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IN THE FAMILY COURT
AT PAPAKURA

FAM-2015-055-000219
[2016] NZFC 4217

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995
BETWEEN	PAKPAO WATTANA Applicant
AND	RICHARD DERRICK Respondent

Hearing:	18 May 2016
Appearances:	F Lemalu for the Applicant G Goulter for the Respondent
Judgment:	18 May 2016

ORAL JUDGMENT OF JUDGE MAUREEN SOUTHWICK QC

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[1] Before me is an application for a final protection order. That application follows a temporary protection order having been made on 11 November 2015 as a result of a without notice application filed by the applicant.

[2] The respondent defends the making of a final protection order.

[3] I am aware of the fact that running parallel to these proceedings are various Care of Children Act 2004 proceedings. Currently, there exists an interim parenting order which provides for the parties' child Betsy, born on [date deleted] 2013, being in the care of the applicant, but with supervised contact only to the respondent.

[4] I note, in passing, that that interim parenting order has not been the subject of compliance by the applicant for some time and, indeed, there was a serious risk that a warrant which issued would need to be enforced. Probably because of the intervention of lawyer for the child in the COCA proceedings, it did not require implementation, which was fortunate for this very young child.

[5] The history of this matter is that the parties began a relationship in approximately 2013. They did not know each other well but, as a result of their association, Betsy was born in New Zealand in [date deleted] 2013.

[6] The parties went to Thailand, the homeland of the applicant, in or about 2014, and whilst in Thailand separated in approximately May 2015.

[7] The applicant and Betsy returned to New Zealand in August 2015, and the respondent and his then wife returned to New Zealand in October 2015.

[8] The facts upon which the applicant based her application for a without notice protection order included a number of allegations of physical abuse, psychological abuse and sexual abuse of both her and the parties' daughter.

[9] The respondent for his part robustly denies most of these allegations. What he does acknowledge is that there were a number of arguments between the parties during what was plainly an unsuccessful and deteriorating relationship. He says that there were verbal arguments during which each called the other unpleasant names.

[10] He acknowledges also that there was an incident when at a low time for him he sent a communication to the applicant which could have led her to believe he felt that he might end his life.

[11] Beyond that, however, he says that the allegations are manipulative, untrue, and are the result of jealousy on the applicant's part of his relationship with other women (which he acknowledges). He says that the applicant wished to rekindle the relationship with him as late as October 2015.

[12] The applicant gave evidence to support her application. What emerged from that evidence was a concerning level of lack of consistency and an inability to explain why she did not take steps earlier than she did. The applicant acknowledged that she had not read her affidavits before she signed them and that, therefore, they were unlikely to be wholly accurate. Certainly, it became necessary for her to modify some of her evidence quite significantly.

[13] By way of example, it had been alleged that there was an incident in October 2015 where the respondent visited her home, presenting a letter to her which the respondent had insisted she signed in connection with an IRD debt arising out of child support.

[14] An important aspect of her evidence appeared initially to be that there were other family members present at that time. Her evidence changed several times as to who exactly was present and whether Betsy was present. Furthermore, the purpose of the visit and the signing of the form appeared to have a benign explanation which did not warrant the sinister suggestions raised in her affidavit.

[15] Despite the manner in which the visit was described and which was said to have lead the applicant to be extremely fearful, she acknowledged that she then got into a car with the respondent, who drove her to the police station for purposes which were entirely unrelated to the relationship between the parties.

[16] It was difficult to make any sense of this incident, but my clear impression was that it had been repeated in a fashion designed to further the possibility of

obtaining the protection order rather than repeating the event in an entirely truthful manner.

[17] Mr Derrick's evidence about the visit varied significantly from that of the applicant. He suggested that there was no great scene at all and that family members were not there. He said that he was happy to accede to her request to take her to her destination because it was raining. He explained the reason for the need to have the IRD form signed. I note that Mr Derrick is paying child support regularly.

[18] By way of another example of inconsistency, in her affidavit of 10 November 2015 the applicant spoke about the respondent often, "forcing her to have sex." In her oral evidence she said this occurred on one occasion and then later in her evidence suggested that Mr Derrick's parents had heard arguments about an issue of unreasonable sexual demands. The nature of this evidence also lead to significant difficulty in forming any reliable conclusion.

[19] It was said by the applicant that in March 2015 Mr Derrick had strangled her and kicked her in the stomach. The incident was described in a way that one would have expected the applicant to have sought assistance, or to have left immediately. There was a suggestion that she feared for her life at that stage.

[20] Not only did the applicant not seek any assistance but there is no other person who she seems to have spoken to, who could have provided evidence. There is no medical evidence. I note also that subsequent to this apparent incident, the applicant continued in a relationship with the respondent.

[21] I do not ignore the fact that this incident is said to have occurred in Thailand, where social services in connection with domestic abuse may not be so sophisticated. However, the applicant had not been in a relationship with the respondent for a long period and she was in her home country where she had contacts.

[22] In 2014 it is suggested that as a result of an assault by Mr Derrick the applicant suffered a miscarriage. It was said in her oral evidence that the applicant

did provide the hospital with details that this occurred as a result of the assault. No medical evidence has been provided and, clearly, that could have been provided.

[23] Mr Derrick for his part gave quite detailed evidence of what occurred on that occasion. He acknowledged that a miscarriage took place. He said he was at the hospital with the applicant throughout. He said as a result of some obstetric issues scans were completed, revealing that the unborn child did not have a heartbeat.

[24] Given the absence of medical evidence, which was acknowledged could have been produced and the general sense of inconsistency in other areas of the applicant's evidence, it was not possible to place a great deal of weight upon this allegation.

[25] In her oral evidence the applicant said that since February 2015 every time the parties' daughter had sat on the lap of her father the respondent had an erection. She said that she put this to one side in effect because the respondent said that this was a normal reaction. This evidence was not in the applicant's initial affidavit. It was only raised in later affidavits when it became clear that the respondent was opposing orders being made.

[26] I do not accept that the applicant is so naïve as to believe that such behaviour would be classified as normal. My view is that if such had, in fact, been occurring, the applicant would have at least sought advice once in New Zealand.

[27] In her oral evidence, sexual abuse concerns were further embellished when the applicant asked the question of the Court – should a mother hand over a child to a father if she believes the child is going to be "raped"? Allegations developing in seriousness in this manner became a theme of the applicant's evidence.

[28] The applicant says that she observed that Betsy had redness around her vaginal area after being with her father – although when this occurred was not clarified. No medical evidence was provided.

[29] I find that in considering the entire history of this matter, the applicant has indeed found it very difficult to adjust to her relationship with the respondent coming to an end. To some extent, a degree of blame can be laid at the feet of the respondent in that he has himself not relayed a clear enough message to the applicant that the relationship is over. This, in my view, has heightened the distress that the applicant may have felt and, hence, has led in part to what the Court is now facing.

[30] It is important to take note of a particular area of evidence provided by the respondent - that is the evidence of emails that passed between the parties on 15 October 2015.

[31] On 20 October at 1.00 pm, 1.02 pm and 1.08 pm the applicant emailed the respondent asking him to come to her residence - "*Please, please give me sex. Betsy is falling asleep now."*

[32] A following email suggests that if he does not come she will find someone else, and the third email refers to the someone else she has found and then states, "*Oh well can't help it, you made me do this, sorry. Also if I don't see any money then you will be in trouble, good luck."*

[33] The tenor of these emails certainly does not suggest the writer is fearful of the respondent, and further tends to support the respondent's view that much of this behaviour is the behaviour of a "woman scorned".

[34] It was within two weeks of this series of emails that an application for a protection order was sought.

Discussion

[35] In applying the law the first test is whether or not domestic violence has occurred.

[36] On the basis of the respondent's own admission, I find that, even if at the lower level, domestic violence did occur. The respondent acknowledges that he shouted on occasion at the applicant and that he called her names. He also

acknowledges that the email he sent suggesting he might take his own life could have been distressing to the applicant.

[37] However, when I pass to the second test, namely whether the order is necessary, I do not consider there is evidence to persuade me that it is.

[38] In the frequently quoted Court of Appeal decision of *Surrey v Surrey* [2008] NZCA 565, the Court provided the guidance which still presents the template generally followed. That is, once an applicant has proved the existence of violence, and a "reasonable" fear of future violence, the onus moves to the respondent to raise countervailing factors. The reasonableness of that fear is considered from a subjective viewpoint, although objectively assessed.

[39] The difficulty in this case is that I am not of the view that even on a subjective level the applicant is genuinely in fear of the respondent. I observed her carefully during her oral evidence whilst considering the nature of that evidence.

[40] The applicant did not present as a person who was genuinely in fear of the respondent, but rather as a woman who was distressed by the fact that her relationship with the respondent is at an end and that she may not be able to be entirely in control of the consequences which flow from that fact.

[41] As I have indicated earlier, the respondent has not assisted in the situation which developed by failing to make his intentions absolutely clear. However, that is not a reason to manufacture and/or manipulate evidence in order to obtain a protection order.

[42] Even if I had found that the applicant had a fear of the respondent, when judging that subjective fear objectively I would not have found such to be "reasonable", particularly in light of the respondents evidence and in particular the emails of October 2015.

[43] Accordingly:

a) The application for a final domestic protection order is refused.

b) The temporary protection order is discharged.

c) In the particular circumstances of this case and given the fact that I find that the respondent has had some responsibility for the events as they unravelled, I make no order as to costs.

Maureen Southwick QC
Family Court Judge