'cos he holds onto his anger quite a lot and then you see this point he just can't anymore and that's the part that scares me and I know that's still there."

[34] Encouragingly, following their separation the parties have been able to work out arrangements where [Judah] has had a reasonable and consistent level of contact with his father. [Mr Doyle] was frustrated at times that his contact was supervised, particularly when the supervisors were not available and he was unable to see [Judah]. To his credit, after some reflection, [Mr Doyle] completed a Living Without Violence course and Baby and Toddler Toolbox course, a Parenting Through Separation course and he has undertaken some personal counselling as well as on-line cognitive behaviour therapy sessions. [Mrs Doyle] has also completed a Parenting Through Separation course.

[35] [Judah] is now 19 months old and is still being breastfed. [Mrs Doyle] has had some difficulty in weaning him.

[36] There was a rather unedifying series of questions put in cross-examination about why [Mrs Doyle] wasn't expressing more milk or storing more milk to enable [Mr Doyle] to spend a longer time with [Judah] at an earlier date. That seemed to echo a criticism that [Mr Doyle] had made of [Mrs Doyle] while they were still in their relationship. It also seemed an echo of a lack of faith or trust which [Mr Doyle] still has in [Mrs Doyle].

[37] I was satisfied from [Mrs Doyle]'s evidence was that she was focused on getting [Judah] to a point where he can overnight with his father as soon as is reasonably practicable. She was willing to commit to the end of October this year as the date by which that would be completed and she was committing to use her best endeavours to wean [Judah] sooner if practicable.

[38] The principal issues of credibility between the parties seemed to rest on how often verbal abuse had been used by [Mr Doyle], and the exact wording of some of the verbal abuse. Ultimately, I do not think it matters whether there were approximately one dozen occasions, as [Mr Doyle] says, or whether it occurred on almost daily basis, as [Mrs Doyle] says. The abuse was unacceptable in content, tone and frequency either way.

[39] However, to the extent that there were conflicts in the parties' evidence on that issue I preferred the evidence of [Mrs Doyle] and her parents. Their evidence has been more consistent, while [Mr Doyle]'s recollection and account of events has altered over time. I noted that [Mr Doyle] acknowledged during cross-examination that he had used some insulting words which he had previously denied using.[12] He said that with the benefit of reflection he remembered the conversation *"in more of its entirety*".

[40] It is to his credit that he said that he had learnt how abusive his actions were through the process of the nonviolence counselling and parenting course. However, it

[12] Having previously denied he'd called [Mrs Doyle] a "*crazy bitch*" he accepted that he had used that term. He denied that he had called her a "*fucken moron*" but admitted that he said "*stop acting like a fucken moron*".

remained a concern to me that he was unable to acknowledge that what he described as his *"poor communication",* was intentionally demeaning. He also continued to hold to the view that there were *"two-way arguments"* or a *"two-way breakdown in communication*". His counsel challenged [Mrs Doyle] in cross-examination on this issue. He asked her whether she was saying that all of the bad behaviour that occurred with [Mr Doyle]'s fault, whether she thought that she was "perfectly angelic". Her response was:

> "There is nothing that I did or said that warranted the abusive behaviour that I got in return. There were even times where I said nothing and things happened. I didn't have to do – it's got to the point where I didn't have to do, I didn't have to speak, I didn't have to do anything, it just happened."

[41] [Mr Doyle] was also anxious to deny that he had ever used abusive or angry language in the presence of [Judah]. I accept that he may have genuinely tried to avoid doing that. However, I accept the evidence of [Mrs Doyle] and her parents that angry and abusive language was used in [Judah]'s presence from time to time. While [Judah] was too young to understand what was being said, the tone would have been impactful on him.

[42] I was also able to observe the parties when they were giving evidence. As I have said their love for [Judah] was visibly present. Also visibly present was [Mrs Doyle]'s continuing distress and fear. She was, it appeared, genuinely moved to tears when cross-examined on the abusive language that had been used. She was manifestly distressed when her counsel was cross-examining [Mr Doyle] about some of the language that had been used. I asked that the line of questioning stop because the point had been well made. Her reaction to the incident that occurred on 26 May 2020 left me in no doubt that she continues to be impacted by the highly confronting events that she was faced with at a time of mental distress and vulnerability.

[43] As for [Judah]'s progress, he appears to be thriving in the in the care of both of his parents. [Mrs Doyle] was initially concerned that [Mr Doyle] had not yet developed the capacity to understand "cues" that [Judah] gave and that he had unrealistic expectations of [Judah]'s development. Those concerns appeared to have diminished over time. It was evident from the report of lawyer for child dated 9 June 2020 that [Judah] has a busy and fulfilling life. The only residual concern that [Mrs Doyle]

expressed was a wish that father be more communicative about events that had occurred while [Judah] was in his care through the notebook.

Family Violence Act – The Law

[44] I will deal firstly with the relevant principles in the FVA and in particular with the issue of whether or not a protection order continues to be necessary for the protection of [Mrs Doyle]. I will then turn to an analysis of the principles in the Care of Children Act that are relevant to [Judah]'s age and stage of development and to the issue of when his overnight care with his father can commence and how frequent that care should be.

[45] I set out below the relevant parts of the key sections from the FVA:

> **4 Principles**
>
> The following principles are to guide the achievement of the purpose of this Act:
>
> (a) family violence, in all its forms, is unacceptable:
>
> (b) decision makers should, whenever appropriate, recognise that family violence is often behaviour that appears to be minor or trivial when viewed in isolation, but forms part of a pattern of behaviour that causes cumulative harm:
>
> (c) decision makers should, whenever appropriate, recognise that family violence often is or includes coercive or controlling behaviour:
>
> (d) decision makers should, whenever appropriate, recognise that children are particularly vulnerable to family violence, including seeing or hearing violence against others:
>
> (e) decision makers should, whenever appropriate, recognise that children are at particular risk of lasting harm to their current and future well-being:
>
> (f) decision makers should, whenever appropriate, recognise that other factors (for example, all or any of disability, health condition, and old age) may mean that people are particularly vulnerable to family violence:
>
> …
>
> (m) decision makers should consider the views of victims of family violence, and respect those views unless a good reason exists in the particular circumstances for not doing so (for example, because doing so would or may compromise victims' safety):

…

(o) access to the court should be as speedy, inexpensive, and simple as is consistent with justice.

9 Meaning of family violence

(1) In this Act, family violence, in relation to a person, means violence inflicted—

(a) against that person; and

(b) by any other person with whom that person is, or has been, in a family relationship.

(2) In this section, violence means all or any of the following:

(a) physical abuse:

(b) sexual abuse:

(c) psychological abuse.

(3) Violence against a person includes a pattern of behaviour (done, for example, to isolate from family members or friends) that is made up of a number of acts that are all or any of physical abuse, sexual abuse, and psychological abuse, and that may have 1 or both of the following features:

(a) it is coercive or controlling (because it is done against the person to coerce or control, or with the effect of coercing or controlling, the person):

(b) it causes the person, or may cause the person, cumulative harm.

…

(5) Subsection (2) is not limited by subsections (3) and (4) and must be taken to include references to, and so must be read with, sections 10 and 11.

10 Meaning of abuse

(1) A single act may amount to abuse.

(2) A number of acts that form part of a pattern of behaviour (even if all or any of those acts, when viewed in isolation, may appear to be minor or trivial) may amount to abuse.

(3) This section does not limit section 9(2).

11 Meaning of psychological abuse

(1) Psychological abuse includes—

(a) threats of physical abuse, of sexual abuse, or of abuse of a kind stated in paragraphs (b) to (f):

(b) intimidation or harassment (for example, all or any of the following behaviour that is intimidation or harassment:

(i) watching, loitering near, or preventing or hindering access to or from a person's place of residence, business, or employment, or educational institution, or any other place that the person visits often:

(ii) following the person about or stopping or accosting a person in any place:

(iii) if a person is present on or in any land or building, entering or remaining on or in that land or building in circumstances that constitute a trespass):

…

(g) in relation to a child, abuse stated in subsection (2).

(2) A person psychologically abuses a child if that person—

(a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a family relationship; or

(b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring.

…

(4) Psychological abuse may be or include behaviour that does not involve actual or threatened physical or sexual abuse.

(5) This section does not limit section 9(2)(c).

79 Requirements for making of protection order

The court may make a protection order if it is satisfied that—

(a) the respondent has inflicted, or is inflicting, family violence against the applicant, or a child of the applicant's family, or both; and

(b) the making of an order is necessary for the protection of the applicant, a child of the applicant's family, or both.

82 Duty to consider whether apparently minor or trivial behaviour forms part of pattern against which victims need protection

(1) This section applies if some or all of the behaviour in respect of which the application is made appears to be minor or trivial when viewed in isolation, or appears unlikely to recur.

(2) The court must nevertheless consider whether the behaviour forms part of a pattern of behaviour against which the applicant, or a child of the applicant's family, or both, need protection.

(3) This section does not limit section 10(2) or the matters that the court may consider in determining, for the purposes of section 79(b), whether the making of an order is necessary for the protection of the applicant, or a child of the applicant's family, or both.

83 Court must have regard to perception and effect of behaviour

(1) When determining whether to make a protection order, the court must have regard to—

(a) the perception of the applicant, 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, a child of the applicant's family, or both.

(2) This section does not limit the matters that the court may consider when determining whether to make a protection order.

[46] In s 9(3) of the FVA "*violence*" includes a pattern of behaviour which may be coercive or controlling and which causes the abused person or may cause the abused person cumulative harm.

[47] I note that the definition of psychological abuse in s 11 of the FVA includes, but is not limited to, intimidation and harassment. It may be or may include behaviour that does not involve actual or threatened physical abuse. I also note that pursuant to s 10 that a number of acts that form part of a pattern of behaviour may amount to abuse, even though when viewed in isolation they may appear to be minor or trivial.

[48] In order to make a protection order under s 79 of the FVA I must find not only that [Mr Doyle] has used domestic violence against [Mrs Doyle] but also that the making of the order is necessary for the protection of the applicant.

[49] The Court of Appeal in *SN v MN*[13] confirmed the approach previously adopted in *Surrey v Surrey*[14] in relation to the Domestic Violence Act 1995 (DVA). The observations of the Court of Appeal in both of those cases remain apposite to cases under the FVA. In *SN v MN*[15] the court noted:

> "It is unlikely a court could rationally refuse to grant a protection order where the behaviour is such as to lead to reasonable fears for safety based on being subjected to a pattern of serious domestic violence, unless there are very strong indications to the contrary."

[50] Key points to emerge from *Surrey v Surrey* include:

(a) At [38]: the court observed that the assessment of necessity under s 14(1)(b) (now s 79(b) FVA) required a broad-based assessment of the need for protection in the future, having regard to both the objects of the DVA and the statutory factors set out in s 14 (now ss 79 to 83 FVA) as well as any other relevant factors:

(b) At [39]: the level of risk of future violence will obviously be a relevant factor in assessing necessity. This does not require a full inquiry into risk levels with associated detailed expert evidence:

(c) At [40]: The scheme of the DVA envisages that the Court will assess the risk of domestic violence on the basis of past conduct, informed by the subjective views of the victim and any other relevant factors. The nature and seriousness of past domestic violence, and a pattern of past violence, are relevant to assessing necessity. The single most robust predictor of future violence is a history of prior multiple offences:

(d) At [41]: The necessity for a protection order must be assessed against the seriousness of the past domestic violence. The more serious the possible future violence, a lesser risk of it reoccurring may justify a protection order than if possible future violence is less serious:

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[13] *SN v MN* [2017] 3 NZLR 448
[14] *Surrey v Surrey* [2010] 3 NZLR 581
[15] See Note 11 at [23]

(e) At [43]: Once an applicant has proved the existence of past violence and his or her reasonable subjective fear of future violence, the evidential burden passes to the respondent to raise countervailing factors that weigh against the need for a protection order. It is not required that the applicant show that no countervailing factors exist:

(f) At [101]: Under s 14(5)(a) DVA 1995 (now s 83 FVA) it is mandatory for the Court to have regard to the perception of the applicant or a child of the applicant's family as to the nature and seriousness of the behaviour in respect of which the application is made. This paragraph appears to concentrate on the nature and seriousness of past violence, but it is a reasonable interpretation to include the victim's subjective fears for the future:

(g) At [102]: the fact that Parliament has mandated that the subjective views of an applicant (or child) regarding past violence have to be taken into account suggests that the purpose of a protection order may not only be to ensure that those that have been subjected to domestic violence in the past are safe in the future from the risk of domestic violence "*but also that they feel safe from domestic violence*": (emphasis added).

[51] In *Q v Q*[16] Heath J noted that a subjective fear of future violence must be reasonably held. In *A v B*[17] [Protection Order] Hansen J noted that the issue of 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.

Family Violence Act – Analysis and Decision

[52] I am conscious of the increased emphasis on the impact of psychological violence, including verbal abuse, reflected in the new provisions in the Family

[16] *Q v Q* [2012] NZHC 1448
[17] *A v B* [Protection Order] [2008] NZFLR 65 at [20]

Violence Act. I am also conscious that it is not alleged that [Mr Doyle] used physical violence against [Mrs Doyle], or directly threatened physical violence.

[53] In submissions [Mr Doyle]'s counsel urged the following points as relevant:

- The claim that there was material nondisclosure in particular the failure to disclose that the parties were not living together. I have already dealt with that issue.

- There had been no breaches of the temporary protection was approximately 11 months old.

- [Mr Doyle] was willing to provide undertakings and had no desire to contact the applicant [for] parenting purposes.

- [Mr Doyle] had re-partnered and has a child soon to be born.

- The parties have conducted changeovers directly and [Mrs Doyle] has proposed in-person discussions on the issue breast feeding.

- [Mrs Doyle] had consented to a positive safety finding under s 5(a) COCA and had proposed unsupervised contact for [Judah] in her original application.

[54] [Mr Doyle] accepted that the language he used in the context it was used in was not appropriate. I am confident that, with the benefit of reflection and with all he has learned since, he regrets what occurred during the relationship. The insulting, demeaning and misogynistic aspects of the abuse were of real concern to me. There is no doubt that they would have had a serious impact on [Mrs Doyle]'s self-esteem. It is apparent that they are having, and I find on balance of probability that they are having, a continuing serious impact on her psychological well-being.

[55] Of particular concern is the fact that these words were used at a time when [Mrs Doyle] was suffering the symptoms of post-traumatic stress disorder and recovering from postnatal depression brought on by the traumatic events surrounding

[Judah]'s birth. The use of words such as "*fucking crazy*" and *"fucking moron"* in those circumstances must have been designed to cause harm to her and they clearly did cause lasting harm.

[56] [Mr Doyle] refers to the difficult and stressful situation that he and his wife were in at the time with the young baby long working hours and maternal distress to cope with. I can only echo the concern that Duffy J expressed in *Lowe v Way*[18] that:

> "To view violence as situational can carry with it the idea that in some way, the victim of the violence has contributed to the exhibition of the violence. Whilst a situation can explain how violence occurred, it cannot, in my view, be used as an excuse for violence. No matter how provoking a victim might have been, the use of violence, particularly towards a vulnerable victim, can never be tolerated."

[57] [Mr Doyle] also suggests that because there has not been a breach of the order since was made the order is no longer necessary. The contrary view is that the order has been effective in ensuring that there has been no further psychological violence. The Court of Appeal in *SN v MN*[19] found "*especially irrelevant*" the fact that there had been no breaches of the order since it was made.

[58] I do not find the fact that [Mr Doyle] has re-partnered to be relevant. I do not find the fact that [Mrs Doyle] has been willing to discuss some issues person to person with [Mr Doyle] to be relevant. The fact that she was willing to do that while there was a subsisting protection order is unremarkable. Her acknowledgement that [Judah] is safe with [Mr Doyle] does not diminish her personal need for protection from any future abuse by [Mr Doyle]. If [Mrs Doyle] is otherwise entitled to protection order she should not be compelled to accept personal undertakings as an alternative.

[59] I find that the persistent and repeated verbal abuse by [Mr Doyle] was psychological abuse within the definition in the FVA.

[60] It was clear that [Mrs Doyle] remains fearful and she believes she needs protection. It is evident that the orders have brought her some comfort and security in her dealings with [Mr Doyle] since the orders were made.

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[18] *Lowe v Way* [2015] NZHC 93 at [83]
[19] *SN v MN* (supra) at [42]

[61] I find that her fears and desire for protection are, when objectively assessed, reasonable. There was a strong element of power and control to the language used by [Mr Doyle] in the context it was used. It would likely have a lasting impact on [Mrs Doyle]'s sense of self-esteem.

[62] The frequency and nature of the abuse by [Mr Doyle] indicates a real risk of future abuse, particularly in times of stress or anger, and particularly if the sobering impact of the current orders is absent.

[63] It may be over time, as [Mrs Doyle] and [Mr Doyle] rebuild a relationship of trust and confidence around their mutual love for [Judah], that [Mrs Doyle] no longer has a continuing need for the order. Should that be so it will open to [Mr Doyle] and/or [Mrs Doyle] to apply under s 47 of the FVA to discharge the order. However, that time may be well into the future. [Mrs Doyle] is entitled to protection while she recovers her sense of safety and self-worth at her own pace.

[64] I am satisfied on balance of probabilities that a final order under s 79 of the FVA is necessary.

Care of Children Act

[65] I now move to consider the orders should make in relation to the care of [Judah]. The relevant sections of the Care of Children Act are:

> **4 Child's welfare and best interests to be paramount**
>
> (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
>
> (2) Any person considering the welfare and best interests of a child in his or her particular circumstances—
>
> (a) must take into account—

(i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and

(ii) the principles in section 5; and

(b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.

(3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person's gender.

(4) This section does not—

(a) limit section 6 or 83, or subpart 4 of Part 2; or

(b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:

(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:

(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:

(d) a child should have continuity in his or her care, development, and upbringing:

(e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:

(f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

6 Child's views

(1) This subsection applies to proceedings involving—

(a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or

(b) the administration of property belonging to, or held in trust for, a child; or

(c) the application of the income of property of that kind.

(2) In proceedings to which subsection (1) applies,—

(a) a child must be given reasonable opportunities to express views on matters affecting the child; and

(b) any views the child expresses (either directly or through a representative) must be taken into account.

[66] As I have said I do not need to make finding relation to [Judah]'s safety in the care of [Mr Doyle], notwithstanding the final order that I will make under the FVA, as that issue has been determined.

[67] I bear in mind the Supreme Court judgment in *Kacem v Bashir*.[20] The critical points that emerged from that judgment were that judges must consider and address all of the s 5 principles in their judgment, or else note if they are not considered relevant. There is no weighting to be given to any of those sections except the s 5(a) principle, which every court must take into account.

[68] I am satisfied, that [Judah]'s right in terms of s 5(b) for his care, development and upbringing to be primarily the responsibility of his parents will be met. That will be so whether I make the orders that [Mrs Doyle] asks me to make, or whether I make the orders that [Mr Doyle] asks that me to make. That is because the orders will ensure that both parents have a meaningful and continuing involvement in [Judah]'s care and upbringing. [Judah] will spend frequent time in the care of each of them.

[69] The need for [Judah]'s care development and upbringing to continue to be facilitated by ongoing consultation and cooperation between parents can also be facilitated by orders with appropriate conditions attached. As well as the notebook, the communication counselling [Judah]'s parents have agreed to attend should ensure constructive future communication.

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[20] *Kacem v Bashir* [2010] NZFLR 884

[70] Orders which allow [Judah] to transition to the point where his father is sharing overnight care responsibilities will ensure that there is continuity in his care, development and upbringing as required by s 5(d).

[71] Appropriate orders will also ensure that [Judah] continues to have a relationship with both of his parents and despite family group. Those relationships, his identity including his culture, religion and language, can be and will be preserved and strengthened in accordance with his rights under ss 5(e) and 5(f) because the orders will ensure that [Judah] has frequent and meaningful time with both of his parents and their family groups. The improved communication that is likely to come with time, and as a result of the communication counselling, should ensure that [Judah]'s parents are able to agree on significant cultural and identity issues.

[72] However, the orders that I am going to make need to be appropriate for [Judah] given his young age and stage of development. It is encouraging that there is relatively little difference between the position of [Mrs Doyle] and the position of [Mr Doyle]. It is principally a question of when changes in the pattern of care for [Judah] should occur.

[73] In considering the issue of the timing and frequency of overnight contact with [Mr Doyle] for a boy of [Judah]'s young age I was aided by material that was provided to me by [Judah]'s lawyer in the form of an article by Pruitt, McIntosh and Kelly labelled "*Parental Separation and Overnight Care of Young Children*".[21] That paper, published in two parts, looked for an integrated perspective of the two apparently disparate theories of "attachment", and "early parental involvement", for very young children.

[74] Attachment theory (the concept that a very young child has a primary need to form a close attachment with one parent, usually their mother) has usually been seen as standing in opposition to parental involvement theory (the concept that a child from a young age needs to form a secure attachment with both parents and needs dual parental – typically paternal – involvement).

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[21] Parental Separation and Overnight Care of Young Children, Part I and Part II: Family Court Review, Vol 52 No 2 April 2014 240-255 and 256-262.

[75] The paper noted that a "triadic secure base" developed through a co-parenting environment was optimal; "triadic" referring to the secure and meaningful involvement of mother, father and child. There are important preconditions discussed in the paper for successful triadic involvement with very young children (generally younger than four years), particularly in terms of overnight care. Those preconditions include the need for the child to have a level of secure attachment with each parent and the need for recognition by each parent of the other's importance to the child.

[76] Particularly relevant to this case was the authors' conclusion that prevalent opinions and theories which warn against overnight care – typically by a father – during the first three years of a child's life, are not actually (yet) supported by the limited available research. There is however some caution expressed about higher frequency overnight schedules with young children, particularly where the child's relationship with a second parent has not been established, or where there is a risk the child might be exposed to frequent conflict between the parents.

[77] Part II of the paper included a very helpful table, which I have attached as an appendix to this judgment. The table is labelled "*Considerations for Determining Postseparation Overnight Care of Children aged 0 to 3 Years*". It was a useful tool when considering the appropriate orders to make in this case.

[78] Both parts of the paper also provided an empirical basis to assess how [Judah]'s need to secure the optimal "triadic secure base" (in the sense of the best involvement of both of his parents in his life) might best be met. Obviously, such an aid to decision-making is not to be slavishly followed and I must not lose sight of [Judah]'s individual needs nor the need to protect him from all forms of violence.

[79] In terms of each of the criteria in Table 1, I find on balance of probabilities the following:

- **Safety**: [Judah] is safe in the care of each parent. I can be satisfied about that because of the finding that has already been made by Judge Fleming. I am reassured by the fact that [Mrs Doyle], who has consistently exercised good judgement where the care of [Judah] is concerned, agrees he is safe in the care

of his father. On the other hand however, Mr and [Doyle]'s separation related conflict is still in the process of being resolved.

- **Trust and security with each parent:** [Judah] has an established trusting relationship with both parents. It is likely that he seeks comfort from and is soothed by his father, and that he finds support for exploration with his father.

- **Parent mental health:** there are no current issues.

- **Health and development:** [Judah] has no significant developmental needs however, he is still being breastfed.

- **Behavioural adjustment:** I am unaware of any relevant issues here.

- **Co-parental relationship:** some aspects of A to F in this part of the table are established.

    - Their ability to communicate civilly about, and plan for [Judah] together is still emerging. The continued constructive use of the communication notebook will assist them in the interim.

    - It is likely that the parents will manage most future conflicts that arise. The communication counselling should aid them in that regard

    - There is no evidence that they are not consistent, yet responsive with schedules.

    - They do value their child's relationship with the other parent.

    - I believe that they can and do put [Judah]'s needs before their own wishes for time and contact.

    - It is evident from the incident on 16 May that some more work might be required on low stress exchange during [Judah]'s transitions. It may take time genuine trust to emerge so that for example [Mrs Doyle] is

no longer fearful [Mr Doyle] might become angry and [Mr Doyle] no longer feels the need to record exchanges.

- **Pragmatic resources to support overnight sharing:** I'm unaware of any significant issues here.

- **Family factors:** I'm unaware of any issues or concerns here.

[80] In terms of my assessment overall of the factors in Appendix I, I find on balance of probabilities that lower frequency overnights with [Mr Doyle] of around four occasions per month are currently indicated. Initial overnight contact once per week will give [Judah] an opportunity to settle in nights with his father relatively frequent. The family will have time to adjust through until 2021 when [Judah]'s overnights with father are likely to increase as [Judah] matures. The view of [Judah]'s parents and [Judah]'s lawyer that it may be time for [Mr Doyle]'s contact with [Judah] to be increased further early in the New Year may well prove to be right.

[81] In terms of s 6 of COCA, [Judah] is obviously too young to express his wishes or to give instructions to his lawyer. It is clear though that he is currently thriving.

[82] I find on balance of probabilities that [Judah]'s needs will best be met if he is allowed the time needed for him to be weaned within a timeframe that is appropriate for him, so that his nutritional, as well as his emotional needs can continue to be met while he is in the care of each of his parents. The parents' intention to convene a roundtable meeting and negotiate an increase in [Judah]'s contact with [Mr Doyle] (if increase is then appropriate) early in the New Year will meet [Judah]'s particular needs. I am encouraged by the progress the parties have already made in their discussions to date.

[83] I do not accept the thesis that father initially endeavoured to advance which was that [Mrs Doyle] was in some way delaying the transition from breastfeeding or was otherwise trying to slow down or frustrate [Mr Doyle]'s desire for more time with [Judah]. I considered that she was demonstrating a real wish to see [Judah] transition

to overnight care as soon as practicable. I gained the impression that is a view [Mr Doyle] is also coming to hold.

[84] Both of these parents have [Judah]'s interests to the fore now, even if their views as to the details of his care are not yet perfectly aligned. Because of [Judah]'s young age and rapid development, I agree with his parents, and with his lawyer. It is appropriate that interim orders be made with a view to be at being reviewed following the roundtable that the parties intend to hold in the New Year. Hopefully further court intervention will not be necessary. There is a good chance that [Mrs Doyle] and [Mr Doyle] will be able to reach an appropriate agreement then and that they will continue to meet appropriate agreements to change [Judah]'s care in line with his developmental needs as he matures.

Orders and Directions

[85] I make a final protection order in favour of [Mrs Doyle] pursuant to s 14 of the FVA.

[86] I received no submissions or application in respect of the temporary tenancy order and ancillary furniture order, but since [Mrs Doyle] gave her address as different to the one in the temporary order I assume they are no longer required and they are hereby discharged.

[87] I make an interim parenting order as follows:

(a) The current provisions for the care of [Judah] will remain in force until either [Judah] is fully weaned, or until Tuesday, 27 October 2020 whichever is the earlier.

(b) From that time [Judah] will also be in the care of his father from around 2.00 pm every Friday through until around 11.30 am every Saturday. The exact times made it be dependent upon the timing of [Judah]'s naps.

(c) [Judah] is to share his time on his birthday and Christmas Day in the care each of his parents equally and I note that Christmas Day this year falls on a Friday, so logically [Judah] might spend the afternoon of Christmas Day through until Boxing Day with [Mr Doyle].

(d) The remaining terms of the existing parenting order are to remain in full force and effect until further order of the court.

[88] I grant leave to the parties to submit a joint memorandum containing any further details conditions or terms of parenting which they agree should be included in these orders. I direct that any such memorandum come before me with a view to appropriate orders being made.

[89] Lawyer for the child is to prepare a draft order for sealing and is to file it after [Mrs Doyle] and [Mr Doyle] have had an opportunity to comment on it. That is to be done on or before 18 July 2020.

[90] The appointment of lawyer for the children is to continue until further order of the court so that she can facilitate the planned roundtable meeting in the New Year.

[91] There is to be a case management review scheduled for late February 2021. The parties are to file a joint memorandum, or if they are unable to agree separate memoranda, seven days prior to that case management review. They should contain any agreed changes to this interim parenting order, and/or any procedural directions that they are seeking.

[92] A copy of this decision is to be provided to the counsellor appointed under s 46G COCA.

Signed at Auckland this 13th day of July 2020 at am / pm

K Muir
Family Court Judge

Appendix I

Table 1
Considerations for determining postseparation overnight care of children aged 0-3 years.

Bear in mind when using this chart, that …

1) The left column reflects conditions within the caregiving environment to be considered in determining the presence or absence, and frequency, of overnights.
2) Parents and other decision makers will need to weigh not only the number of overnights, but the spacing and frequency of transitions between homes, and the emotional ease of the exchanges for the child.
3) Even when all parenting conditions are met, higher frequency overnights (see right hand column) are not generally indicated for infants 0-18 months. For reasons of temperament or maturation, this will also apply to older infants/toddlers who demonstrate regulation difficulties or other signs that they are stressed by the arrangements.
4) When either lower or higher levels of overnights are not indicated initially, they may become so with the child's maturation, and/or with the assistance of education and/or counselling support for parents, or mediation. An agreed "step-up" plan is helpful in progressing towards overnights.
5) This developmentally based guidance for children 0-3 (ie: up to 48 months) *is not intended to override the discretion of parents who jointly elect to follow other schedules in the best interests of their child, and in the context of their own circumstances*.

Considerations (In order of importance)	*Rare/No overnights indicated*	*Lower frequency overnights indicated (1-4 per month)*	*Higher frequency overnights indicated (5+ per month)*
1. **Safety** A) The child is safe in the care of each parent B) Parents are safe with each other	A or B is absent	A is established B: Conflict is separation-related & non-threatening or endangering	A and B are established
2. The child's trust and security with each parent The young child: A) Is continuing an established, trusting relationship (of 6 months or more) with a parent When resident parent is not present, the young child: B) Seeks comfort from and is soothed by the other parent C) Finds support for exploration with the other parent	A or B & C absent	A is established, B & C are emerging	A-C are established
3. Parent mental health The parent has: A) Sensitivity in recognising and meeting child's needs B) No or well-managed drug and alcohol issues C) No or well-managed mental health issues	Any of A-C are absent	A-C are emerging	A-C are established
4. Health and development The young child: A) Has significant developmental or medical needs B) Such needs are well supported in the proposed arrangement C) The infant is exclusively breast-feeding or will not yet accept a bottle	A exists but B is absent; C exists	A and/or C are absent; or A exists but B is emerging / established	A and C are absent; A exists and B is established
5. Behavioural adjustment Relative to temperament and stage of development, the child shows any of the following *persistent behaviours (ie: over 3-4 weeks)*:	Any of A-F exist; G is absent	Any of A-F sometimes exist but G is established	Any of A-F are rare; G is established

A) Irritability, frequently unsettled, without medical cause B) Excessive clinging on separation C) Frequent crying or other intense upset D) Aggressive behaviour, including self-harming behaviour E) Regression in established behavours, eg: toileting, eating, sleeping F) Low persistence in play and learning G) Any regressions or difficulties in the above are short lived and readily resolved			
6. Co-parental relationship Parents are able to: A) Communicate civilly about and plan for their young child together B) Manage conflicts arising, using interventions as needed C) Be consistent yet responsive with the schedule D) Value or at least accept the child's relationship with the other parent E) Put their child's needs before their own wishes for time/contact F) Ensure low stress exchange of the child at transitions		A-F are established or emerging	A-F are established
7. Pragmatic resources to support sharing of overnights Parents: A) Can be the main caregiver for the young child during schedule overnight and majority of scheduled day time (excluding work time) B) Live within a manageable commute of each other C) When a parent cannot personally care for the child overnight, care by the other parent is prioritised	A, B and C are absent	A and B are established, and C is emerging	A-C are established
8. Family Factors A) Arrangement reflects status quo and/or older siblings sharing the same overnight schedule are a source of security to the young child B) Overnight arrangements would enable maintenance of other relationships that are sources of security to the child (eg: grandparents) and/or enable exposure to important elements of each parents' cultural or religious practices		A exists if applicable; the importance of B for the child is emerging or established	A exists if applicable; B is established