NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995, 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 WHAKATANE

FAM-2010-079-000128
[2016] NZFC 1953

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995
BETWEEN	RAYMUND WINSLOW-BURTON Applicant
AND	KIMBRA POINDEXTER Respondent

Hearing:	3 March 2016
Appearances:	Applicant appears in Person S Coffey for the Respondent K Casey as Counsel to Assist
Judgment:	3 March 2016

ORAL JUDGMENT OF JUDGE S J COYLE

---

[1] On 28 January 2011 His Honour Judge Geoghegan made a final protection order in favour of Ms Poindexter against Mr Winslow-Burton who at that time was simply known as Mr Burton. The matter is before the Court today as Mr Winslow-Burton has sought to discharge that protection order. Ms Poindexter has been very clear in her pleadings and in evidence today that she wants the order to remain. Thus the sole issue that I have to determine is whether to discharge the protection order or not and if I do not then the current final protection order made by Judge Geoghegan continues.

[2] For the reasons set out in my minute of 3 February 2016 Mr Casey is here today as counsel to assist the Court. His role has been to cross-examine on behalf of Mr Winslow-Burton, given that Mr Winslow-Burton is self-represented and Ms Poindexter is a victim of domestic violence.

[3] Ms Flynn is also present here today. She is the Court-appointed counsel for Mr Winslow-Burton and Ms Poindexter's children, Bree and Jeff. She is here pursuant to s 83(da) Domestic Violence Act 1995 ("the Act"). That section provides that a lawyer appointed under the Care of Children Act 2004 has a right to attend a hearing under the Domestic Violence Act. That right, however, does not extend to participating at the proceedings and thus Ms Flynn's role here has been to simply observe.[1]

[4] The basis of Judge Geoghegan's decision to make a final protection order is set out in His Honour's judgment. At [23] and [24] His Honour stated:

> The fact that Mr Burton has made the threats which he has made, not simply to Ms Poindexter but also to a number of members of her family and also friends, demonstrates a very concerning level of anger and volatility on the part of Mr Burton. The fact that it is made in the face of a temporary protection order being in force is concerning. The fact that Mr Burton has also indulged in similar behaviour towards an employee of Mr Douglas [the then lawyer for the children] demonstrates that he has little control over the anger issue which he obviously has.

[5] Then at [24]:

---

[1] *Cachatoor v Faber* FC Tauranga FAM-2015-070-000515, 20 January 2016

> In those circumstances I am satisfied that the making of a protection order is absolutely necessary. There will continue to be difficult times ahead as contact has to be arranged. There are potential flashpoints between the parties in the sentencing of Mr Burton, whatever the outcome may be, they also create lingering resentment on the part of Mr Burton. All of those circumstances point to a very volatile mix which requires the protection of a protection order.

[6] The reference to "sentencing" was made by His Honour as at that time Mr Winslow-Burton was facing charges in the criminal jurisdiction of this Court for threatening to kill and for breaching the temporary protection order. Mr Winslow-Burton was eventually sentenced to eight months' imprisonment and served four months in custody in relation to those charges.

[7] What became apparent during Mrs Coffey's cross-examination of Mr Winslow-Burton today was that he has subsequently been convicted again of breaching the protection order. That related to him being in the possession of firearms. It appears that he had firearms, in full knowledge that possession of firearms constituted a breach of the protection order, so as to enable him to go opossum hunting. Mr Winslow-Burton's evidence, which I have no cause to disbelieve, was that he was sentenced to "12 months' come up for sentence if called upon" in relation to that breach.

[8] He has also subsequently faced a further charge in the criminal jurisdiction of this Court relating to fighting in a public place. In relation to that his evidence is that he was discharged without conviction, presumably pursuant to s 106 Sentencing Act 2002.

[9] The current care arrangements for the children are set out in a parenting order and there are current proceedings before the Court relating to a breach of that order and an application by Mr Winslow-Burton and his wife for day-to-day care of the children. The interpretation and implementation of that parenting order continues to be a source of great conflict between the parents and I have no doubt that that conflict is directly impacting upon the children.

[10] Ms Poindexter, in her cross-examination by Mr Casey, said (with what I perceive to be a sense of relief) there has recently been a 12 month period where

there have been no applications before the Court and she saw that as a good thing. As Mr Casey implied in his cross-examination it really is a tragedy that these children have been before the Court with constant litigation between their parents about them and as between each other.

[11] The ability to discharge a protection order is contained in s 47 of the Act which states as follows:

> 47 Power to discharge protection order
>
> (1) The court may, if it thinks fit, on the application of the applicant or the respondent, discharge a protection order.
>
> (2) On an application under subsection (1), the court may discharge a protection order even though the order—
>
> (a) applies for the benefit of a specified person pursuant to a direction made under section 16(2); or
>
> (b) applies against an associated respondent pursuant to a direction made under section 17.
>
> (3) Where a protection order to which subsection (2) relates is discharged, the order ceases to have effect for the benefit of the specified person or, as the case requires, against the associated respondent, as if that person had applied for and been granted a discharge of the order pursuant to subsection (4).
>
> (4) Where a protection order—
>
> (a) applies for the benefit of a specified person pursuant to a direction made under section 16(2); or
>
> (b) applies against an associated respondent pursuant to a direction made under section 17,—
>
> the specified person or, as the case may be, the associated respondent may apply for the order to be discharged in so far as it relates to him or her.
>
> (5) On an application under subsection (4), 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.
>
> (6) Where an application is made under this section in respect of a temporary protection order, the Registrar must assign a hearing date, which must be—
>
> (a) as soon as practicable; and
>
> (b) unless there are special circumstances, in no case later than 42 days after the application is made.

[12] Parliament gives no guidance to the Courts as to what circumstances it may decide to discharge a protection order but rather vests a wide discretion in the Court to do so, "If it thinks fit."

[13] As Mrs Coffey has said in her submissions the Court of Appeal decision in *Surrey v Surrey* [2010] NZFLR 1 (CA) is relevant. She also makes reference to *Seadon v Seadon* [2002] NZFLR 825 (HC) where Chambers J at paragraph 17 stated:

> The primary focus on a discharge application is the respondent's behaviour since the application was made and the likelihood of a recurrence of domestic violence should the order be discharged.

[14] Her Honour Judge Smith in *SPPRS v PLS* [2012] NZFC 6555 undertook what the learned authors of *Westlaw NZ* describe as "a comprehensive review of the factors to be considered in determining whether a protection order should be discharged."

[15] At paragraph 35 of Her Honour's judgment she set out what she believed to be the relevant factors as including (but not in any exhaustive sense):

(a) Identifying the behaviour that led to the making of the order in the first place;

(b) An assessment of the risk of future violence;

(c) The order may have been obtained by false or misleading evidence;

(d) The period of time that has elapsed since the making of the order and any other domestic violence;

(e) Whether there has been any domestic violence in the intervening period;

(f) Whether there have been any breaches of the protection order in the intervening period

(g) Whether the parties have formed new relationships if their single status contributed to risk when the order was made;

(h) Asking if child care arrangements have settled to ameliorate the prospect of future risk;

(i) The need for ongoing contact between the parties, whether on an interpersonal basis or as parents and whether or not under the umbrella of a formal court order;

(j) The attendance at Stopping Violence courses or other interventions to reduce the prospect of violence;

(k) Undertakings provided (relevant but not determinative);

(l) The ongoing perception of the protected persons and the views of any children as to need for the order or fear of the applicant;

(m) Change in circumstances or disposition that may have contributed to violent behaviour such as mental disorder, use of drugs and alcohol.

[16] Her Honour also stated that the issue of necessity as considered by the Court of Appeal in *Surrey v Surrey* is relevant in considering a discharge. What the cases also make clear is that there is an onus, in this case on Mr Winslow-Burton, to establish to the Court's satisfaction that an order is no longer necessary for the protection of Ms Poindexter or their children.

[17] Mr Winslow-Burton in his affidavit evidence and in his cross-examination sets out his evidence as to why he believes the protection order should be discharged:

(a) Firstly, he asserts that it is predominately being used by Ms Poindexter as a weapon against him rather than as a shield to protect her and/or the children.

(b) Secondly, he alleges that she has been assisted in that process by some members of the [location deleted] Police.

(c) Thirdly, he denies that he is an ongoing risk to Ms Poindexter principally on the basis that he is now happily married in a functioning and functional relationship, living at least 180 kilometres away from where Ms Poindexter lives, and that he has no desire to have any contact with her at all, except in relation to the children. He says his primary focus in life is to simply be a readily available and involved father to his children.

[18] Ms Poindexter believes that the order is necessary because of what she states has been ongoing examples of harassment and abusive behaviour. She has a very clear fear that without the order she is at risk of further violence and that what has occurred since the final order was made by Judge Geoghegan in 2011 has been lessened by the existence of the protection order and that if it is removed that she will then be at risk from increased and further harassment and psychological abuse by Mr Winslow-Burton.

[19] In support of her position she has attached a list of the Family Violence Incident Reports ("FVIR") that have been provided by the New Zealand Police. Those reports are evidence of a complaint having been made but they are not determinative of the truth of the content of each of those reports, as clearly some of the reported incidents are a source of disputed evidence between the parties.

[20] I intend to go through each of those incidents in the order that they appear in the police summary, noting that they are not necessarily in chronological order. Also I do not intend to traverse those which clearly relate to incidents that pre-dated the making of the final protection order.

[21] The first FVIR is on 8 December last year when Mr Winslow-Burton complained to the police that Ms Poindexter has breached the parenting order by hanging up on phone calls between he and the children.

[22] The background to the matter is that at a judicial conference before me in relation to proceedings under the Care of Children Act on 7 December it became apparent, during the submissions advanced by Mrs Coffey, that Ms Poindexter had enrolled the children in counselling, although at that time they had not commenced their counselling. That the children had been enrolled in counselling was a unilateral guardianship decision made by Ms Poindexter; Mr Winslow-Burton in Court became very distressed and agitated at not being consulted as a father and as a joint and equal guardian of the children about that counselling. My minute records my views as to the inappropriateness of such a unilateral action.

[23] The next day Mr Winslow-Burton rang the children to have phone contact with them pursuant to the terms of the parenting order. It appears that Ms Poindexter listened in to the phone conversation, (quite why she feels able to was not explored in cross-examination today), and it is her evidence that Mr Winslow-Burton engaged in a line of conversation with the children that she perceived to be psychologically abusive. In particular she alleges that he made reference to the fact that she may be in trouble for breaching the parenting order and that Mr Winslow-Burton knew the fact that the children were going to counselling and wanted to know what was discussed. She responded by terminating the telephone call. Mr Winslow-Burton rang back and while initially allowing the phone calls Ms Poindexter eventually would not let Mr Winslow-Burton talk to the children anymore, particularly when he had exceeded his allocated half hour.

[24] Mr Winslow-Burton, in cross-examination from Mrs Coffey, accepted he may have rung up to 15 times. Mr Winslow-Burton in his evidence denied that he in any way denigrated Ms Poindexter but rather saw the basis upon which she elected to terminate the calls as being centred in her being upset about being "called out by me" for her unilateral decision at the preceding judicial conference day.

[25] Mrs Coffey in her submissions described Mr Winslow-Burton's number and frequency of calling back as being harassment. While I accept that Mr Winslow-Burton went over the top I do not accept that his behaviour was harassment as defined in the Domestic Violence Act.

[26] As I so often remind myself this Court, more than any other Court, is dealing with people in their raw humanity, with humanity at times being attractive and other times unattractive. Any decision this Court makes cannot be in a vacuum of recognising the humanity of people. What is clear on the evidence is that Mr Winslow-Burton loves his children and his children love him. At a human level his reaction at being denied telephone contact with his children and his agitation at being so denied is entirely understandable. His evidence additionally was that he did not do so recklessly or spontaneously but rather sought advice from Constable A of the [location deleted] Police before continuing to ring, including the period after his allocated half hour had expired.

[27] I agree with Mr Casey that there was much of Ms Poindexter's evidence in which she seemed incapable of accepting responsibility for what has occurred. She might not have agreed with what was being said to the children. She might have believed that it was psychologically damaging to them (although as Mr Casey explored in his cross-examination there is no evidence from anyone else such as schools or other family members that these children are in any way being affected at present in a negative sense as a consequence of being exposed to parental conflict). But that there were an escalation (which led to the events and the number of phone calls which were made on that night) has as a direct causative link to Ms Poindexter's view that she can be the sole arbitrator of what is appropriate conversation as between the children and their father, and the sole arbitrator as to whether in the circumstances she can then shorten the contact in breach of the Court order.

[28] Mr Winslow-Burton should have stopped short of making 15 phone calls as I would have thought he would have got the message long beforehand that Ms Poindexter was not going to let him talk to the children. But as already said his response is entirely understandable at a human level.

[29] There is a further incident referred to on 13 September relating to a dispute about not returning the children and it is for the purpose of my decision of no great moment.

[30] On 1 August 2015 Ms Poindexter went to the police station reporting that her children had said to her on the way home from a visit with their father that, "Dad was saying that you were evil." Mr Winslow-Burton denies referring to the children's mother in that way at all, either directly to the children or inadvertently. I accept his evidence.

[31] There is a further incident referred to on 3 August which relates to a dispute about the pick-up arrangement and as the summary records, "Neither party willing to compromise." The result was Ms Poindexter went to the police station to make a complaint of breach of the parenting order. The fact that neither party was willing to compromise is really indicative of the high level of adult conflict around the children and it does not do either party any credit that there was no compromise or move to compromise by either of them.

[32] There are breaches on 26 March 2014 relating to texting about the children. That appears to have been texting by Mr Winslow-Burton to Ms Poindexter, on the face of it in breach of the protection order, but arising out of the frustration of Ms Poindexter to engage in meaningful communication about his seeing the children.

[33] On 22 June 2013 there was an argument at a soccer match. The police report records that Mr Winslow-Burton motioned to head-butt Ms Poindexter's then partner. That partner has not sworn affidavit evidence and has not been available for cross-examination to corroborate that. There is a clear conflict in the evidence and I am unable to resolve that conflict and thus I am not satisfied on the balance of probabilities that that incident occurred.

[34] On 14 February 2013 a report refers to the possession of firearms and this resulted in the criminal conviction that I have referred to earlier.

[35] On 24 April 2011 there is an allegation which appears to have been made by Ms Poindexter's father that Mr Winslow-Burton drove past the address where she was living. Mr Winslow-Burton's evidence, not challenged in cross-examination, was that he was going to the beach with his flatmates. The road upon which

Ms Poindexter was then residing was the only access to the beach. It was a public road and he drove past at 50 kilometres an hour. As Mr Winslow-Burton said in his cross-examination his being on a public road driving past where Ms Poindexter lives is not a breach of the protection order. It would be if he watched, beset or loitered near where she was living. But simply driving past on a road which is the sole point of access cannot be a breach. 30 November 2010, there were texts to a third party again in relation to Mr Winslow-Burton trying to see the children.

[36] The following VIR all relate to matters that predated the making of the final protection order.

[37] Mr Winslow-Burton is currently facing two charges. One of breaching the protection order and one of breaching the terms of the parenting order. As I understand the evidence the breach of the protection order relates to the phone calls outside the half hour period. Mr Winslow-Burton's evidence is that he received permission and advice from Constable A to continue to make those calls, given that he had been denied to contact he was entitled to have pursuant to the order. Indeed his evidence is that the Whakatane Police, appropriate in my view, decided to not proceed with a prosecution but the [Location deleted] Police subsequently decided to pursue the prosecution. I of course do not have the benefit of seeing all the information and the disclosure information but if the disclosure information provided by the police confirms that Constable A gave that advice to Mr Winslow-Burton then I cannot comprehend that a Judge could find the charge proven beyond reasonable doubt as Mr Winslow-Burton would have lacked I would have thought the requisite mens rea or intent.

[38] Mr Winslow-Burton is somewhat perplexed as to what the charge relating to the breach of the parenting order relates to and I have not been able to ascertain the exact basis of that. In any event Mr Winslow-Burton is appearing in the Tauranga District Court tomorrow and entering a plea of not guilty to those two charges.

[39] Looking at the factors identified by Her Honour Judge Smith the behaviour that led to the making of the protection order in the first place was clearly psychological abusive behaviour.

[40] Mr Winslow-Burton has appeared in my Court on a number of occasions and on the last occasion, as he candidly acknowledged, his behaviour was entirely inappropriate and in the course of his cross-examination today he apologised. He has demonstrated at times, although not today, a propensity to fly off the handle at short notice but that has to be weighed against the background to the matter and his ongoing sense of frustration at what he perceives to be the unjust use of the protection order and the perplexing and contrary advice he has received from time to time by the [Location deleted] Police.

[41] Nevertheless Mr Winslow-Burton's volatility is a factor which clearly concerned Judge Geoghegan in 2011 and it is an issue which does concern me.

[42] There are no allegations in these proceedings that the initial order has been obtained by false or misleading evidence. There has been one subsequent breach of the protection order, leaving aside the charges that were before the Court at the time the protection order was made which resulted in the eight month sentence of imprisonment. Significant in my view, and notwithstanding that on the previous occasions Mr Winslow-Burton had been sentenced to eight months' imprisonment, that in relation to the firearms breach Mr Winslow-Burton was simply ordered to come up for sentence if called upon, one of the lowest possible sentencing options available under the Sentencing Act 2002.

[43] I also need to take into account the fact that the parenting proceedings are unresolved. The Court has directed a 133 report and that is in the process of being undertaken, as I understand it, at this point in time. Thus there is the potential for ongoing conflict and stress between the parties.

[44] That has to be weighed against the fact that for a number of years now there had been care arrangements which, by and large, have proceeded without incident. In part Mr Winslow-Burton has ensured that he does not have any face-to-face contact with Ms Poindexter at change-over and that is all done through his wife who accompanies him.

[45] Mr Winslow-Burton has attended a Stopping Violence programme and while in his evidence he did not set out what he had learnt from that, given that he is not represented by counsel I do not hold that against him. In cross-examination he was able to articulate, firstly, some empathy for Ms Poindexter. Secondly, an understanding that in 2011 he was, to use his words, "not in a good place", for his relationship had just ended and it seems he had a period of mental unwellness which required medication and he, as a consequence of orders made by the Court on a without notice basis, had a severely restricted relationship with his children. He accepts that he engaged in acts which were violent, as defined in the Domestic Violence Act at that time.

[46] He gave an example of the changes he has made, including in relation to the phone call incidents, seeking advice from the police. His evidence was that prior to attending the Living Without Violence course he would have simply just flown off the handle and reacted in a way which probably would have resulted in him facing serious charges.

[47] The fact that there is a significant geographical distance between where both parties live is a factor I need to consider in my view. The changeovers that occur are in public places and there has been no allegations that there have been any serious or significant acts of violence at the changeovers.

[48] Ms Poindexter alleges that Mr Winslow-Burton stares at her in an evil manner. That clearly is her perception and Mr Winslow-Burton denied that he was doing so. I have no doubt that there remains a great deal of tension between these adults and that any looks that Mr Winslow-Burton has been giving towards Ms Poindexter are unlikely to be loving and endearing in nature.

[49] Clearly I have to place significant weight on the perception of Ms Poindexter. I have no difficulty in accepting her evidence that she believes the order is necessary for her protection. Her evidence is that she expects there would have been a lot more breaches and a lot more difficulties but for the existence of the order. In considering the issue of her perception, as Her Honour Judge Smith has said in the *SPPRS v PLS* decision, the comments of the Court of Appeal in *Surrey v Surrey* are pertinent. That

is, the Court has to consider whether Ms Poindexter's subjective belief and fears are, when viewed, objectively reasonable.

[50] Mr Casey, on behalf of Mr Winslow-Burton, in essence submitted that an objective assessment of Ms Poindexter's perception would lead to a conclusion that her fears are unreasonable. He pointed to one significant factor in my view and that is an acceptance by Mr Winslow-Burton at times that he was at fault and an acknowledgement that he could have done things better and that he had some part to play in the conflict. In his submission that had to be contrasted with Ms Poindexter's resolute failure to accept that she in any way has contributed to the situation. As I have already set out, it is my view her response to the phone call on 8 December was entirely unreasonable and really set up the chain of events that subsequently occurred.

[51] The distance between where they live in my view is significant, as is the fact that changeovers occur in a public place, with little evidence of any real conflict or distress over changeovers. Additionally, as Mr Casey put to Ms Poindexter in cross-examination, much of her belief as to why she needs an ongoing protection order is centred in the events which led up to the making of the final protection order by Judge Geoghegan.

[52] In terms of actual tangible evidence there is very little that could even remotely be construed as ongoing domestic violence between the making of the order and this hearing. Mrs Coffey countered, pointing to the fact that there was a protection order in place and no doubt that has simply achieved what it is meant to do and led to a reduction or a cessation in violence.

[53] Additionally, again at a very human level, the world view that Ms Poindexter has at present must have been influenced through the experiences she had which led to the disintegration in her relationship with Mr Winslow-Burton and the events which led up to the making of the final protection order. It is only natural that having had her trust violated by her exposure to Mr Winslow-Burton's violence that it will take a long time for her to accept and believe that he has changed. But I agree with Mr Casey that there is much in Ms Poindexter's evidence which shows that she

does not take responsibility for how her actions lead to ongoing stress and conflict and that she at times overtly uses the existence of the order and her belief that she has a right to determine what is best for their joint children and as a consequence uses the protection order when she feels like it as a weapon rather than a shield.

[54] The combined totality of all of those factors has led me to the very clear conclusion that, whilst I entirely understand Ms Poindexter's perception, when I stand back and view her position objectively, it is my finding that her belief as to the need for ongoing protection is unreasonable. The perception is of course but one of the many factors I need to consider, as set out by Judge Smith. But the totality of the factors I have referred to above and the lack of real and tangible evidence of ongoing breaches, together with my view that the order has been used as a weapon, have compelled me to the conclusion that the protection order is no longer necessary for the protection of Ms Poindexter. Additionally, it is clearly not necessary for the protection of the parties' children.

[55] Whilst I accept the exposure to conflict is no doubt impacting on the children that is an issue which is going to be assessed in the context of the Care of Children Act and given that there is no evidence that these children are at risk in the care of their father I do not believe there is a necessity from their perspective either for the protection order to continue. As a consequence it is my finding that the protection order made by His Honour Judge Geoghegan on 28 January 2011 is hereby discharged.

S J Coyle
Family Court Judge