EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2019-044-000418
[2020] NZFC 3601

IN THE MATTER OF	THE FAMILY VIOLENCE ACT 2018
BETWEEN	[JULIAN FARRADAY] Applicant
AND	[HARRIET GOWER] Respondent

Hearing:	26 May 2020
Appearances:	A Malone for the Applicant A Fletcher on behalf of N Bodewes for the Respondent (via telephone)
Judgment:	26 May 2020

ORAL JUDGMENT OF JUDGE K MUIR

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[1] The matter before me today in this *[Farraday] v [Gower]* proceeding is the application by Mr [Farraday] under r 170 Family Court Rules 2002 for orders excluding certain evidence.

[2] The applicant and respondent were formerly married. They separated in 2010. They have two children, [Karl] who is aged 14 and [Jeremy] who is aged 13. The

proceeding itself is an application for orders under the Domestic Violence Act 1995 brought by the former husband against his former wife.

[3] The key issues appear to be whether or not the respondent has engaged in behaviour which would justify the orders. She on the other hand says that there has been a pattern of behaviour by the applicant – and I am quoting from para [14] of the respondent's submissions – "of harassment and the making of allegations to undermine (the respondent)", she also says "This is not the behaviour of a person fearful of the person he seeks to be protected from."

[4] In oral submissions the respondent's counsel, Ms Fletcher, elaborated by saying that the key issue from the respondent's point of view is whether or not the orders were necessary for the protection of the applicant.

[5] The applicant objects to paras [3]-[8] of an affidavit filed by the respondent on 12 February 2020 and to exhibits A to E of that affidavit. In para [6] of the affidavit in support of his interlocutory application sworn 24 February 2020 he said:

> Specifically, I seek to have removed from the affidavit paragraphs 3 to 8 and exhibits A to E on the following grounds:
>
> (a) Exhibits A and B are non-sworn statements.
>
> (b) Exhibits C and D are partially legible and/or have been redacted by the applicant. The source, maker and context of the records is unknown.
>
> (c) Exhibit D relates to guardianship concerns and is irrelevant to the determination of the issue of whether a protection order is necessary for the protection of myself and [my fiancée].

[6] He went on to say that he believed he was prejudiced by the inclusion of the evidence because it was not capable of being tested under cross-examination. He said that if the evidence was not removed then the unpleasant and prejudicial nature of the evidence, even though "not relevant", will result in him having to lead rebuttal and possibly, "retaliatory evidence." This will likely extend the hearing time and negatively impact on the tone of the proceedings. His counsel elaborated on those submissions today.

Evidence Objected To

[7] I will now record the specific evidence that is objected to, because I will later be dealing with the evidence objected to a paragraph by paragraph basis:

> 4. The Applicant, in his Affidavit dated 03 October 2019 at paragraph 33, deposes that he was informed verbally by a staff member at [organisation 1] that they had issued a Trespass Order against me. He acknowledges that in fact an Order was not issued. **Attached** and marked **"A"** is a true and correct copy of an email from [organisation 1] stating that no Trespass Order had been issued. This is an example of the behaviour the Applicant enters into in order to upset me and create difficulties for me.
>
> 5. The Applicant has also laid complaints to CYF [location A] accusing me of emotionally and psychologically abusing the children. This was investigated and CYF found no cause for concern. **Attached** and marked **"B"** is a true and correct copy of [Sarah Hicks], Social Worker's report.
>
> 6. The Applicant has also reported to Waitemata District Health Board ("WDHB") that Ms [Tate] of [a school in location A] has concerns about [Karl] and [Jeremy]. **Attached** and marked **"C"** is a true and correct recording of the WDHB's investigations. The WDHB found that Ms [Tate] had no concerns at all about the children. Despite that, the Applicant continued to argue that Ms [Tate] did have concerns.
>
> 7. **Attached** and marked **"D"** are an email from the Appellant to a number of teachers at [the school] stating that I have in the past provided false information and misleading innuendos about the Applicant; and an email from a teacher [Jane Chong] who writes *"I feel the issue has escalated dramatically and quite frankly I am too scared to reply to [Julian Farraday]"*.
>
> 8. The Applicant also reported to WDHB accusing me of medical neglect and sexually inappropriate behaviour but would not allow Oranga Tamariki to be informed. **Attached** and marked **"E"** is a record of that report.

Exhibits Objected To

[8] I will also now briefly describe each of the exhibits that are objected to.

[9] Exhibit A is a letter dated 20 September 2019 addressed, "To whom it may concern," from [Jonah Riley], National Youth Manager, [organisation 1], Auckland. It says in summary that it had been written to provide clarification on the interactions of

[organisation 1] with the respondent while her son was a member of the Youth Programme, specifically:

> (1) At no time did [organisation 1] serve [Harriet] with a trespass order, nor did we seek one against her in any way.
>
> (2) At no time did [organisation 1] have concerns about [Harriet] being a risk to the safety of the young people in our programme.

[10] Exhibit B is a case note record from a social worker, [Sarah Hicks], at CYF [location A] dated 31 August 2015 which is headed, "Rationale for not interviewing [Jeremy] and [Karl]," and the document goes on to discuss a concern that there have effectively been allegations and counter-allegations made by the parents who are the parties in this matter as to issues of concern about those boys.

[11] Exhibit C is a series of file notes said to be about [Jeremy Farraday]. They seem to date from August 2019 and they include passages that highlight voice messages on the "admin phone" from the applicant, "[Julian]", which express concerns about his sons and about investigations that were carried out as a result. It runs to two pages with several notations.

[12] Exhibit D is an exchange of emails between [a school at location A] and the respondent. It includes, in an email that the respondent sent to [the school] on 27 April 2017, this passage:

> It is well documented in the past of Ms [Gower]'s tactic in providing false information and misleading innuendos about myself and my character, both of which is defamatory and slander. I am determined to not let this mar [Karl]'s secondary education and his relationship with me and the school.
>
> Because of this oversight, I now request under the Official Information Act the document that Ms [Gower] provided for the school in regards to [Karl]." (sic)

[13] It also includes an email from [Jane Chong], who evidently a visual art teacher in the school, sent internally, addressing the email that was received from the applicant in which she said that she assumed she did not need to reply and said, "As the emails have continued, I feel the issue has escalated dramatically and quite frankly I am too scared to reply to [Julian Farraday]."

[14] Finally, exhibit E is a series of partially redacted file notes, again dealing with [Jeremy Farraday], which the respondent says in para [8] of her affidavit of 12 February are a record of complaints to the Waitemata District Health Board by the applicant, accusing her of medical neglect and "sexually inappropriate behaviour". She says that this evidences the fact that the applicant would not allow Oranga Tamariki–Ministry for Children to be informed of these supposedly serious allegations. While there are a number of redactions. The relevant passages from that email seem to be:

> Writer confirmed what he was saying his concerns were, which he confirmed as:
>
> - Medical neglect
> - Sexual inappropriate behaviour.
>
> Writer strongly suggested as he has these concerns, he is obligated to make a report of concern to Oranga Tamariki. He responded by saying that Oranga Tamariki refused to accept any more ROCs[1] from him.

The Law

[15] This is an application under r 170 Family Court Rules 2002 which provides that:

> **170 Pre-hearing rulings on evidence**
>
> (1) The Court may, at any stage of the proceedings, –
>
> (a) make an order determining a question of admissibility of evidence proposed to be tendered at the hearing by a party:
>
> (b) if it is proposed that the evidence of a person be admitted at the hearing in the form of a videotape, make an order authorising the tendering of the evidence by that means, and give any directions that it thinks fit relating to the procedure by which the videotaping of that evidence is to be carried out.
>
> (2) Any order or directions under subclause (1) may be varied or revoked by the Court on its own initiative or on an interlocutory application for the purpose.

[16] The applicant also urges on me that r 193 Family Court Rules is relevant:

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[1] Presumably reports of concern.

> **193 Striking out pleading**
>
> (1) The court may order that all or part of an application or defence or other pleading be struck out if the pleading or part of it—
>
> (a) discloses no reasonable basis for the application or defence or other pleading; or
>
> (b) is likely to cause prejudice, embarrassment, or delay in the proceedings; or
>
> (c) is otherwise an abuse of the court's process.
>
> (2) An order under subclause (1) may be made by the court—
>
> (a) on its own initiative or on an interlocutory application for the purpose:
>
> (b) at any stage of the proceedings:
>
> (c) on any terms it thinks fit.

[17] I am not entirely convinced that r 193 is directly relevant. It relates to pleadings rather than affidavit evidence and I think there are other provisions in the Family Court Rules that are of more relevance which I refer to below.

[18] Issues of admissibility of evidence must primarily be determined applying the rules of law found in the Evidence Act 2006. To quote from *R v Gwaze*:[2]

> All the rules of exclusion provided by the Act are binding on Judges. Although their application may raise 'nice questions of judgment', they do not confer discretion as to the admissibility of evidence. They prescribe standards to be observed.

[19] However, s 12A Family Court Act 1980 provides the Court with the discretion to admit any evidence that it considers may assist in the determination of proceedings, despite that evidence being inadmissible under the Evidence Act.

> **12A Evidence**
>
> (4) The effect of section 5(3) of the Evidence Act 2006 is that that Act applies to the proceeding. However, the court hearing the proceeding may receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

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[2] *R v Gwaze* [2010] NZSC 52 at [49].

[20] I will also bear in mind the importance of r 3 Family Court Rules:

> **3 Purpose of these rules**
>
> (1) The purpose of these rules is to make it possible for proceedings in the Family Court to be dealt with –
>
> (a) as fairly, inexpensively, simply, and speedily as is consistent with justice.
>
> (b) in such a way as to avoid unnecessarily formality.
>
> (c) in harmony with the purpose and spirit of the family law Acts under which the proceedings arise.
>
> (2) These rules must be read in light of their purpose.

[21] That rule emphasises the need for efficient solutions to be found in the interests of fair, just and expeditious disposition of matters that come before this Court.

[22] Before examining the discretion that is given to me by s 12A Family Court Act and the guiding principles in r 3 Family Court Rules, it is important to first consider whether the evidence in question is admissible in terms of the Evidence Act. The starting point may be ss 7 and 8:

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is–
>
> (a) inadmissible under this Act or any other Act.
>
> (b) excluded under this Act or any other Act.
>
> (2) Evidence that is not relevant is not admissible in a proceeding.
>
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
>
> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will–
>
> (a) have an unfairly prejudicial effect on the proceeding.
>
> (b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[23] The "relevance" test in s 7(3) is not particularly exacting. Any evidence that has a tendency to prove a matter or disprove a matter which is material to the determination of the proceedings will cross that threshold.[3]

[24] Particularly relevant in determining this issue is r 158 Family Court Rules 2002:

158 Form and contents of affidavit

(1) Every affidavit—

(d) must be limited to any matters that would be admissible if the deponent were giving the evidence orally at the hearing.

(e) must, if it is an affidavit in reply, be limited strictly to matters in reply.

(2) The court hearing the proceedings—

(a) may refuse to read an affidavit that—

(i) unnecessarily sets forth any argumentative matter or copies of, or extracts from, documents; or

(ii) is an affidavit in reply, but introduces new matter; and

(b) may order that the costs incurred in respect of, or occasioned by, an affidavit of a kind described in paragraph (a) be paid by the party filing the affidavit.

[25] I am therefore required to consider firstly whether evidence would be admissible if the deponent were giving the evidence orally. Secondly, I am to exclude unnecessarily argumentative matter, or copies of or extracts from documents if they are unnecessarily included. Finally, I note that I can order that the costs of, or incurred in respect of, or occasioned by an affidavit which offends against the rules can be paid by the party filing the affidavit.

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[3] *Wi v R* [2009] NZSC 121.

[26] Finally, I need to consider whether or not the provisions in the Evidence Act dealing with hearsay evidence are relevant. Of particular relevance are ss 16, 17, 18 and 19 Evidence Act 2006.

> **16 Interpretation**
>
> (1) In this subpart,—
>
> **business—**
>
> (d) means any business, profession, trade, manufacture, occupation, or calling of any kind; and
>
> (e) includes the activities of any department of State, local authority, public body, body corporate, organisation, or society
>
> **business record—**
>
> (a) means a document—
>
> (i) that is made–
>
> (A) to comply with a duty; or
>
> (B) in the course of a business, and as a record or part of a record of that business; and
>
> (ii) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied; but
>
> (b) does not include a Police record that contains any statement or interview by or with an eyewitness, or a complainant, or any other person who purports to have knowledge or information about the circumstances of alleged offending or the issues in dispute in a civil proceeding
>
> **circumstances,** in relation to a statement by a person who is not a witness, include–
>
> (a) the nature of the statement; and
>
> (b) the contents of the statement; and
>
> (c) the circumstances that relate to the making of the statement; and
>
> (d) any circumstances that relate to the veracity of the person; and
>
> (e) any circumstances that relate to the accuracy of the observation of the person

duty includes any duty imposed by law or arising under any contract, and any duty recognised in carrying on any business practice.

(2) For the purposes of this subpart, a person is unavailable as a witness in a proceeding if the person—

(a) is dead; or

(b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or

(c) is unfit to be a witness because of age or physical or mental condition; or

(d) cannot with reasonable diligence be identified or found; or

(e) is not compellable to give evidence.

(3) Subsection (2) does not apply to a person whose statement is sought to be offered in evidence by a party who has caused the person to be unavailable in order to prevent the person from attending or giving evidence.

17 Hearsay rule

(1) A hearsay statement is not admissible except—

(a) as provided by this subpart or by the provisions of any other Act; or

(b) in cases where–

(i) this Act provides that this subpart does not apply; and

(ii) the hearsay statement is relevant and not otherwise inadmissible under this Act.

18 General admissibility of hearsay

(1) A hearsay statement is admissible in any proceeding if—

(a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and

(b) either–

(i) the maker of the statement is unavailable as a witness; or

(ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

(2) This section is subject to sections 20 and 22.

> **19 Admissibility of hearsay statements contained in business records**
>
> (1) A hearsay statement contained in a business record is admissible if–
>
> (a) the person who supplied the information used for the composition of the record is unavailable as a witness; or
>
> (b) the Judge considers no useful purpose would be served by requiring that person to be a witness as that person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied; or
>
> (c) the Judge considers that undue expense or delay would be caused if that person were required to be a witness.
>
> (2) This section is subject to sections 20 and 22.

[27] I will need to consider whether any of the exhibits that the respondent has exhibited constitute business records and if so, have they been created in circumstances where they are likely to be reliable; are they made from information that is supplied directly or indirectly from a person who had personal knowledge of the matters in question. I will need to note s 17(b)(ii) which allows a hearsay statement to be admitted if it is relevant and not otherwise inadmissible under the Act and I will have to note s 18, which requires me to consider whether the circumstances relating to the statement provide reasonable assurances that the statement is reliable and either the maker of the statement is unavailable or undue expense or delay would be caused if the maker of the statement were required to be a witness. Finally, under s 19, it is open to me to allow hearsay evidence contained in a business record if either the person who supplied the information is unavailable or there would be no useful purpose served by requiring them to give evidence, or undue expense or delay would be incurred as a result.

[28] From the case law, the following passages are particularly relevant to the issues today. Family Court Judge Murfitt in *D v O* said at para [22]:[4]

> Relaxation of the rules of evidence is not a licence for evidential anarchy. While hearsay evidence and opinion evidence may at times be admitted under the relaxed evidential rules, the touchstone will always be relevance and reliability.

[4] *D v O* [2006] NZFLR 137.

[29] McGechan J in *Donovan v Graham* said:

> It is important affidavits will not be allowed to mushroom, with irrelevance piled upon irrelevance, accusation upon accusation and with the parties becoming increasingly and unproductively inflamed.[5]

[30] I also endorse the just and pragmatic approach taken by Judge Somerville in *Brock v Norton*:[6]

> [21] Rule 158 provides the Court with discretion to refuse to receive evidence in certain circumstances. It is a discretion to be judicially exercised and, in my view, it would be difficult to refuse to accept evidence that could have an impact on the outcome of the proceedings. If for example an affidavit in reply introduced new material of relevance, I would be reluctant to refuse to accept it, simply because it is, 'new matter'.
>
> [22] In similar vein, I consider that cl (2)(a)(i) which provides the Court with the ability to refuse to accept any affidavit evidence that, "unnecessarily sets forth any argumentative matter or copies of or extracts from documents" is directed at the form in which evidence is introduced. If evidence is relevant and is not excluded as being inadmissible, then it should be received in evidence unless the manner in which that evidence is produced in the affidavit is unnecessarily argumentative or unnecessarily involves copies of, or extracts from, documents. It should not be used to prevent a Court from taking into account relevant and admissible evidence.

Submissions

[31] I turn now to the issues that counsel raised in their submissions. There was a preliminary issue as to whether or not this application ought to have been made without leave. There was also an issue raised as to whether or not the respondent ought to have filed a notice of opposition. It was pointed out to me that the affidavit filed by the applicant was filed on 24 February 2020 when it ought to have been filed on 19 February 2020. However, neither counsel placed much weight on these preliminary issues and I do not believe that either party has suffered prejudice as a result of any procedural niceties that have not been complied with.

[32] As for the evidence that is objected to the applicant's overall objection is as set out in paras [7] and [8] of the affidavit of the applicant dated 24 February 2020, as I have recorded above.

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[5] *Donovan v Graham* (1991) 4 PRNZ 311.
[6] *Brock v Norton* [2016] NZFC 468.

[33] In her oral submissions today, Ms Malone for the applicant accepted that if the evidence is relevant, the Court has discretion to admit it, but she reminded me that the parties have been fighting with each other for 10 years and she said this evidence would "absolutely" prolong the process. She said, "Correspondence concerning concerns that both parties have is not relevant to issues in the proceedings. It is not relevant to the issues at all." She says that the respondent's argument is that effectively the applicant is, "Putting himself in her face," but the documents do not support that proposition. She also emphasised the fact that the issues that were raised by the challenged evidence might need replies and therefore run the risk of prolonging the proceeding.

[34] The respondent's overall approach was summarised in para [5] of her submissions where she said simply that the evidence produced is relevant and helpful in the determination of the application for a protection order. In submissions today she emphasised that the evidence was submitted because it will help the Court assess whether the order is necessary from the subjective view of the applicant. She said that the applicant's perception of the respondent and the risk she poses is at the heart of this family violence matter. She argued that based on what is before the Court, there is no prejudice that would be suffered by the applicant and no embarrassment that would be caused if the evidence is admitted. If there were concerns about the delay that might be caused, she said these concerns could have been dealt with at callover and can still be dealt with.

[35] She denied that there was any abuse of the Court's process in proffering this evidence in this form now, saying it was more about the applicant attempting to stop the respondent from putting forward evidence that would disprove aspects of his case. She said that the applicant knows the facts, he was involved, and it simply becomes a question of the weight to be given to the alleged hearsay evidence from the absent authors of the exhibits which are objected to. It is a question of weighing that evidence, the information in those documents, against the evidence of the applicant, who would be available for cross-examination. The exclusion of the evidence might lead to the respondent seeking leave to adduce direct evidence from the authors of any excluded documents by way of summons or affidavit. Exclusion might, ironically, prolong the hearing or the disposition of this matter.

[36] I want to address at this point a phrase that was used by the applicant on several occasions in his affidavit of 24 February 2020 at para [8]. It was suggested on several occasions that if these passages of evidence and these exhibits remain in evidence, the applicant might have to lead "Retaliatory evidence." I do not know what retaliatory evidence is. If that means evidence in reply, then yes, if the applicant has relevant evidence in reply and can persuade a Court that leave should be granted to adduce that evidence now, he can apply for leave to produce that evidence. However, evidence is not a form of engagement or conflict. It is particularly inappropriate in the context of a family violence hearing for the parties to be suggesting that evidence can be filed "in retaliation".

Analysis and Decision

[37] I turn now to each paragraph of the affidavit evidence which the applicant objects to starting with para [4]. The applicant's submission essentially was that the [organisation 1] letter does not contradict the applicant's evidence and is therefore not relevant to the respondent's case. In his affidavit of 3 October 2019 at para [33] he initially said that he was told verbally that a "trespass order" had been made against the respondent, but he says now that he acknowledges that such an order had not in fact been issued. However, exhibit A not only confirms that no trespass order was issued but it also appears to confirm that [organisation 1] Youth did not have concerns about the respondent being, "A risk to the safety of young people in our programme." That is relevant because at para [33] of the applicant's affidavit dated 3 October 2019 he had said, "However, [Harriet] was warned about her behaviour." He attached, as exhibit E to that affidavit, an email exchange between himself and [organisation 1], which is somewhat ironic given that he is objecting to documents of that nature being attached to the respondent's evidence. The respondent in submissions today emphasises the fact that the content of para [4] and the relevant exhibit disproves a statement that the applicant made and is therefore admissible under s 7(6) Evidence Act.

[38] I note that exhibit A is a letter on [organisation 1]'s letterhead and is signed by the ostensible author. While it is arguably hearsay for the respondent to produce this letter if she is relying on the truth of the statements contained in it, the applicant does

not appear to be challenging the authenticity of the document. It may not strictly speaking be a "business record" and therefore may not carry significant weight against any specific denial by the applicant but overall, that is just a question of the weight that the Court gives to it – should the applicant contest the veracity of the statements it contains – as against the weight to be given to any direct evidence from the applicant.

[39] In some ways this is a contest of hearsay evidence against hearsay evidence. At para [33] of his affidavit of October 2019 the applicant was saying that the respondent was warned about her behaviour, something he has no direct knowledge of. The respondent in reply says she was not warned about her behaviour. That is her direct evidence. She adduces as confirmation the letter from [organisation 1] and while that might be hearsay, the applicant can scarcely complain when he effectively started the hearsay exchange. In my judgment, the contents of para [4] and exhibit A are admissible. In particular the aims of r 3 will be promoted if I allow the evidence not be read and it is appropriate that I exercise my discretion under s 12A of the Family Courts Act 1980.

[40] Turning to para [5] of the affidavit and exhibit B, this is an historical document evidently prepared by CYF (as it then was). It might be open to question as to why something that is so historical is being produced in evidence, but then of course the applicant's case is based on allegations of 10 years of conflict since separation, which he essentially alleges has been "a continuing pattern of behaviour".

[41] Again, the applicant does not challenge the authenticity of this document per se. His counsel emphasised a concern that allowing this evidence to be admitted might cause problems with timing as far as the hearing was concerned. We already have five witnesses involved in a hearing of one day and she emphasised the fact that it was important that it be heard and determined on the date it is set down for, which is 26 June 2020. The respondent emphasises the fact that the evidence goes to the reasonableness of the applicant's perception that the orders are necessary. She argued that if this document was not admitted, she would be hamstrung in defending her case. Notwithstanding the fact that the document dates back five years and deals with an issue concerning the parties' children, it is not being adduced in order to prolong or

re-engage in an argument that has been resolved concerning the care or custody of those children.

[42] In my analysis, this paragraph from the affidavit and the exhibit are admissible. Essentially, the respondent is saying in para [5] that the applicant has made a series of allegations or of false allegations against her; in other words, he is engaging with her or engaging against her and that that is an indication that he does not fear her and therefore does not need the protection of the orders he seeks. That is to some extent corroborated by this document from 2015 which records that there have been "allegations and counter-allegations" made. Again, is a question of the weight to be given to the document. The weight the evidence carries is a matter for the trial Judge. However, I am not willing to strike it out. Its admission meets the aims of r 3 and it is appropriate that I exercise my discretion under s 12A of the Family Courts Act 1980 as otherwise there is a risk that either relevant evidence will be excluded, or the hearing prolonged through additional witnesses being needed, assuming they can be found. I also regard this document as fitting squarely within the definition of a "business record" as it is a "Case Note" prepared by a named CYF social worker in August 2015 headed "Rationale for not interviewing [Jeremy] and [Karl]". I am satisfied given the likely circumstances of its' preparation that the information it contains is likely to be reliable. While I do not know whether or not the author is likely to be available to give evidence I do consider that the expense or delay occasioned by requiring the maker of the statement to be a witness justifies the exercise of my discretion under s 18 and 19 Evidence Act 2006.

[43] Moving on to para [6] of the affidavit and exhibit C. The essence of the respondent's evidence is that false reports were being made against her by the applicant to the Waitemata District Health Board. We have at exhibit C a business record of Waitemata District Health. It appears to be a contemporaneous record made at the time, between 2018 and 2019. Again given the circumstances of it being prepared and the fact it is a contemporaneous record by a third party prepared in an official capacity I find the information it contains is likely to be reliable. There is no suggestion that it is inauthentic or not genuine. If there were, then that would be a different matter.

[44] In relation to both this document and the other documents, I also need to consider what the impact of exclusion might be. Taking account of the r 3 need to be adopting a process which is fair, just and expeditious, I would be concerned if the respondent was effectively required to summons or reduce affidavit evidence from the authors of these statements, even assuming she could track them down. Of course if the applicant can establish that the statements are inauthentic, it would be open to him to lead evidence to that effect. That is a different matter. I think in the context of the discretion that I have under s 12A Family Court Act, it is fair and just and will ensure that the proceedings are disposed of efficiently if I allow exhibit C and the exhibits that I have earlier referred to, to be admitted.

[45] Moving on to para [7] and exhibit D, it was urged on me that this evidence and the exhibit are relevant for two reasons. Firstly, again they show that the applicant's claim that he has a subjective fear of the respondent and therefore needs the protection of the orders may be questionable. It is also suggested that they might be relevant because they indicate that the applicant engages in a tendentious manner with third parties, the respondent included. It is submitted that the fear expressed by Ms [Chong], the visual arts teacher, in her email contribution of 1 May 2020 is relevant to that issue.

[46] I am not sure how much weight the Judge can give to Ms [Chong]'s expression of fear but if the applicant is suggesting that he would be prejudiced because he is not able to cross-examine Ms [Chong] as to why she was fearful or what she was fearful of, I am not sure that cross-examination would be particularly helpful. Her subjective feelings at the time are not really open to challenge in the context of this proceeding and again this is a record by an uninvolved third party prepared in a professional capacity containing contemporaneous information which may therefore, on balance of probabilities, be reliable. What is most relevant is the existence of the exchange itself, which indicates that the applicant was communicating with third parties about his former wife in a somewhat confrontational manner. Whether the hearing Judge chooses to give little weight, or no weight, or significant weight to the expression of fear recorded at the time by Ms [Chong], I do think that, overall, exhibit D is relevant, as are the contents of para [7]. I think it appropriate that I exercise my discretions under s 12A Family Courts Act 1980 and s 18 & 19 Evidence Act 2006. I am satisfied

that this is a business record maintained by the school as part of their records and that requiring direct evidence might occasion unjustifiable expense or delay.

[47] Finally, I turn to para [8] and exhibit E, this is another business record from WDHB. It is fair for the applicant to note that that document is highly redacted and to express concern about that. However, it is not unusual for official records of this kind to be redacted, so as to exclude private information. The respondent has said in her evidence that she was not responsible for the redactions. If the applicant challenges that we might be faced with a different issue. I do not understand the applicant to otherwise say that the document is inauthentic. It does go to the necessity of the orders issue that the respondent has raised. It does seem to provide the Court with some independent data to confirm that there were "repetitive" issues raised by the applicant, "He responded by saying that Oranga Tamariki refused to accept any more reports of concern from him."

[48] Again, the weight that the Judge might give that against any direct evidence that the applicant might lead is a matter for the trial Judge.

[49] However, it should be borne in mind that the applicant will have an opportunity to respond to all of these matters. He will presumably be giving direct evidence rather than hearsay evidence. It is likely that his evidence will be accorded due weight. It is a matter for the hearing Judge as to how much weight is to be given to any indirect evidence, including the indirect evidence that has been led by the respondent.

Procedural Direction

[50] Overall, I am satisfied that it is appropriate for me to exercise my discretions under s 12A Family Courts Act 1980 and ss 18 and 19 Evidence Act 2006 and admit all of the evidence that has been objected to.

Evidence in Reply

[51] Counsel for the applicant has pointed out to me that her client has not had an opportunity to reply to paras [4]-[8] of the respondent's affidavit because he chose

instead to challenge admissibility. He is to be allowed seven days from today to file that evidence. It is to be concise and strictly in reply and that reply evidence would therefore be due on or before 2 June 2020.

Costs

[52] The respondent is unable to tell me today whether or not her client was legally aided. If she was legally aided, then I would be inclined to award costs and I would consider that costs on 1B of the scale set out in the District Court Rules were appropriate. The applicant, however, has pointed out to me that there is a risk that the costs on scale might exceed the actual preparation time involved. I therefore direct as follows:

(a) Ms Bodewes is to advise within seven days whether or not her client is legally aided. If she is, then the costs issue need go no further.

(b) If she is not, then she is to provide details of the actual cost incurred in preparing for and attending at this hearing. I will award no more than two-thirds of that actual cost and no more than 1B scale costs, whichever is the lower. The respondent should provide a schedule showing the costs that she claims in terms of the District Court scale and in terms of her actual and reasonable costs within seven days.

(c) If the applicant takes issue with the respondent's calculations of her entitlement under the scale he should file a brief submission with the ultimate schedule within seven days and the file can be referred to me for any dispute to be resolved.

K A Muir
Family Court Judge