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IN THE FAMILY COURT
AT WAITAKERE

FAM2016-024-000014
[2016] NZFC 2547

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995
BETWEEN	VERA CHASE Applicant
AND	JACOB FINI Respondent

Hearing:	23 March 2016
Appearances:	P Le'au'anae for the Applicant C Kelly on behalf of E Stenhouse-White for the Respondent P Cobcroft as Lawyer for the Child
Judgment:	23 March 2016

ORAL JUDGMENT OF JUDGE B R PIDWELL

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[1] The parties in these proceedings were in a de facto relationship for approximately eight years. It has been characterised as an on-and-off-again relationship. They have one child Rowena Fini born on [date deleted] 2011. She is five years old.

[2] The application before the Court is Ms Chase's application for a protection order. The issues for me to determine are whether there has been domestic violence and if so whether there is a need for a protection order.

[3] The parties' relationship ended in 2015, in September. The procedural background to this application is of relevance. Ms Chase filed an application on a without notice basis in the Huntly Family Court on 24 February 2016. That application was considered by His Honour Judge Druce who declined to make the order on a without notice basis. He noted "jurisdiction made out, threshold not met, clear safety concerns for applicant and child at handovers of child to and from father but these can be safely resolved at the hearing on 3 March 2016."

[4] Further context however is required because in addition to that application there are concurrent Care of Children Act 2004 proceedings in the Waitakere Family Court. Those proceedings were initiated by Mr Fini on 10 December 2015. He applied for an order without notice preventing the removal of Rowena from the Auckland area. That application was granted. When he sought to enforce that order in a subsequent application, it appeared that Ms Chase had already relocated to Huntly with Rowena before the order was technically served on her.

[5] The issue of whether that order is to be enforced and more importantly whether Rowena should return to the Auckland area is a matter that is still before the Court and has been allocated a hearing date of 30 March 2015.

[6] When the matter came before me in a directions' conference in respect of both applications and sets of proceedings, I directed the domestic violence hearing to proceed before the Care of Children Act proceeding was determined and therefore heard it yesterday on 22 February; that was because the Court had the capacity to consider the domestic violence application which must take priority in accordance

with the rules and also because the outcome of that hearing would affect the outcome of the Care of Children Act application in terms of s 5A issues.

[7] At the directions' conference on 9 March before me Ms Chase's counsel submitted that her position was, at that stage, that there were no safety issues for Rowena in her father's care and that the application for a protection order related only to her relationship with Mr Fini and she was not alleging that Mr Fini's contact with Rowena should be supervised in any way. That is recorded in my minute of that day.

[8] The parties lived in Auckland and their relationship appears to have been affected by their use and abuse of alcohol. There are family violence reports which are exhibited with that recurring theme. They have a five year old child and the incident which appears to have occurred in September 2015 was essentially the last unfortunate incident between them resulting in their final separation.

[9] Turning now to the general legal requirements, this Court has the power to make a protection order under s 14 Domestic Violence Act 1995 if the Court is satisfied that the respondent, namely Mr Fini, is using or has used domestic violence against the applicant or the child or both and that the making of the order is necessary for the protection of the applicant or the child or both.

[10] The Court needs to take into account the perception of the applicant as to both the nature and seriousness of the behaviour alleged and also the effect of that behaviour on the applicant or the child.

[11] Domestic violence is defined in s 3 of the Act as including physical abuse and sexual abuse and psychological abuse which is further defined. In this case there are allegations of physical abuse and psychological abuse in the form of threats and damaged property.

[12] The law specifically states that a single act may amount to abuse and in addition a number of acts looked at together which may form a pattern of behaviour and also amount to abuse.

[13] The second limb of the test in s 14 that of necessity has been comprehensively addressed by the Court of Appeal in *Surrey v Surrey* [2008] NZCA 565. Necessity must be assessed against the seriousness of the past domestic violence. The more serious the possible future violence a lesser risk of it occurring may justify a protection order than if the possible future violence is less serious.

[14] However, once an applicant has proved the existence of past violence and the reasonable subject of fear of future violence the evidential burden passes to the respondent to raise countervailing factors that weigh against the need for a protection order and unless the respondent meets the evidential burden the applicant does not need to show there are no countervailing factors.

[15] So in summary the applicant must prove domestic violence and a reasonable subject of fear of future violence, the evidential burden then passes to the respondent to demonstrate factors weighing against the necessity of the order.

[16] In the case of *Colledge v Hackett* [2000] NZFLR 729 His Honour Judge Walsh listed some factors which can be taken into account when deciding if an order is necessary including whether the violence was a one-off event, whether it was symptomatic of the breakdown of the relationship, if since the separation the threat has dissipated, that the character of the applicant is such that it is difficult to see why that person would need protection, the perspective of the applicant and the affect on the applicant and whether there are any other protective measures that can be taken as a result the applicant does not need a protection order.

[17] Turning now to the evidence for the applicant, Ms Chase. She gave evidence and was cross-examined and in addition her mother was cross-examined. She alleges that Mr Fini has inflicted physical violence on her in the form of giving her a black eye in 2012 and exhibited a photo to her affidavit of her at that time which shows a shadow under her eye.

[18] She also alleges that he punched her. Initially she said that happened in June or July 2015. It appeared, under further cross-examination that that was the incident which occurred in September 2015 when they separated. She alleged that he

punched her in the stomach and she slapped him back. In addition she said that he had threatened her on the phone when the phone was on speaker phone and it was a threat to kill when he said allegedly, quote, "Don't you fuckin' tell me, 'No,' bitch or I will kill you".

[19] In addition the event which precipitated the filing of the application on 13 February at a changeover when they were handing Rowena over. She alleges that during that exchange that Mr Fini said and I quote, "You better watch yourself or you're going to get yourself fuckin' killed," and repeated that to her.

[20] She said her mother heard him say that and she notified the police. That was the evidence that was before the Court when the without notice application was declined. Ms Chase subsequently filed evidence providing further allegations. In addition she says that Mr Fini is Facebook stalking her, that he had sent a threatening message to a friend of hers and that concerned her because she felt he had invaded her privacy and was able to look at her Facebook page or associates that she had associated with on that website.

[21] In addition she increased the allegations against Mr Fini by stating that he had broken her nose in the past, which was not in her initial affidavit, by punching her, that she had on more than one occasion received black eyes from him and overall that their relationship was essentially splattered with incidents of punches and the like.

[22] In support of her evidence her mother Jessica Chase indicated and gave evidence that Mr Fini, from her perspective, is a controlling person. She had not witnessed any black eyes. She acknowledged that her daughter had a broken nose on one occasion but was unable to indicate how that had occurred and gave evidence that she had not made any enquiry as to whether or how that had occurred which was a curious explanation.

[23] She said she had seen Mr Fini hit her daughter on one occasion in 2012 but that incident was not explained or corroborated by Ms Chase herself and she took no

steps herself in relation to that incident. She said she was present at the changeover in February when the alleged threat was made. She said she heard the threat.

[24] However, her evidence was inconsistent in detail with that of her daughter's in respect of where she was and what was said. In addition, Ms Chase confirmed that she had spoken with her mother subsequently about what was said on that day.

[25] Ms Chase confirmed that the last allegation of physical violence, from her perspective, was that incident on 19 September 2015 which was the date the parties separated. During that incident, which occurred at their home, they were both drinking. Her initial evidence was that she wanted Mr Fini to stay at home with her and their child when he wanted to leave. There was an argument which resulted in him punching her in the stomach and she slapping him in return. He then called the police and they then asked him to leave and issued him with a police safety order.

[26] The following day her car was keyed and there was a deep scratch across the door. She did not lay any charges nor seek a protection order at that time.

[27] Just finally in relation to Ms Chase she confirmed that she had been convicted of two excess breath alcohol charges in the last few years and she was not sure of the alcohol readings. She had also been convicted of a reckless driving charge.

[28] Turning now to the evidence from Mr Fini. He denies any form of physical abuse. He accepts that on occasion there has been a physical interchange, if I can call it that, but says Ms Chase has instigated that and he has resisted her by batting or pushing her away. He says that he accepts that their relationship was difficult at times and when alcohol was involved, he says, Ms Chase's personality changed. She also takes sleeping pills and that affected her behaviour and he has learnt strategies to walk away from situations of conflict.

[29] He denies any violence, physically, he accepts he keyed her car on the day of their separation and denies any threats. He accepts he sent the Facebook message to the third person explaining that when he realised that person may be involved with

Ms Chase and therefore have access to his daughter, that he felt concerned and essentially told him to stay away because he thought he was involved in a local gang. He said it was not to intimidate or threaten Ms Chase but was a protective measure against his daughter.

[30] In relation to the incident on 19 September he gave evidence of that in detail under cross-examination, stating that the parties were both drinking on that day, that when the vodka they were drinking ran out he stopped drinking and went to watch a league game, Ms Chase continued drinking and then became difficult and aggressive.

[31] She decided to verbally engage with him and he told her to leave him alone. He said she took her sleeping pills and then essentially attacked him. He pushed her away; she continued to grab at him. He rang the police and left the property. The police came after some delay, of an hour or two. He was concerned for his daughter, he stayed in a neighbouring property and said he could hear walls being hit and his daughter crying, but he did not feel he could enter the property again because he was concerned about any allegations Ms Chase would make if that occurred.

[32] Ms Chase was throwing his clothing and items off the deck. When the police arrived he says he denied punching her to them and agreed to leave the property. He was breathalysed and the police enabled him to leave the property, issued him with a PSO to resolve the problem, that the police then took Ms Chase and Rowena to the police station, on his evidence, out of concern for her ability to keep Rowena safe in those circumstances.

[33] Mr Fini accepted that he has a criminal history and that was exhibited and an update was made available to the Court for the purposes of this judgment. He is currently 31 years old and he has a criminal history which includes convictions for excess breath alcohol and also a conviction for common assault in 2006, male assaults female in 2008 and aggravated assault in 2009 in addition to escaping custody together with two charges of injury with intent to injure in 2009.

[34] He received a prison term as a result of that offending together with standard and special release conditions. His sentence started on 5 May 2010 and he would have served half of that prison term. Since then he has one conviction for excess breath alcohol for which he received community work and disqualification; although he subsequently obtained a work licence and one conviction for failing to give information.

[35] Mr Fini explained his criminal history indicating that the prison term he received in 2010 was essentially exactly what he needed in terms of a wakeup call. That coupled with the birth of his daughter meant that he has essentially, from his perspective, turned his life around. He attended anger management and learnt strategies to diffuse conflict and walk away. He explained his understanding of how conflict and aggression can adversely affect people. That coupled with the passage of time and his role as Rowena's father, against the background of the passing of both his parents, made him choose a different course for his life.

[36] He says that despite that criminal background, during the time he was in a relationship with Ms Chase, he has not physically harmed her and indeed has used the strategies that he learnt through anger management to diffuse the conflict that was evident in their relationship.

[37] When there are allegations of physical violence made by one person against the other the Court is challenged with the job of having to determine those. The standard of proof is a balance of probability. The evidence of each person needs to be considered against the surrounding circumstances and the Court is usually greatly assisted by any independent evidence that is available to it.

[38] In this case we have a situation where Ms Chase says now that she was in an abusive relationship which involved physical violence in the form of punches and threats and that the last threat in February was the last straw which led her to make the application for a protection order.

[39] The independent evidence that I have available to me to assist the family violence reports, they detail the number of times the police have been involved with

this couple; commencing from October 2009 when they were in Hamilton having a verbal fight or argument and a member of the public called it in to the police. Although the report says, "Both parties were adamant everything physical had occurred," I am satisfied that should read, "Both parties were adamant nothing physical had occurred," and the matter was not taken any further.

[40] The family violence reports from then on however describe arguments between the parties. The next one on 14 January 2013 with Ms Chase commencing an argument about a fan, with each of them pushing each other and Mr Fini leaving the room, Ms Chase following him and throwing a table at him and Mr Fini leaving the address.

[41] Ms Chase denies that she threw the table. What that incident says to me is that an incident occurred resulting in Mr Fini leaving the property and no charge has been laid.

[42] The incident on 19 September is also particularised in the family violence reports noting that the police were called by Mr Fini at nearly midnight indicating that he had been assaulted and locked out of his house. The police action on that occasion is confirmed in that report which confirms that Mr Fini left the address to stay with his brother, that although the parties had been drinking Mr Fini denied punching Ms Chase and stated he did not want to pursue the matter but was only concerned about his daughter.

[43] The police report confirms that the police had concerns for a child being in Ms Chase's care because she was intoxicated. He also says that she had taken certain sleeping pills, she denies this. However, it is clear that on that occasion, once again, alcohol was involved and an incident happened which resulted in Mr Fini leaving the property, the police being called and no arrest being made.

[44] The other family violence reports relate to complaints by Ms Chase about an inappropriate photo being posted on Facebook by Mr Fini and her not pursuing that matter. A further incident is described on 17 December 2015 when Ms Chase

contacted the police because she saw Mr Fini outside her property and she called 111.

[45] In explanation to that Mr Fini accepts he was outside her property but wanted to know where his daughter was, the relocation of her being an issue before the Court at that time. He did not enter the property nor try and engage with her.

[46] Ms Chase's evidence was inconsistent at times. She was unable to provide details of the alleged incidents of physical violence, the incidents of themselves became blurred, one into the other. The overall theme of her evidence was that these incidents occurred when alcohol was involved and she acknowledged that she regularly takes sleeping pills and therefore her recollection of these events would, in my view, be distorted.

[47] The evidence needs to establish that these events occurred to the necessary standard of the balance of probabilities that is more likely than not.

[48] The police policy on family violence is to arrest when there is evidence of a sufficient standard to establish that an offence has occurred. I note on each of the occasions that the police have been called, and there had been numerous, that no arrests were made. Mr Fini was not arrested and indeed he was the one who was walking away from the incident each time.

[49] Given his criminal history, which the police would have been aware of, it is likely that they would be looking at the evidence closely and would not have hesitated to arrest Mr Fini if they had any credible evidence of any violent offending. In fact they have not done so on a number of times, that says to me that there is no credible evidence to satisfy them and that an arrest should be made.

[50] In the same way, due to the surrounding facts, which I have outlined above in terms of alcohol and sleeping pills and also the context of this application, I too cannot be satisfied that the necessary standard that the allegations of physical violence have been proved on a balance of probabilities.

[51] Mr Fini however acknowledges that he did key Ms Chase's car at the time of separation and under s 32C(3) damaged a property can be a form of psychological abuse. The other allegations of the threat, in particular the threat in February 2016, which allegedly occurred at the changeover of Rowena.

[52] Having heard Mr Fini give evidence and noting the emotion which comes in with the Care of Children Act proceedings, I am satisfied that he did not state those words in front of his child. Although a threat was allegedly heard by Ms Chase's mother. They live together and they are obviously supportive of one another and it is likely there has been some discussion about the events of that day.

[53] It is the timing of the application within the context of the Care of Children Act proceedings that I view that alleged threat as well and it is likely that the applicant knew of the legal ramifications of a protection order when filing that application, having been advised by counsel. Although there may been some words spoken, I cannot be satisfied that a threat was made of the nature described by the applicant.

[54] I do not consider the Facebook message to a third party to be abusive to Ms Chase. It was not intended for her and needs to be seen in light of a father protecting his child from undue influence of another.

[55] On that basis, I can only establish that domestic violence has occurred due to the acknowledgement that Mr Fini has harmed the property of Ms Chase and not under any other limb.

[56] If I go to a second limb of the test, that of necessity, it is a broad assessment of risk of future violence. I need to take into account Ms Chase's subjective views. I note that she sent a friendly worded text to Mr Fini on 4 March and although her evidence is that she is scared of him, I am not satisfied that that is her current view. I consider she is more concerned about the outcome of the Care of Children Act proceedings and the prospect of her having to return to Auckland against her will.

[57] Indeed, if there need to be countervailing factors put forward on behalf of Mr Fini, I am satisfied that there is no ongoing risk of him harming any property or abusing Ms Chase; they live separate lives. The keying incident was part of the breakdown of their relationship in difficult circumstances involving alcohol, more on her part established by the police, taking her back to the police station and allowing Mr Fini to drive on that occasion.

[58] There was also evidence that she was damaging his property at the same time and in my view there are enough protective measures available under the parenting orders which will be shortly made to ensure that there is no need for a protection order.

[59] Mr Fini impressed me as someone who has come a long way since his former offending. He showed insight into his role as a parent, he showed traits of frustration at the process and at times a sense of arrogance but overall I am satisfied that he has moved on significantly from the person he used to be and is now only focused on the best interests and welfare of his daughter.

[60] Accordingly, having made those findings, it is clear that the application for a protection order is declined.

B R Pidwell
Family Court Judge