NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT MANUKAU

FAM-2006-092-001834
[2016] NZFC 2324

IN THE MATTER OF	The Care of Children Act 2004
BETWEEN	JAROD SHERMAN Applicant
AND	ALEX BRISTOL (deceased) Respondent

Hearing:	3 and 4 March 2016
Appearances:	Applicant in Person Mr P Maskell as Lawyer for the Children
Judgment:	31 March 2016

RESERVED DECISION OF JUDGE MAUREEN SOUTHWICK QC

Background

[1] This is an application to discharge a domestic protection order made in favour of the respondent, his deceased partner (Alex Bristol) and the parties' children (Riley, born in [date deleted] 2002 and Stevie, born in [date deleted] 2004). The order was made after a defended hearing on the 30 October 2006. At that time, the order extended also to a further child, Esme. Esme is the older daughter of the deceased respondent.

[2] On 24 October 2012, the then named respondent, Alex Bristol, passed away. The children had been in their mother's day-to-day care until that time. After the applicant and Alex separated, there was a supervised contact regime in place as between the applicant and the children. However, subsequent to that order being made, the applicant and Alex had agreed between themselves that contact could occur on an unsupervised basis at defined weekend times. Between February 2010 and 2012, the applicant lived in Christchurch with the consequence that there was very limited contact with the children.

[3] On 29 October 2012, an interim parenting order and additional guardianship order was made in favour of the sister of the children's mother, Rosanna Bristol. Rosanna had been named testamentary guardian in the will of Alex Bristol. It is the evidence of Rosanna Bristol that the applicant adopted an abusive attitude toward her and that contact that was attempted between the applicant and the children in December 2012 failed because of that attitude.

[4] In April 2013, an order was made by consent that the applicant would have contact with the children at a supervised contact centre.

[5] On 16 August 2013, the applicant filed an application to discharge the protection order. That application was made on the grounds that significant time had passed since the order was made, that no subsequent allegations of violence had occurred, that the children's deceased mother had agreed to unsupervised contact at an earlier time, that the applicant had attended a Living Without Violence programme and that the order was preventing normal contact with the children.

[6] At the same time, the applicant applied for a declaration that he should be sole guardian of the children and that Rosanna's guardianship should be removed.

[7] On 27 March 2015, a final parenting order was made, confirming the earlier orders in favour of Rosanna. Supervised contact was to continue. Directions were made to advance the application for discharge of the domestic protection order.

[8] On 10 June 2015, Mr Maskell's long-term appointment as counsel for the children was extended to the domestic violence proceedings. Mr Maskell filed a report on the 9 April 2015. In that report it is recorded that both Riley and Stevie had some hesitations about contact with their father.

[9] In September 2015, counsel for Rosanna applied to strike out the application to discharge the domestic protection order on the basis that the applicant had not complied with the Court's directions. I note that at no time did Rosanna have status in the domestic protection proceedings, there being no order in her favour. Hence she was not correctly named as the respondent in the applicant's proceedings.

[10] In answer to the strike out application, Judge McHardy directed that the matter was to proceed to hearing.

Relevant Legal Provisions

[11] Section 16(1)(A) of the Domestic Violence Act 1995 ("the Act") provides that a protection order continues to apply for the benefit of a child of the applicant's family until –

(a) The child ceases to be a child of the applicant's family, or

(b) The order sooner lapses or is discharged.

[12] Section 16(5) provides that where the applicant dies at any time after a protection order is made for the protection of the applicant, then, notwithstanding the death of the applicant, the order, if it has not sooner lapsed or been discharged, continues to apply for the benefit of –

"*a child who at the time of the applicant's death was a child of the applicant's family until that child attains the age of 17 years*".

[13] Hence, the order obtained in 2006 subsists for the two young children of the then parties.

[14] In seeking to discharge a domestic protection order, s 47 of the Act provides in part as follows:

> *"(i) The Court may, if it thinks fit on the application of the applicant or the respondent, discharge a protection order ...*
>
> *(v) On an application under sub-section 4 of this section, the Court may, if it thinks fit, discharge a protection order in so far as it relates to that specified person or, as the case may be, that associated respondent*".

[15] Whilst no grounds for discharging an order are specified within s 47, the issue of "necessity" remains a governing factor in considering the application. In seeking to discharge an order, the applicant has the onus of establishing to the Court's satisfaction that the protection order is no longer "necessary" for the protection of the respondent and/or the children of the family, or both.

[16] To that extent, the Court of Appeal's guidelines provided in *Surrey v Surrey* [2010] 2 NZLR 581, remain relevant. Hence, the Court's enquiry must focus upon whether or not the protected person (in this case the two young children) could be said to have a reasonably held belief that he/she has the need for protection and that there exist factors which support that belief when judged objectively.

[17] Over the years, a number of Judges have referred to a "checklist" of factors which might be taken into account in carrying out the necessary enquiry. For example, in *PJG v MER* [2011] NZFLR 377, Judge Smith provides a helpful summary at paragraph [22] (although rightly emphasising that the list of factors referred to should not be regarded as exhaustive) :

"(a) On what basis the protection order is obtained

(b) Whether there was cogent reason for it

(c) Whether the order was obtained falsely or inappropriately

(d) Whether the respondent is in a safe place

(e) An analysis as to the time that has elapsed since the making of the temporary and final protection order

(f) What steps the applicant may have taken to reform character and particularly attending the Stopping Violence programme

(g) What insight, if any, the applicant may have as to the issues of domestic violence

(h) The geographical distance of the parties

(i) Whether the parties have formed new relationships

(j) What might be the ongoing need for contact as between them

(k) Clearly and importantly the applicant's [victim's] view and any views of the children

(l) The empathy for the victims of violence".

[18] In this case, the tests applied will be more limited, given the fact that the Court is concerned about the children only. Most importantly, in the context of this case are considerations which centre upon the reasons for the original order being made; what steps the applicant has taken in the meantime; what insight the applicant demonstrates with respect to the impact of his behaviour, including possible psychological damage to the children; the views of the children and the applicant's ability to empathise with the children's experiences and likely response to further violence.

[19] Given the passing of time, the Court will, where possible, note the attitudes and observations of the applicant at the date the order was made, and any changes in those at the time of the application to discharge.

The Applicant's Case

[20] The applicant's focus in support of the application was to a great extent upon his grievance that Alex had agreed to unsupervised contact subsequent to the

protection order being made, but that he was now being unfairly excluded from the children's lives.

[21] The applicant was anxious to impress upon the Court his view that the 2006 decision was based upon "*minor and trivial*" incidents of violence. He was disparaging of the Court process – it was because of this allegedly inadequate process that he said he would not attend a supervised contact centre in order to see the children. He indicated that in spite of this offer remaining in place and the urgings of the Court, he would rather not see them at all than comply with such constraints.

[22] Further, it was the applicant's expressed view that Rosanna was standing in the way of contact occurring. Whilst the applicant purported to be generally supportive of Rosanna's parenting role, I was left in no doubt that the relationship between Rosanna and the applicant is very difficult and that the applicant was unprepared to accept any responsibility for this. Neither is there a feasible working relationship between the applicant and Rosanna's partner, Leith - there has already been a physical confrontation between these two.

[23] The applicant said that the primary reason he was seeking to discharge the protection order was because this would allow him to have unsupervised contact with his children. That, of course, is not necessarily the position. I spent some time explaining to the applicant that he would still need to apply for variation of the current supervised contact order and that this would require a hearing pursuant to s 5(a)/A of the Care of Children Act. Despite this I am unsure as to whether the applicant fully understands that to be the case.

[24] The applicant's interpretation of the 2006 decision was worrying. Whilst Judge Malosi did express some sympathy for the applicant when offering the view that the then applicant could have intervened earlier in correcting the children's behaviour toward the current applicant, the decision was nevertheless clear in finding that the applicant was significantly psychologically abusive both toward Alex and Esme.

[25] For example, at para [7] the decision reads:

> "*Under cross-examination it was put to Alex that* [*the* applicant] *is a fairly volatile person, who expressed himself freely, including by way of the use of obscenity. Alex accepted that all of that was so and, furthermore, that she had put up with that type of behaviour throughout the course of the lengthy relationship. That, of course, does not right the wrong".*
>
> At para [10]:
>
> "*Be that as it may, his actions towards Esme on that occasion and around both of the children was completely unacceptable*".
>
> At para [18] :
>
> *"What was most disturbing out of the evidence I heard from the parties today was the [*applicant's*] utter contempt for Alex. He denied calling her a 'slut', but admitted calling her an 'idiot' because, in his own words, 'she is an idiot'".*

[26] The Judge found also that, during an argument around the time of separation, the applicant spat at Alex's face, called her a slut and threatened 11-year-old Esme, whom he abused by uttering obscenities at her.

[27] In oral evidence to support the current application, the applicant denied that Alex was ever frightened of him in spite of the fact that the recorded history of events pointed to Alex avoiding any resumption of sharing the same accommodation. This was in the face of her being requested to do so. He said that the "*utter contempt*" referred to by the Judge was only a feeling he had for a transitory period of time. In addition, he completely denied the allegations of abuse, as made by Esme.

[28] The applicant referred to the Living Without Violence course which he had attended. His evidence suggested to me that he never believed that he had a need to receive that counselling. I note his evidence that he was required by the provider to receive this on a one-to-one basis, rather than in a group session. Insofar as his current situation is concerned, the applicant said he did not believe he needed counselling, although he would attend counselling if directed by the Court. His comment was "*I don't feel I have any personal issues".*

[29] Arising out of the applicant's evidence I find that his relationship with Rosanna and her partner, Leith, will remain difficult as a result of two factors – one is that the applicant believes the children should be in his care because, as he puts it, "*they are my children*".

[30] Secondly, the applicant is unable to recognise that the lengthy period during which he has now had no contact with the children, particularly when added to the various tensions and complexities in the current dynamic, would be likely to result in the children having very reasonable hesitations about seeing their father.

[31] In this regard, I find that the applicant lacks, importantly, required insight into these children's needs. In addition, I find that the applicant misjudges Rosanna, whose clear evidence was that she wished to reinstate contact between the children and their father but on a progressive basis, commencing immediately and initially at a supervised contact. The applicant's response to such suggestions is one of attack upon the system and upon Rosanna, whilst emphasising his own needs rather than those of the children. It is difficult not to conclude that these grievances would not be passed on to the children with damaging impact.

Evidence of Rosanna and Esme

[32] Oral evidence was given by Rosanna and Esme, both of whom had filed affidavits. Others had filed affidavits in support of the protection order remaining. I was advised, prior to the matter commencing, that those persons were not prepared to attend Court, it being suggested that they had been subjected to threats by the applicant. I can make no finding with respect to that allegation, given the absence of the deponents and the applicant's denial that such has occurred. Neither am I able to give any weight to the content of those affidavits.

[33] Rosanna's evidence was calm and measured. She was cross-examined by the applicant and stood firm in making the following proposals and in highlighting aspects of her affidavit evidence :

- The contact order of 5 April 2013 should be reinstated as "a good start" and should progress from that point.

- On the day of her sister's death, or very shortly thereafter, whilst funeral arrangements were being made in her mother's home (that is the children's maternal grandmother), the applicant had arrived at the house in an agitated state. The police were called by Esme, who remained protected by the protection order. Rosanna had been frightened by this incident as had Esme.

- From her observations, the applicant remains a person who becomes very quickly agitated - this concerns her. Rosanna would be very nervous if she was on her own with the applicant. Rosanna's body language when giving this evidence confirmed that fact.

- Rosanna relies upon assistance from her mother (the children's maternal grandmother) during the hours that Rosanna is at work. The relationship between the applicant and the children's maternal grandmother is very difficult - the applicant's own evidence confirmed this. It was Rosanna's evidence that the applicant had quite recently telephoned the maternal grandmother in an abusive fashion and that this had distressed her mother.

- On one occasion there had been a physical confrontation between Rosanna's partner, Leith, and the applicant.

[34] Rosanna has been receiving long-term counselling since the death of her sister to assist her in unexpectedly becoming a "mother" and in the grief attached to the loss of her sister. I note that Rosanna had been appointed testamentary guardian in the will of Alex. The children have now been in her care since October 2012 and are reported to be dong well.

[35] The applicant became agitated during some of Rosanna's evidence and he was, therefore, given an opportunity to comment upon some of the fresh allegations made. In particular, he was given the opportunity to respond to the suggestion that he had been speaking in an offensive way to the children's grandmother quite recently. In response, the applicant first denied and then said he could not remember when he last telephoned her, but it was "*a long time ago*". When it was put to him that it may have happened quite recently, he said "*I may have*". In this area I find that the applicant was not honest and that it is very likely that recent calls have taken place which have indeed been abusive.

[36] Esme filed an affidavit on 4 October 2013 in response to the application to discharge the domestic protection order. In that affidavit, Esme maintained that she,

her mother and the children were all scared of the applicant "*because he has been abusive to us for many years*". She describes in her affidavit a number of specific incidents of physical and psychological abuse and says "*in the weeks leading up to my Mum's death, Jarod sent many abusive texts and left abusive, rude voice mail messages (all of which can be heard and read on her cell-phone)".* The applicant denies sending abusive texts during that period.

[37] At paragraph [7] of her affidavit Esme said "*I fear for my brother and sister's safety when they stay with him because I have known him since I was four years old and, growing up, he was abusive and nasty to me and it is not pleasant being at the receiving end of his abuse*".

[38] Esme, now a young woman who works, confirmed in her evidence the events described by Rosanna at the time of her mother's death. She described the applicant arriving unexpectedly at her Nana's house when they were planning her mother's funeral. She said "*he pulled up and started yelling something and so she (Rosanna) came inside ... and locked the door".* She said that the applicant then stood at the front door yelling about Alex. Esme called the police because she was so fearful of the applicant.

[39] Observing Esme, it was plain that the recollection of her abusive experiences with the applicant remain vivid and detailed. It was not difficult to find her to be a credible witness who remained nervous of the applicant. It is important to note that Esme has very regular contact with Stevie and Riley, her half siblings, and that the applicant regards much of her evidence to be fanciful.

The Children's Current Views

[40] The lawyer for the children in this case, Mr Maskell, has been involved in the children's lives for many years. He has represented them in both the parenting proceedings and in the domestic violence proceedings. His relationship with the children is clearly one of trust and I therefore consider his reporting to the Court and his submissions to be of significance.

[41] The views of the protected persons should be taken into account in the context of the situation they find themselves in. Where only the children remain to be protected their need to retain that protection will, to a large extent, be judged in the context of their views as reported by their lawyer. Consideration of those views and their reasonableness will be assisted by the evidence of significant persons in their lives.

[42] In Mr Maskell's report of 9 April 2015, under the heading "Children's Perspectives", he says as follows:

> "5. *I met with Riley and Stevie separately at my offices on 1 April 2015. Riley told me that he is 'not really' afraid of Dad 'but he doesn't behave properly'. Riley also told me that he does not like the way* [the applicant*] reacts and that he whispers things to him when they have contact at Barnardos.*
>
> *"6. Stevie stated that she is 'not really' afraid of [*the applicant*] and that she feels safe. Stevie then commented that [*the applicant*] 'sometimes says things at Barnardos and that this has happened 'maybe once' ".*

[43] In his submissions in relation to the potential discharge of the protection order, Mr Maskell submitted that the order should remain but that the contact between the applicant and the children should be reinstated without delay at a supervised access centre. I am not required to make any parenting orders but do note that the ball is very much in the applicant's court in that regard.

[44] Mr Maskell referred to Judge Malosi's 2006 findings and in particular the fact that the applicant "*vented his frustration and anger without thought to the children being exposed to that and being frightened and concerned for both of their parents"*. Mr Maskell refers to the applicant's volatile personality and the fact that the order was found to be necessary, as without it "*there are no boundaries laid down for* [the applicant] *in terms of future behaviour"*.

[45] Lawyer for the children submits that the kind of belittling and demeaning behaviour which had occurred in the past amounted to psychological abuse and should this occur at this point in time, emotional harm would be done to the children, disturbing their current stability.

Discussion

[46] Nothing in the applicant's evidence led me to conclude that the applicant had anything other than an angry view of the history of events which had led to the current situation. The applicant was unable to acknowledge any responsibility for his part in this and is, in my view, unable to place the children's needs ahead of his own. This is best illustrated by his refusal to have any contact with the children, except on his terms, whilst at the same time complaining that he has been excluded from his children's lives.

[47] In addition, I find that the applicant retains a view that Rosanna and the children's maternal grandmother are largely the cause of the situation he now finds himself in. On the evidence before me, that is an unfair assessment of the position and further reflects the applicant's focus upon his own needs.

[48] The applicant was given the opportunity to accept the suggestion of counselling to deal with the deep grievances he continues to hold and indeed some historic personal issues he referred to at hearing. He is, however, unable to accept that he has any need for counselling – that is worrying when considering future contact with the children whilst his views and grievances remain without adjustment.

[49] There are a number of persons in the children's lives, who, on a daily basis, continue to fear the applicant. I find that these include Rosanna, the children's maternal grandmother and Esme. I find also that events, both historically and more recently, have reasonably led to these fears.

[50] The applicant demonstrates considerable agitation when things do not go his way – this was illustrated in Court. From my observation during two hearings over which I have now presided, the applicant would benefit significantly from personal counselling.

[51] The major fears in this case are two-fold. Firstly, these young children have had to adjust to the death of their mother. They are reported now to be in a stable living situation with their aunt, who is supported significantly by the children's

maternal grandmother. This Court should not take any step which has the potential to undo that stability.

[52] Secondly, I have serious concern that the applicant will pass on to the children his very negative views of their grandmother, of Rosanna, possibly of Rosanna's partner and of their half-sister, Esme. This would be psychologically abusive of the children and cause significant damage to them.

[53] Having made all of those findings, I do, nevertheless, retain the view that, for these children, who have already lost one parent, safe contact with the applicant is important. It is, therefore, regrettable that the applicant currently lacks the insight to enable him to understand that by addressing his own personal issues and amending his attitude to those important persons who are with the children on a daily basis, his chances of regular unsupervised contact with the children would be hugely enhanced.

Decision

[54] I find that the protected persons continuing to be named in the Domestic Protection Order made on 13 October 2006 have a reasonable fear of the applicant and that there is a necessity for that order to remain in force. Without the order so remaining, I find, on the balance of probabilities, that psychological damage to the protected persons would be likely to result.

[55] Accordingly, the applicant has not discharged his obligation to persuade the court that the Order should be discharged and hence the application is declined.

Maureen Southwick QC
Family Court Judge