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IN THE FAMILY COURT
AT AUCKLAND

FAM-2009-004-000265
FAM-2009-004-000275

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
AND IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1955
BETWEEN	A Applicant
AND	B Respondent

Hearing: 12 & 13 August 2009

Appearances: A Fisher for the Applicant
A Grant for the Respondent

Judgment: 20 August 2009

RESERVED DECISION OF JUDGE S J FLEMING

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[1] The applicant and the respondent were married in December 1990 but had lived together before that. They had been in a relationship since around 1983. They have not lived in the same house since March 2008. The applicant is an American and the respondent, a New Zealander. They have lived most of their married life in New Zealand.

[2] According to the psychiatric evidence, the applicant suffers from Attention Deficit Hyperactivity Disorder. Towards the end of the marriage, she also had become dependent on prescription medication, which she had started to use because of severe headaches.

[3] In January 2008 the applicant and the respondent travelled to the United States. The purpose was to try and address the applicant's health problems. Specifically it was intended for a pain management specialist to treat the applicant's headaches which had led to the dependency on prescribed medication. They stayed with a relative of the applicant's – Dr H.

[4] The respondent spent most of the first three months of 2008 in the United States with the applicant but difficulties between them were beginning to become apparent. In March 2008, the respondent returned to New Zealand while the applicant remained in the United States.

[5] Upon returning to New Zealand, the respondent moved back into the Auckland home which had been acquired in his name during the course of the relationship. The respondent and the applicant lived (except for periods of study overseas) in this property from about 1987 until December 2006. In December 2006, they had moved to stay in the respondent's parent's beach property at Stanmore Bay. They remained there for just over a year, prior to travelling to the United States for the medical treatment.

[6] Towards the end of last year the respondent sent an email to the applicant in which he said he regarded their relationship as over. There had obviously been difficulties for a long time. The applicant had apparently not appreciated the extent

of the problems and on 23 January 2009 she returned to New Zealand and moved back into the Auckland home. I understood she did so in the hope of resurrecting the marriage.

[7] The applicant knew the respondent would be overseas at the time she arrived. The respondent said he made it clear he did not want the applicant to stay in the Auckland home and preferred she delayed her arrival until he had returned from Europe. Although there was some dispute about this, I am satisfied the applicant was aware of her husband's views because she arranged for some friends to stay with her in the home. No doubt she was apprehensive about what the respondent's reaction to her moving back into the house would be.

[8] The respondent arrived back in New Zealand on 25 January 2009 and went to the home. Not unexpectedly there was an argument and both differ in their accounts of precisely what was said or occurred. There is no dispute however that the respondent packed his wife's belongings into her suitcases and took them to the front door. The respondent was very unhappy to discover his wife had moved back into their home against his wishes and had apparently been looking through documentation he had in the house. He then left but came back a short time later. When the respondent finally left, he made it clear he expected the applicant to vacate the home in the next few days.

[9] Four days later, on 29 January 2009, the respondent went again to the house. On this occasion he was accompanied by some friends – a Mr and Mrs L – who had been staying in the home for most of the previous year with the respondent. The respondent had been contacted by Mrs L who was going to the house to retrieve the family's possessions. By the time the respondent arrived, Mr L (and his son) was already there and packing the car. The respondent tried, but was unable, to open the front door because the applicant had had a new locking deadbolt installed. The respondent called out to the applicant and kicked the front door a number of times in an attempt to gain entry but he was unsuccessful. The descriptions of the force used and the length of time over which the kicking continued are very much in dispute. It is difficult to know which version is correct since both the applicant and the respondent were obviously upset and emotional

which affects the accuracy of their recall. However, the L's, who accompanied the respondent, described the kicking being for a short period of time of between 10-30 seconds and since they were not directly involved, their evidence is more likely to be closer to what occurred.

[10] The applicant described herself as being terrified and there were scuff marks left on the door following the incident. She said the bolt was also bent.

[11] These events (and a subsequent attempt to find out her cell phone number) were essentially the catalyst for the application made by the applicant for a protection order.

[12] Some subsequent events occurred that were of concern to the applicant and increased her anxiety. Only three of them involved the respondent. The events are:

- She left some items outside the property for collection by a courier but they were removed before the courier arrived, which led the applicant to believe the house was under surveillance.

  The evidence does not support that conclusion – there are many other possible explanations.

- Matrix Security attended the house in March though not asked to do so by the applicant.

  According to the respondent, the Security Company had concerns the security system was being interfered with.

- A number of tyres on her car were slashed. She suspected the respondent was responsible.

  There is no evidence the respondent was responsible for, or in any way connected with, this incident.

- In March the respondent went to the Auckland property with his lawyer and two police officers to uplift personal items and did not provide advance notice of his intentions.

- On 2 April the respondent followed the applicant's car for a distance of about a kilometre after two men had come to the property claiming they had been asked to cut lawns and hedges.

[13] There has been no other direct contact (except for a chance meeting in a Bank) since these proceedings were filed in February, but the applicant has suffered additional distress as a result of her financial position. She is unable to access funds in the way that she did when she and the respondent were married to each other, she has no employment and no source of continuing income.

APPLICATION FOR A PROTECTION ORDER

[14] The Act provides the Court may make a protection order if satisfied the respondent is using, or has used, domestic violence against the applicant and the making of an order is necessary for the protection of the applicant (s.14).

Has there been Domestic Violence?

[15] The first issue which arises is whether there has been domestic violence. The meaning of domestic violence is defined in s.3 and relevantly, in this case, means psychological abuse.

[16] The applicant makes no allegation of physical abuse. Evidence was given about an incident which occurred last year. The respondent's account was he touched the applicant on the shoulder (and possibly the neck) to attract her attention. The applicant gave no evidence about the incident but it was referred to in the evidence of Dr H who recounted what she had been told by the applicant. The respondent said he had difficulty at first in identifying the incident when he read

about it in Dr H's affidavit. There must have been some reaction by the applicant to what occurred or the respondent would not have been able to recall it at all.

[17] The only direct evidence is that of the respondent and the account he gives does not, on any standard, amount to physical abuse. If the incident had been of concern, I would have expected the applicant to mention it and the fact she does not supports the conclusion that any adverse effect of the contact was accidental.

[18] Psychological abuse is defined as including, but not limited to, intimidation, harassment, damage to property and threats of other forms of abuse. In addition a number of acts that form part of a pattern of behaviour may amount to abuse even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial (s.3(4)(b)).

[19] In this case the two incidents on 25 and 29 January 2009 precipitated the application for a protection order, but those events cannot be viewed in total isolation. The relationship had been in difficulties for some time and heated arguments had become a regular feature of their relationship. The respondent would shout at the applicant during these arguments. He agreed to attend anger management counselling prior to travelling to the United States at the suggestion of Dr H. I did not understand the respondent to deny at the hearing there were numerous occasions when he was verbally abusive to the applicant during the time they were in the United States last year. He did not accept, however, he had an anger management problem and said "the way I handled that anger was entirely appropriate". He acknowledged Dr H, did not consider the way he was conducting himself was "entirely appropriate" and in fact was told by her his behaviour was "abusive and would not be tolerated". The respondent did challenge the frequency of the occasions upon which his behaviour resulted in comment by Dr H and pointed out Dr H's family had little tolerance for any swearing.

[20] It is important to place some context around what was occurring in the United States. The applicant had become dependent upon prescribed medication and would have been behaving quite uncharacteristically. No doubt this was a source of tension in the relationship. The respondent's way of dealing with the tensions – by

becoming angry and loud – was hardly likely to assist. Further the purpose of the travel to the United States was to reduce the applicant's level of medication which would have been a very difficult process. Dr H described the usual effects of such a program on a person as including nausea, restlessness, jitteriness, insomnia and muscle aches. It would not have been an easy time for the applicant or the respondent.

[21] In these circumstances there was increased pressure in the relationship which had already reached a stage (before the travel to the United States) when further marriage counselling was to be undertaken. Counselling, both joint or individual, does appear to have been embraced by the respondent and the applicant throughout their lengthy relationship and, at times, not necessarily associated with difficulties in their relationship. On this occasion however it appears it was related more to the state of the marriage.

[22] The time in the United States was the last occasion the respondent and the applicant shared a residence. The marriage was in a state of tension and difficulties. In summary, the applicant was withdrawing from dependency on medication, the couple were arguing and the respondent was reasonably regularly shouting and swearing at his wife in the course of these arguments.

[23] The respondent then left the United States for the final time in mid-March 2008. He returned to New Zealand and moved into the Auckland home. There were continuing discussions between the two including a proposition put by the applicant that they should move to live in the United States but, by the end of that year, the respondent at least, had decided that the relationship had ended.

[24] My impression of the applicant when giving quite lengthy evidence was she remains a person who could best be described as fragile. I have already referred to the applicant's diagnosis of ADHD which is reasonably well managed. Dr W (the psychiatrist) also said the applicant was currently suffering from an acute stress reaction.

[25] The question is, whether the two incidents on 25 and 29 January 2009, the past regular use of loud and insulting language by the respondent in combination with those events involving the respondent which occurred after the filing of the application amount to psychological abuse.

[26] The respondent's behaviour in the United States was obviously unpleasant in view of the comments of Dr H, who was an impressive witness. I note the applicant however placed little emphasis on it. It occurred at a time when the relationship was deteriorating rapidly. I expect both the respondent and the applicant were probably behaving uncharacteristically as a result of the health factors and the stresses and strains which had existed in their relationship for some time prior to their arrival in the United States and continued thereafter. Nevertheless I accept the behaviour was upsetting to the applicant.

[27] On 29 January the respondent accompanied by a couple, who had been mutual friends, tried to kick down the door to gain entry to the house. There was some minor damage. He left soon thereafter and did not return. I believe the applicant when she said she was very frightened on that occasion and the earlier one when her husband arrived at the house.

[28] In view of the applicant's state of health, and her experience of how her relationship was with her husband when they were last living together in the United States, it is unsurprising she would have been very apprehensive and anxious about the possible repercussions of her decision to return to New Zealand and to move into the Auckland house in the face of opposition from her husband. She would have been expecting the worst.

[29] The respondent's arrival at the house some two months later in the company of Police and lawyers would have been upsetting and probably intimidating to the applicant, as would have been the occasion when the respondent followed her car for a short distance.

[30] Overall I am satisfied the various behaviours and incidents did amount to domestic violence in the form of psychological abuse.

Necessity

[31] I also need to be satisfied the making of an order is necessary for the applicant's protection (s.14(1)(b)).

[32] In determining that question I need to assess the need for protection having regard to the objects of the Act (in the main to reduce and prevent domestic violence in domestic relationships and ensure effective legal protection for victims) as well as any other relevant factors (*S v S* (2008) NZCA 565).

[33] I must also consider whether the past domestic violence forms part of a pattern of behaviour in respect of which the applicant needs protection (s.14(3)).

[34] I do not consider the conduct does form a pattern of behaviour when it only occurred around the time of the separation and latterly arose because of a dispute about occupation of the house which will now be resolved.

[35] A further consideration is the perception of the applicant of the nature and seriousness of the behaviour in respect of which the application has been made (s.14(5)(a)).

[36] In this case the nature of the past behaviour is not at the serious level even though the applicant perceived the events this year as frightening at the time. She is described as suffering from an acute stress reaction but that is also attributable to the breakdown of the marriage as well as her concerns about the respondent's behaviour.

[37] Finally I must take into account the effect of the behaviour on the applicant. I have already referred to those effects.

[38] I must take all factors into account when deciding whether a protection order is necessary for the applicant's protection.

[39] I am satisfied there is little likelihood of any repetition of what has occurred. The events earlier this year took place in the context of the applicant returning to live

in the home after a year in the United States against the wishes of the respondent. Of course she was perfectly entitled to return to the home and the respondent had no basis upon which he could try and insist she left. The reverse also applied. The background does provide a context for what occurred in January and since then there has been no further attempt to have the applicant moved from the home. I will be determining the issue of occupation and making an order which settles that issue for now.

[40] The shouting and verbal abuse is also unlikely to be repeated now the two are living apart.

[41] I regard what occurred between January and March of this year in totality to be very much situational and arising in the context of final breakdown in a long marriage relationship. The real precipitating factor for what occurred was the dispute about who was entitled to reside in the home and that dispute is now to be resolved.

[42] In all of the circumstances I am satisfied the making of a protection order is not necessary for the protection of the applicant.

OCCUPATION ORDER

[43] There are cross-applications for an occupation order of the Auckland property under s.27 of the Property (Relationships) Act 1976.

[44] The discretion to make an order is an unfettered one. There is no dispute the ultimate inquiry is as to what is just and fair in the particular circumstances of the case and there is no onus on either party to make out a need for an occupation order, or against it (*Doak v Turner* (1981) 1 NZLR 18).

[45] In this case the following factors are relevant:

Alternative accommodation

The applicant does not work outside the home and has not for many years. She has no present source of income.

An offer has been made by the respondent to make funds available to the applicant to rent accommodation for a period of something around nine or 10 months with the possibility of that being extended in the future. That offer does not address with any certainty what would happen after that date and if relationship property had not settled, the applicant would be in real financial difficulty. She would be reliant upon the respondent being prepared to extend the offer which he may or may not do.

On the other hand, the respondent is working and earning money. He has access to capital to fund a move to new accommodation and the ability to pay outgoings well into the future.

Health

The applicant has health issues and there is medical evidence supporting the submission that being settled, secure and safe will assist the applicant in maintaining her health.

If the applicant had to move, she would face all the disruption of finding new accommodation and the uncertainty of not knowing how long her husband would continue funding alternative accommodation while the division of property remains unresolved. The evidence points to the applicant's health suffering if she is in that position.

Attachment

The respondent has a strong emotional attachment to the Auckland home which was the home in which he lived as a child.

This may well be a very relevant factor if there was a dispute about ultimate ownership of the home but it is not, in my view, so relevant in the particular circumstances of this case where the order is one about occupation pending division of relationship property.

Convenience

The respondent enjoys the facilities at the Auckland property such as a home office and gymnasium. He also considers he needs to move from where he is presently residing into larger accommodation, such as would be provided by the Auckland property, because of his particular circumstances – he is now living with his new partner and her adult children.

The respondent appears to be in a financial position to afford alternative accommodation which includes extra facilities and is larger than that where he presently resides.

[46] Overall in the circumstances of this case, particularly having regard to the applicant's health and financial position as compared with that the respondent, I am satisfied it is just and fair an occupation order be made in respect of the Auckland property in favour of the applicant.

[47] I do not expect the occupation order to continue indefinitely, particularly when it appears from the correspondence produced at the hearing to be accepted the respondent will ultimately retain the Auckland property. I cannot at this time predict a date when relationship property might reasonably be resolved since proceedings have only recently been filed. Accordingly the occupation order is made until relationship property is finalised either by agreement or Court order.

[48] The occupation order is on the basis that the applicant is responsible for the payment of outgoings on the property.

COSTS

[49] There will be no order for costs in circumstances which each party has been successful on an application.

Signed at Auckland this 20th day of August 2009 at 4.45 ~~am~~/pm

S J Fleming
Family Court Judge