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

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IN THE FAMILY COURT
AT THAMES

FAM-2014-075-000105
[2017] NZFC 10114

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995
BETWEEN	[RENATA MERRITT] Applicant
AND	[ANDRE CARR] Respondent

Hearing:	12 December 2017
Appearances:	R Clark for the Applicant J Rae for the Respondent
Judgment:	21 December 2017

REASONS OF JUDGE E B PARSONS

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[1] I heard these proceedings on 12 December 2017. At the conclusion of the hearing I indicated that the temporary protection order be discharged, and the occupation and ancillary furniture orders made final. I now provide my reasons.

[2] These proceedings relate to the matter of [Merritt] and [Carr]. Ms [Merritt] appears today seeking a final protection order, an occupation and ancillary furniture order. Mr [Carr] is defending those applications.

[3] There has been an application made on a without notice basis for a temporary protection order and ancillary orders in terms of occupation and furniture on 28 July 2017. Those orders were granted on the E-duty platform in terms of temporary orders and a notice of intention to appear has been filed by the respondent on 21 August 2017.

[4] There have been previous proceedings in terms of the Domestic Violence Act 1995 between these parties when the applicant sought and obtained in December 2014 a temporary protection order with temporary occupation and ancillary furniture orders again granted on a without notice basis. At that time there was a notice of discontinuance filed by March 2015. In support of that notice of discontinuance there was a memorandum of counsel filed in which it was asserted that the respondent's reaction to the applicant's orders served on him on 23 December 2014 was apparently not at all as the applicant expected. The respondent wanted to discuss reconciliation and relationship property settlement which have involved all properties having its origin during the parties' relationship moving from his sole name into his and the applicant's names as equal owners.

[5] It was further asserted that there was a s 21 agreement that had been signed in March 2015 and it was also stated that the fact that the respondent would agree to counselling was a revelation for the applicant and importantly that the applicant no longer wanted the protection order and other orders in place as she no longer felt at that time that they were necessary. It was therefore sought that the temporary orders be discharged and the substantive proceedings discontinued.

[6] What has happened since that time is that the parties have continued to see each other. The respondent asserts that he still regards the separation date as 23 December 2014 when he was served with the previous temporary protection order whereas the applicant claims that the date of separation was 13 April 2017.

Evidence

[7] Before I get into the substantive application today there was a preliminary issue around some of the evidence filed. There was hearsay evidence filed by the applicant in her responding affidavit of 27 September 2017 which related to a letter attached from a former employee of the parties called [Kenny Webber]. The letter was 12 May 2016 and was written to the respondent in the context of a personal grievance at the time. Within that letter there was information around being yelled at, fear of possibly being hit and being sworn at by the respondent. There was also a letter attached which was from the respondent's daughter which had information in it relating to allegations of having been physically hit numerous times, called abusive names and having had some of her belongings thrown out of the house and told she had to go and live in a shed where pigs lived by her father (the respondent). It also contained information around alleged threats of the applicant by the respondent which she said she had overheard.

[8] The respondent's counsel has filed a memorandum indicating that he sought to have the evidence removed in terms of those letters attached, together with certain paragraphs removed. Counsel quite properly set out the portions of the Evidence Act 2006 in terms of ss 17 and 18 as well as Rule 158 Family Court Rules 2002 which sets out that matters must be strictly in reply in terms of Rule 158 and in terms of Rule 170 enabling the Court to make orders determining questions of admissibility. It was quite clear that the applicant had had ample time to obtain best evidence which she failed to do in terms of those letters which were, at best, hearsay propensity evidence. Rather than completely removing them from the Court file I indicated that I would regard that evidence as less than best evidence and accordingly place lesser weight, if any, on it but would leave it on the Court file as filed. The respondent was granted leave to respond orally to the allegations raised in those letters.

These proceedings

[9] In terms of the background, this is an indicated an application by Ms [Merritt] for a final protection order, that application having been made on 21 August 2017 as well as occupation and ancillary furniture orders, those temporary orders having already been made on that date. There are three requirements that the Court must be satisfied of for a protection order to be made. They are that the applicant and the respondent have been in a domestic relationship. Secondly that the Court is satisfied that the respondent has used domestic violence against the applicant and thirdly that the Court is satisfied that making an order is necessary to protect the applicant. Once the Court is satisfied that the respondent has used domestic violence against the applicant and that the order is necessary there is no discretion to decline making an order (*Surrey v Surrey*[1]). In these circumstances the parties have lived in a de facto relationship since 1999 having been going out since 1997 until either December 2014 or 13 April 2017. While each have children they have no children together.

[10] In terms of s 7(1) and s 4(1) of the Act there is no dispute but that these parties have been in a domestic relationship and jurisdictionally that much is established.

[11] Section 14 of the Act requires the Court to then be satisfied of two things before making a protection order. The first is that the respondent has used domestic violence against the applicant or is using it in terms of s 14(1)(a). Domestic violence is defined within s 3(1) of the act as violence against the applicant by a person that the applicant has been in a domestic relationship with. Violence is defined within the s 3(2) and is physical abuse, sexual abuse, psychological abuse and psychological abuse includes but is not limited to intimidation, harassment, damage to property, threats of physical, sexual or psychological abuse, financial or economic abuse and psychological abuse may include behaviour which does not involve actual threatened physical or sexual abuse. A single action may amount to abuse, or a number of actions which form a pattern of behaviour may amount to abuse even though some or all of those acts in isolation would not amount to abuse in terms of s 3(4). Domestic violence includes the respondent encouraging another person to engage in behaviour towards the

[1] *Surrey v Surrey* [2010] 2 NZLR 581

applicant which would amount to domestic violence if the behaviour was carried out by the respondent.

[12] It is important to note at this point two provisions of the Act in terms of s 5 which is the object of the Act and that is to reduce and prevent violence in domestic relationships by recognising that domestic violence in all its forms is unacceptable behaviour and ensuring that where domestic violence occurs there is effective legal protection for its victims. I have to read this together with s 85 of the Act. Section 85 of the Act states that every question of fact arising in any proceedings under this Act other than criminal proceedings must be decided on the balance of probabilities.

[13] I note that Priestly J has commented that the standard of proof has a built-in flexibility. He was referring to the Supreme Court Judgment of *Z v Dental Complaints Assessment Committee*[2] and Priestly J said that the flexibility did not authorise a shifting or intermediate standard of proof but alerted Courts to the quality of evidence required to discharge the onus. The more serious the allegations the more tendency to require stronger evidence before the balance of probabilities is satisfied.

Allegations of domestic violence

[14] Turning to the allegations of domestic violence here, here the respondent has denied being domestically violent to the applicant in terms of his affidavit which was filed with his notice of intention to appear. His affidavit of 21 August 2017 states at paragraph 6, *"I do not accept that I have been violent to [Renata] in the manner she suggests, I therefore do not agree that the orders are necessary."* What he did in fact accept in evidence is that he had kicked in a shed door on the jointly owned property and also at one stage sworn at the applicant at the time. He also accepts that in April this year he told her to "bugger off" and "fuck off" around the time the applicant says the parties separated.

[15] The original allegations in terms of physical allegations are those contained in the original affidavit filed in the first set of proceedings in 2014 by the applicant. In terms of those specific allegations from 2014 the allegations by the applicant were that

[2] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 and [2009] 1 NZLR 1

if she got a protection order the respondent said he would kill her or throw her out on the street. She alleged physical and psychological abuse in terms of verbal abuse, throwing objects, threats and physical violence including being tripped up, grabbed by the shoulders, shaken, pushed into walls, throwing and smashing glasses and being pulled by her hair.

[16] Because those proceedings were discontinued the respondent never filed evidence at the time responding to those allegations. He provides a blanket denial of any violence in his affidavit in the current proceedings.

[17] The allegations from 2017 do not relate to any physical or sexual abuse. While the applicant refers to the 2014 allegations there are no fresh or further allegations relating to physical or sexual abuse at all. The focus of the allegations from 2017 relate to psychological and emotional abuse and intimidation. Specifically, the 2017 allegations are that in early 2016 there was an incident which saw two detectives come to see the applicant and the respondent relating to an allegation that the respondent had threatened to hire somebody to kill her. The police are said to have spoken to both her and the respondent at the time. No charges were laid. Indeed in terms of the evidence before the Court there were no police reports relating to that or any incidents at all.

[18] There was evidence filed by the applicant concerned that she had had cars following her. This was denied by the respondent. There were no details, times, place or identification provided by the applicant around the vehicles said to have followed her. Indeed the allegations can at best be said to be vague. In terms of 15 July 2017 the applicant alleges that a car pulled up her driveway and somebody was knocking at her door and trying to open the door. A man in a red van jumped out. He had been looking behind the garage. When asked his name the applicant said he gave the name of John Smith. She was not able to get his licence plate number and he indicated he had been talking to a friend at that address. The applicant says that she saw him later in the day passing by she thinks. Again there is no evidence to connect this person with the respondent at all. That was something that the applicant accepted during evidence, however she maintains that her fear is that it was somebody who was

connected to him. She accepted in cross-examination that there was no mention of the respondent during any interchange she had with that person on 15 July 2017.

[19] On 21 July this year the applicant arrived home to find the padlock cut on the driveway gate and the garage side door damaged and a number of vehicles taken. The applicant is remaining at this stage on a joint property. In cross-examination what was established was that the respondent had indeed broken the padlocks on the driveway gate and had kicked in the side door of the garage and taken a number of vehicles including a [make and model deleted] vehicle. It transpired in evidence that there had been a letter sent to the respondent by the applicant's lawyer on 10 July 2017 indicating that Ms [Merritt] did not want the respondent to come onto their joint property at [address deleted] where she is residing. The letter confirmed that there were issues relating to violence and threats of violence from the respondent some 15 months ago and that she held concerns for her safety and security. The letter sought confirmation that the respondent would stay away from the property where she resides and that any request for permission to go onto the property should be made through lawyers. This was put to the respondent in cross-examination who indicated that in his view there was no prohibition of him going onto the property. He said that it was joint property and that he had waited until he knew that the applicant was not present so that there was no conflict. Again in questioning it arose that he knew that the property would be vacant and the applicant would not be there because a friend of his had seen the applicant driving south away from her home at which time he took it upon himself to enter the property by way of breaking the locks and damaging the garage side door to then remove a number of vehicles.

[20] On 22 July the applicant gives evidence that there was a man found yelling her name at 4.00 am in the morning indicating that she needed to sign the papers relating to the separation. When she indicated she was not going to there was a response from the unknown person on her veranda at 4.00 am to the effect of, *"Well then you're not going to see any of it, bang, bang."* She indicated that the words bang, bang were yelled at her. Again the applicant is unable to indicate any connection between this person and the respondent other than she indicates there were so few people who know about the separation and the property negotiations other than each of the parties and their lawyers, that it must have been somebody connected to the respondent. The

police were alerted to this incident by the applicant and have taken a statement from her. Again, there is no corroborative evidence of this before the Court and certainly no evidence of any charges or convictions of anybody including importantly the respondent that can support this. The applicant notes that the incident took place on her birthday which is 22 July.

[21] In terms of the incident that is said to have occurred on 27, 28 July 2017 the applicant says that she was driving her vehicle when the wheel nuts on her front wheel were found to be finger-loose and dangerous and in her view highly likely to have led to an accident had she not picked up that the car felt funny and stopped to check. She reported this incident to the Police. In cross-examination she again conceded that there was no evidence relating the loosening of the wheel nuts to the respondent and there was no evidence to suggest that the respondent had been either spoken to or charges or arrested in relation to this and no direct knowledge of any connection between this to the respondent.

[22] In terms of background, the parties have been negotiating property settlement for some months with the assistance of their lawyers. It is far from settled at this point and each of the parties gave evidence blaming the other in relation to who was at fault in terms of delay. Each allege that the other party and their counsel were the ones causing the delay and hold-up and that the matter would have settled but for the other. It is unclear who is at fault other than that there is a very high degree of antipathy held between the parties in the absence of the property being settled at this time.

[23] In terms of what is evidentially before the Court there is no corroborative evidence of any of the incidents alleged by the applicant other than the day of cars being removed with a padlock broken and garage door kicked in which the respondent accepts. The incident that appears to have triggered the application for a protection order arises some three months after what she says is the separation in April which is that incident where the respondent broke into their joint property. While not illegal in any fashion or prohibited, it was clearly done in the face of a letter that had asked that he not enter the property and if he were to intend to requested that he do it through advice to the lawyers. Further it happened at a time when he knew that the property would be empty and he could go onto the property and remove the cars. At best this

was unwise, at worst provocative high handed, intimidatory and psychologically abusive in the context it occurred within.

[24] Other than that incident there is no evidence of any police call-outs or any police statements to provide corroborative or supportive evidence to assist the Court in coming to a conclusion that can see the incidents made out. It is in many ways a classic "he said, she said" kind of scenario which does not mean the incidents have not occurred of course but means that from a Court's point of view having to establish whether each individual allegation is made out on the balance of probabilities (as required by s 85) is an exercise that requires something more than just an allegation.

[25] Here I prefer the evidence of the applicant over the respondent's in terms of her evidence being consistent and presented in a matter of fact manner. The respondent in contrast, presented as smug and his answers at times "cute". By way of example, to demonstrate this assessment, he was cross-examined about whether or not he had put a number plate on one of the cars he had taken from the joint property in July which said on the number plate, "[Renata]." He said in answer to both counsel for the applicant and also to me in follow-up questioning that he had not done so. When there was a picture of the [vehicle] put to him with a picture of the number plate "[Renata]" on it he conceded that indeed there had been a number plate "[Renata]" put on the car. His evidence was that he had not done it, that it was not a real number plate but it was a mock number plate that a friend had made. He said he had removed it immediately he had found out it had been placed on the car. Therefore his evidence was at times designed to gild the lily in his favour and I did not find him forthcoming or as honest in giving the evidence as the applicant.

[26] That said I do not doubt that the incidents that the applicant alleges have occurred. The problem being as I have indicated above that there is nothing eventually to suggest that the incidents are connected to the respondent. The example of cars allegedly following her are so vague and indefinite in terms of description and timing that it is impossible to know what precisely has happened when and by whom.

[27] The parties have been trying to negotiate property settlement and each of them have unilaterally taken money out of joint bank accounts. The applicant's own

evidence is that she removed $100,000 from a joint back account so that she could survive. She has frozen some of the accounts. The respondent has responded by removing her as a director from one of the companies, stopping her wages because she is no longer working in the joint towing company that they had previously worked in together. This has resulted in her having no income. The respondent has removed $117,000 that was left from the joint bank account and removed other moneys which he is controlling and he is now holding 10 cars in his possession which he sees as "holding custody of," much as parents might otherwise argue over children.

[28] What has been argued by the applicant's lawyer is that his behaviour has been intimidating and has demonstrated a pattern of behaviour amounting to domestic violence in terms of the Act such as to warrant a protection order. He indicates that the stopping of the income, the taking the applicant off as a director of the company, re-registration of a number of the vehicles and the like all amount to a pattern of behaviour such as to amount to a s 3(4) number of actions forming a pattern of behaviour amounting to abuse.

[29] I accept that the respondent has acted immaturely and boorishly at times. The parties have each acted unilaterally in terms of the property and they are at this time embroiled in a property dispute that has seen the respondent act unwisely.

[30] In terms of looking at whether or not there has been domestic violence I am satisfied that the respondent has indeed been domestically violent on his own accepted evidence in terms of kicking in the shed door and breaking the locks at the joint property knowing the applicant was away, and in terms of removing 10 cars including one that very clearly a special one to the applicant. It was purchased at a time she had had cancer and her own evidence is that she has a special affinity with it and is the one that was found with the number plate "[Renata]" on it in town.

[31] The respondent's own evidence is also that he has sworn at the applicant earlier this year. I accept the applicant's 2014 evidence that the respondent has also been physically violent towards her then but as she herself acknowledged not since.

[32] The critical point of analysis is really step 3 in terms of necessity. Having found that there has been domestic violence the real issue is whether or not there is a reasonable subjective fear of future violence. In these circumstances the focus of behaviour has been around the property that the applicant is on. There is nothing in terms of evidence that leads me to assess that the evidence on the balance of probabilities supports that there have been concerns for the applicant beyond the property.

[33] Accordingly the fear of future violence is not objectively established in terms of the findings I have made. The applicant's fear of future violence is founded in large part on a number of the allegations that have not been proved. In evidence, it was the fear of being followed around town by cars and friends of the respondents, as well as of people coming to her property that were of concern to her. In these circumstances where an occupation order has also been applied for I am satisfied that it is necessary to make an occupation order for the applicant's safety and this is to ensure that the respondent does not come onto the property or endeavour to come onto it to take anything at all. The occupation order is to exist for a period of 12 months or until the final property settlement is resolved between the parties whichever is earlier.

[34] In terms of having considered that eventually a final protection order is not necessary I have considered the features of the violence that has occurred. There is no suggestion even on the applicant's own allegations which the respondent has denied in terms of physical that there has been any physical violence since 2014. The violence that was alleged have occurred pre-2014 has been denied by the respondent. The respondent has completed an anger management course. He says he has completed two. One from the 2014 temporary protection order, however there is no evidence of completion of that on the Court file and the applicant believes it was never completed. I have no corroborative evidence to suggest that it was not. What I do have is a completion report in terms of the programme that the respondent has completed with the last session on 26 October 2017. The type of violence identified during the programme was situational offending with no prior history known. It was assessed that the respondent had achieved the primary objective of the programme, had attended all sessions and complete all the requested tasks, had acknowledged the behaviour that resulted in the referral, had undertaken sufficient empathy and victim impact work

regarding those affected to satisfy programme goals and had put in place safety and relapse prevention plans. That is a standard form that has been completed by the non-violence programme providers in terms of a completion report.

[35] The violence that is alleged in terms of the current intimidation I have not been able to establish on the balance of probabilities other than the incident on 21 July 2017. The number plate being placed on the [vehicle] after it was taken is said to have been something done by a friend of the respondent. It was placed on the applicant's favourite car. It caused the applicant distress and while the respondent denies having actively placed it on the car I find he was likely complicit in this action. The respondent, accepts he was verbally abusive in April this year. It is in my view symptomatic of the breakdown of the relationship.

[36] I have indicated to the applicant and the respondent that the evidential findings in terms of balance of probabilities does not mean things have not happened to the applicant. The Court is not saying that things have not happened to the applicant but rather from an evidential assessment the Court is unable to find that those incidents have been proved to be connected to the respondent such as to amount to domestic violence. However, it has also been made clear that if there were to be any further incidents of the nature qualifying as domestic violence that were perpetrated by the respondent towards the applicant there is nothing to prevent a further application being made at all.

[37] I do note that in terms of some of the allegations and particularly the one of early 2016 when the applicant alleges the police contacted her to talk about the respondent having organised somebody to kill her is an incredibly serious allegation. That is one where I have been conscious of *Z v Dental Complaints Assessment Committee* in that it is clear that an incident has occurred. Indeed the respondent did not deny that the police came to talk to both of them but there have been no charges or convictions arising from that and it appears to have occurred from second or third-hand hearsay where it is very unclear in fact who has said what to whom and although the applicant gave evidence of a written statement being in the possession of the police again this was not made available in evidence nor indeed any information directly from the police at all.

Occupation Order

[38] The respondent gave evidence that he does not oppose the making of an occupation order in favour of the applicant. Given the respondent's behaviour in entering the property involving causing damage to a door and padlock, and against a specific request that he not do so without prior consultation between the parties' respective lawyers, I am satisfied that the making of an occupation order is independently of his consent, necessary for the protection of the applicant.

[39] In the circumstances, there is to be an occupation and ancillary furniture order granted in favour of the applicant in terms of the property that she currently resides at [address deleted] as well as the ancillary furniture order – for a period of 12 months, or until the property matters are finally resolved (whichever occurs earlier). The temporary protection order is discharged and there is no final protection order made.

E B Parsons
Family Court Judge