

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

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**IN THE FAMILY COURT
AT MANUKAU**

**I TE KŌTI WHĀNAU
KI MANUKAU**

**FAM-2018-092-000471
[2023] NZFC 7668**

IN THE MATTER OF	THE FAMILY VIOLENCE ACT 2018
BETWEEN	[MOLLY HAMBLIN] Applicant
AND	[ELIJAH MAGRATH] Respondent

Hearing: 13 July 2023

Appearances: Applicant – self represented
Mark Tolich counsel to assist (s. 95 - applicant)
Respondent – self represented
K Goldsbury counsel to assist (s. 95 - respondent)

Judgment: 19 July 2023

RESERVED DECISION OF JUDGE M L ROGERS

Background

[1] [Molly Hamblin] and [Elijah Magrath] were formerly partners with their relationship lasting from 2012 until 2016. There is a qualifying relationship under the Family Violence Act 2018 ('the Act')¹.

[2] Ms [Hamblin] and Mr [Magrath] have raised two children together. Ms [Hamblin]'s son [Cooper Hamblin] was born on [date deleted] 2012. Mr [Magrath] is not [Cooper]'s biological father but has been his only paternal figure. The party's daughter [Thea Magrath] was born on [date deleted] 2014.

[3] Since 2018 Ms [Hamblin] and Mr [Magrath] have been engaged in highly contentious and long running parenting proceedings. The most recent substantive decision in that context is that of Judge Mahon dated 28 April 2023. I note Ms [Hamblin]'s advice that the decision is under appeal but at the time of hearing it was the applicable parenting framework.

[4] Judge Mahon dismissed Ms [Hamblin]'s application to place the children in her day to day care and confirmed as final the parenting order placing [Cooper] and [Thea] in Mr [Magrath]'s day to day care. Ms [Hamblin]'s contact under the parenting order has been stayed and all of her contact is now in the context of a guardianship order.

[5] The children have been subject to the guardianship of the court² since 18 May 2022. Contact between the children and the parties has been supported by Oranga Tamariki on the basis that Ms [Hamblin] has weekly supervised contact with the children for three hours on a weekend day.

[6] There have been an extraordinary and wide-ranging number of applications filed by Ms [Hamblin] in this court and in other jurisdictions.

¹ Family Violence Act 2018, s 12

² Care of Children Act 2004, ss 31 and 33

[7] On 22 October 2020 and 8 April 2021 Ms [Hamblin] filed without notice applications for protection orders against Mr [Magrath] and his mother [Miranda Magrath]. Those applications were declined on a without notice basis and put on notice. The applications were then defended.

[8] An extensive two-day hearing took place before Judge Tan on 24 June 2021 and 27 July 2021. Judge Tan's decision of 17 September 2021 is comprehensive. Judge Tan did not accept Ms [Hamblin]'s allegations of physical and psychological abuse by Mr [Magrath] against her and the children. Family violence not having been proven, the judge found that there was no basis for protection orders against Mr [Magrath] or his mother.

[9] Ms [Hamblin] filed a further application for a protection order on 6 December 2021 which was dismissed by Judge Mahon on 7 December 2021 on the basis "the evidence filed in support does not disclose violence by the respondent since the hearing before Judge Tan".

[10] The application for my determination is one dated 14 November 2022. Ms [Hamblin] is again seeking a protection order against Mr [Magrath] as the first respondent and Ms [Magrath] as the associated respondent. Ms [Hamblin] wants any order to apply for her benefit and also for the benefit of [Cooper] and [Thea].

[11] Ms [Hamblin]'s application sets out extensive concerns about the current parenting arrangements and asks the court to place the children with her or in another safe place. Ms [Hamblin] says Mr [Magrath]'s contact with the children should be supervised.

[12] Ms [Hamblin] says that Mr [Magrath] was abusive during their relationship and had issues with his temper and alcohol abuse. I note that Ms [Hamblin]'s concerns about Mr [Magrath]'s behaviour during the relationship have all been canvassed in earlier proceedings both under the Family Violence Act 2018 and the Care of Children Act 2004.

[13] The concern that led to this application was an alleged report by the children that Mr [Magrath] had threatened to strangle them. That particular issue was subsequently the subject of specific attention in Judge Mahon’s decision, and he found as follows;

“I find that Mr [Magrath] made the alleged comment about strangling to the children. His discussion with them after the Simpsons clip may have also occurred but at another time.

The issue for the Court is the context for the comment and effect on the children. The independent assessments of Ms Begam and Dr Ghanbari confirm that [Cooper] and [Thea] did not take the comment literally and are not afraid of their father. On the contrary, they feel safe in Mr [Magrath]’s care.

Mr [Magrath] accepted in oral evidence that he should not express his frustration as a parent in this manner. However, his comments need to be seen in the continuum of parenting identified by Judge Tan and confirmed by Ms Begum. Ms Begum said the children knew Mr [Magrath] would not action what he said but his comment had an emotional impact on them.

This incident is another example of Ms [Hamblin]’s struggle to interpret anything the children may say to her in context or with balance. She continues to interpret such events as further evidence of abusive behaviour by Mr [Magrath] which she claims puts the children at risk when they are in his care.”³

[14] Ms [Hamblin]’s affidavit of 14 November 2022 alleges that “the children having suffered 5 years of constant unprotected exposure to [Elijah Magrath]’s “angry outbursts”.”⁴ Ms [Hamblin] concludes “Due to this abuse being unaddressed since 2018 and [Elijah Magrath] not curbing his aggression or control, I am worried his abuse will continue to escalate. I have serious concerns for myself and my children’s safety if he does follow through with his threats to strangle them or hurt/harm me”⁵.

[15] That fleeting reference to threats to hurt or harm her is the only detail of any alleged violence by Mr [Magrath] to Ms [Hamblin] in that affidavit, which overwhelmingly focuses on Ms [Hamblin]’s concerns for the children.

[16] Ms [Hamblin] says that Mr [Magrath]’s mother should be included as an associated respondent because;

³ Reserved decision of Judge Mahon dated 28 April 2023 [35] – [38]

⁴ Ms [Hamblin]’s affidavit 14 November 2022, p 4

⁵ Ms [Hamblin]’s affidavit 14 November 2022, p 7

“[Miranda Magrath] has been complicit in [Elijah]’s abuse and has failed to protect the children from [Elijah]. I am fearful [Elijah] will continue to use his mother to harass or abduct the children again. We need to be protected from them both.”⁶

[17] Mr [Magrath]’s affidavit in support of his opposition to the orders sought is brief and denies there has been any abuse either here or when the family lived in Australia. Mr [Magrath] notes that there have been numerous investigations of Ms [Hamblin]’s allegations and they have not been substantiated⁷.

[18] Ms [Hamblin] then filed a second affidavit for these particular proceedings dated 22 May 2023. That affidavit reiterates Ms [Hamblin]’s concerns for the children. Ms [Hamblin] refers to what she says was her earlier experience of “verbal abuse and coercive control of [Elijah Magrath]”⁸ but acknowledges those concerns were dealt with in the hearing before Judge Tan.

[19] Ms [Hamblin]’s affidavit also details her concerns about the court’s findings and processes but what is still strikingly absent is any evidence or even allegation of further family violence by Mr [Magrath] to Ms [Hamblin] since the hearing before Judge Tan.

[20] Each party has been without the assistance of counsel for this application. Having regard to the history of the proceedings and the nature of the allegations, I issued a minute on 12 May 2023 appointing counsel to assist pursuant to s 95 of the Evidence Act 2006. The role of each counsel was limited to put one party’s questions to the other party in the course of cross-examination.

[21] In her oral evidence the focus of Ms [Hamblin]’s concerns was overwhelmingly on the children. Ms [Hamblin] specifically denied any attempt to relitigate past allegations of abuse that have already been the subject of hearings. Rather Ms [Hamblin] says that it was the children’s new disclosure, in October 2022, that they had been strangled by their father, that led to this application. Ms [Hamblin]

⁶ Ms [Hamblin]’s affidavit 14 November 2022, p 8

⁷ Mr [Magrath]’s affidavit 2 December 2022, [6] and [8]

⁸ Affidavit of Ms [Hamblin] dated 22 May 2023, [7] and [9]

says that she considered the new information showed “an escalation of his abusive behaviour towards the children, which continues to be a serious concern”.⁹

[22] The only claim specific to Ms [Hamblin] herself was that Mr [Magrath] had referred to her as a “stupid bitch’ within the children’s earshot and had prevented her from making contact with the children or exercising her guardianship. It was put to Ms [Hamblin] that this did not amount to family violence to which Ms [Hamblin] responded, “I would reference section 9.3 of the Family Violence Act, clearly depicting that isolation of children from a family member amounts to an act of violence.”¹⁰

[23] The section of the Act noted by Ms [Hamblin], ss 9(3) says that;

“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.”

[24] It was put to Ms [Hamblin] that rather than perpetuating family violence, Mr [Magrath] was simply complying with the Family Court’s orders as they relate to parenting. Ms [Hamblin] rejected this proportion and said that;

“By breaching Court orders, exposing the children to episodes of domestic violence such as calling me names, like a “stupid bitch” on the phone, that they hear, that is distressing for them. By destabilising consistent contact, as limited as it is, further distresses the children, isolates them from me and amounts to a pattern of behaviour of coercive control and domestic violence.”¹¹

[25] My understanding of that response, with its emphasis on the effect on the children of the alleged behaviour, was that it confirmed the focus of Ms [Hamblin]’s application was on her allegations of family violence to the children. However, if Ms [Hamblin] intended to characterise the restrictions on her contact with the children as

⁹ Notes of evidence, p 13, ll 26 - 33

¹⁰ Notes of Evidence, p 3 ll 30 - 32

¹¹ Notes of Evidence, p 4 ll 16 - 21

family violence by Mr [Magrath], then that would be unsustainable as those restrictions have been imposed by the Family Court on the basis of substantiated concerns about Ms [Hamblin]’s parenting.

Grounds for making a protection order

[26] Once the court is satisfied there is a qualifying relationship, the key requirements that the court must be satisfied of before making a protection order are as follows;

- (i) that the respondent has inflicted, or is inflicting, family violence against the applicant, or a child of the applicant’s family, or both; and
- (ii) that the making of an order is necessary for the protection of the applicant, a child of the applicant’s family, or both.¹²

The status of the children and jurisdiction to include the children in any protection order

[27] At the time this application was filed the children were not residing with Ms [Hamblin], ordinarily or periodically. The parenting and guardianship orders made by Judge Mahon, confirm that the children do not currently ordinarily or periodically reside with Ms [Hamblin]. They have supervised contact with their mother for 2 to 3 hours per week with an Oranga Tamariki social worker providing the supervision. That means they are not ‘children of the applicant’s family’ as defined by s 8 of the Act.

[28] That in turn means that s 86(1) does not apply and the children are not automatically included as protected people if an order is made in favour of Ms [Hamblin].

[29] A child may apply for a protection order themselves if they are over 16 years of age or else a representative can apply on their behalf.¹³ Ms [Hamblin]’s application

¹² Family Violence Act 2018, s 79

¹³ Family Violence Act 2018, s 62

does not nominate herself as a representative of the children but instead relies on the s 86(1) provisions as she describes the children as “usually living with you (part time or full time)”.

[30] There is no statutory jurisdiction for me to make a protection order that applies to the children. Further, and of even more significance Ms [Hamblin] cannot rely on her allegations of violence to the children to satisfy the requirement of s 79(a) as the allegations of violence are not in respect of ‘a child of the applicant’s family’ as defined by the Act. Ms [Hamblin] needs to satisfy me that there has been family violence by Mr [Magrath] to her.

[31] Ms [Hamblin]’s views that the protected parenting proceedings and their consequences for her relationship with the children are a form of family violence by Mr [Magrath] are in my assessment misconceived. The Family Court has been repeatedly satisfied that Mr [Magrath] has acted in the children’s welfare and best interests, as reflected in the final parenting order in Mr [Magrath]’s favour. There is no evidence that satisfies me those parenting proceedings were part of a pattern of behaviour of the type contemplated by s 9(3).

[32] That being the case, I am not satisfied that Ms [Hamblin] has established on the balance of probabilities that Mr [Magrath] has used family violence towards her. The application for a protection order is dismissed.

Associated Respondent – [Miranda Magrath]

[33] If the court makes a protection order, it can also make an order apply against a person whom the respondent is encouraging, or has encouraged, to engage in behaviour against the protected person if that behaviour, if engaged in by the respondent, would amount to family violence¹⁴. That person Ms [Hamblin] says that Ms [Magrath] has engaged in family violence against the children.

[34] I note my minute of 13 July 2023 regarding service. I was satisfied that service had not been affected in accordance with the Family Court Rules, but that issue was

¹⁴ Family Violence Act 2018, s 89(1)

put to one side on the basis that Ms [Hamblin] was anxious to proceed with the primary application against Mr [Magrath]. That was a sensible approach as the making of an order against an associated respondent is dependent on a protection order being made against the first respondent.

[35] Having dismissed the application as it relates to Mr [Magrath], it is also dismissed in respect of Ms [Magrath].

Outstanding interlocutory matters

[36] The primary application having been dismissed, any outstanding interlocutory proceedings associated with this application are also dismissed.

Judge M L Rogers
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 19/07/2023