EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED

NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995 AND 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/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT TAURANGA

FAM-2007-070-001006
[2017] NZFC 9550

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995 AND CARE OF CHILDREN ACT 2004
BETWEEN	[HEATHER PORTER] Applicant
AND	[ANDREW WILKENS] Respondent

Hearing:	17 November 2017
Appearances:	P Eagle and Ms Rose for the Applicant W Swanson for the Respondent M McCarty as Lawyer for the Children
Judgment:	27 November 2017

RESERVED JUDGMENT OF JUDGE S J COYLE
[on issue of jurisdiction, and chambers directions; ss 7(2), 9(2) and 14 Domestic Violence Act 1995.]

---

[1] Ms [Porter] and Mr [Wilkens] are the parents of [Jessica] (16), [Ethan] (14) and [Zara] (13). Ms [Porter] applied, without notice, for a Temporary Protection Order under the Domestic Violence Act 1995 against Mr [Wilkens]. She made the application not to seek protection for herself, but to protect [Jessica], [Ethan] and [Zara]. Judge Parsons declined to make an order without notice as she was unclear as to whether there was jurisdiction for Ms [Porter] to make such an application, and the hearing before me was a submissions only hearing to determine that issue.

[2] The issue requiring determination is whether a parent can apply for a Protection Order to protect the children when that parent has not been the victim of any form of violence himself or herself.

[3] Ms [Porter] has now filed an amended application in which she seeks:

(a) Firstly, that she can make the application in her own right to protect her children.

(b) Alternatively, if I find that there is no jurisdiction for her to do so, she applies to be appointed a representative of [Jessica], [Ethan] and [Zara].[1]

[4] If the Court determines that a representative should be appointed for the children, Mr [Wilkens] opposes Ms [Porter] being appointed as the representative for their children on the basis that he asserts Ms [Porter] is not impartial. Thus, I need to determine the following issues:

(a) Can Ms [Porter] apply for a Protection Order to protect her children, when she has never been the victim of any domestic violence by Mr [Wilkens]?

(b) If the answer to that question is no, then whether she should be appointed a representative of the children or not, and if not, who should be appointed as representative.

[1] Domestic Violence Act 1995, s 9(2).

Background

[5] Ms [Porter] and Mr [Wilkens] separated in 2007. They have three children [Jessica], [Ethan] and [Zara]. Sometime this year [Jessica] is alleged to have made disclosures to her psychologist that she was sexually abused by Mr [Wilkens]. A report of concern was made to the Ministry for Vulnerable Children, Oranga Tamariki and an investigation opened. [Jessica] and [Zara] were both the subject of evidential video interviews, and all counsel understand that disclosures were made by [Jessica] and [Zara], although the exact extent of those disclosures are unknown as at this stage, as no one apart from the interviewer and the NZ Police have seen the evidential video interview. It is unclear as at the date of hearing whether the police intend to pursue a prosecution against Mr [Wilkens] or not.

[6] Thus, the allegations made by Ms [Porter] under the DVA against Mr [Wilkens] are that he has sexually abused [Jessica] and/or [Zara]. The allegations in relation to [Ethan] are that Mr [Wilkens] has been contacting [Ethan] by Facebook and text, asking [Ethan] to speak with [Zara], and by implication placing pressure upon [Ethan] to intervene on Mr [Wilkens'] behalf. Thus, the allegations under the DVA in relation to [Jessica] and [Zara] are that Mr [Wilkens] has been violent through his alleged sexual abuse of [Jessica] and [Zara],[2] and in relation to [Ethan] Mr [Wilkens] has been violent towards [Ethan] in relation to his alleged psychological abuse of [Ethan].[3] Ms [Porter] accepts unequivocally that she has never been the victim of any domestic violence by Mr [Wilkens] towards her.

[7] Ms Eagle sought in her written submissions to submit that Ms [Porter] has been psychologically abused by Mr [Wilkens] through his alleged sexual abuse of [Jessica] and [Zara], but she accepted that that was drawing a 'long bow'. Given that sexual abuse is by its very nature (in the main) secretive and discrete, and given that Ms [Porter] had no idea it was occurring until the alleged disclosures of [Jessica] and [Zara], she cannot have been psychologically abused by Mr [Wilkens] at the time, and I would be surprised if a Court, having heard the matter, made a finding that Mr [Wilkens'] sexual abuse of [Jessica] and [Zara] (if proven on the balance of

[2] Defined as domestic violence in s 3(2)(b), DVA 1995.
[3] Defined as domestic violence in s 3(2)(c), DVA 1995.

probabilities) was psychologically abusive of Ms [Porter] as she had no knowledge that it had occurred at the time.

[8] Thus, this case turns on the discrete issue of whether Ms [Porter] can apply for a Protection Order when she has not been the victim of domestic violence herself, and where she solely seeks to rely on the domestic violence that is alleged to have occurred against the parties three children. Remarkably, notwithstanding that the DVA came into effect in 1995, there appears to be no reported or unreported decisions on this point.

Consideration of the legal position

[9] Of relevance to determination of this issue is s 7 of the DVA which provides as follows:

> **7 Application for protection order**
>
> (1) A person who is or has been in a domestic relationship with another person may apply to the Court for a protection order in respect of that other person.
>
> (2) Where the person who is eligible to apply for a protection order is **[**under 16 years of age**]**, the application must be made by a representative in accordance with section 9(2) of this Act.
>
> (3) Where the person who is eligible to apply for a protection order is a person to whom section 11 of this Act applies, the application must be made by a representative in accordance with that section.
>
> …

[10] Thus, anyone who has been in a domestic relationship with another person can apply for a protection order in respect of the other person, but, pursuant to s 7(2) where an applicant is aged under 16 years of age, the application must be made by a representative in accordance with s 9(2) of the DVA.

[11] There can be no doubt that Ms [Porter] and the parties' children have been in a domestic relationship with Mr [Wilkens].[4]

[4] Domestic Violence Act 1995, s 4(1)(a) and (b).

[12] Section 9(2) provides:

> 9 **Applications by minors**
>
> …
>
> (2) A **[**minor under 16 years of age**]** must make the application for a protection order by a representative pursuant to rules of Court.

[13] A child is defined in s 2 of the Act as someone under 17 years of age. Minor is not defined in the Act. Thus, the effect of ss 7(2) and 9(2) of the Act is that a child under 16 must make an application for a protection order through a representative. Additionally, [short period of time deleted] after the submissions only hearing, [Jessica] turned 16. She is now caught by s 9(2A) which states that she could now either make an application on her own behalf, or through a representative. While on the face of it, s 9(4) applies to a child who is 17 years and over, pursuant to s 9(2A) the reference in s 9(4) to "17 years or over" in fact includes a child 16 years or over.

[14] A representative is appointed "pursuant to rules of Court". The logical starting point therefore is the Domestic Violence Rules 1996 as pursuant to r 2(1) of the DVR the rules purport to apply to all proceedings under the Domestic Violence Act 1995. However pursuant to r 2(2)(aa)(i) the DVR do not apply to proceedings in the Family Court. A Court is defined in s 2 of the DVA is as a Family or District Court. Thus, bizarrely, pursuant to the DVR which purport to apply to proceedings under the DVA, those rules cannot apply by virtue of the fact that the only Court that can consider proceedings under the DVA (i.e., the Family Court or the District Court) is specifically excluded by the rules themselves. The relevant rules therefore must be the Family Court Rules 2002; in relation to the appointment of a representative, rr 89 to 98 of the FCR apply.

[15] Also, relevant for the purpose of the determination of the first issue before this Court are the purposes in r 3 of the Family Court Rules 2002 which state as follows:

> **3 Purpose of these rules**
>
> (1) The purpose of these rules is to make it possible for proceedings in Family Courts to be dealt with—
>
> (a) as fairly, inexpensively, simply, and speedily as is consistent with justice; and

(b) in such a way as to avoid unnecessary formality; and

(c) in harmony with the purpose and spirit of the family law Acts under which the proceedings arise.

(2) These rules must be read in the light of their purpose.

[16] Pursuant to r 3 of the FCR, I am also required to consider the objects in s 5 of the DVA.

[17] Finally, also of relevance is s 14 of the DVA which is the section empowering the Court to make a protection order. Particularly s 14(1)(a) applies in relation to a respondent who has committed acts of domestic violence "against the applicant, **or** a child of the applicant's family, **or both** …" (*emphasis mine*).

Analysis

[18] Section 7(2) and 9(2) of the DVA clearly provide that where a child, aged under 16, wishes to make an application for a protection order, then he or she must do so through a representative. A child aged between 16 and 17 can make application for a protection order in his or her own right as if he or she were 17, or through a representative. A child aged over 17 must make an application in his or her own right. This would clearly apply to a factual situation where neither parent was supportive of a child, but where that child had been the victim of domestic violence. In that case, it may be that the child cannot rely upon his or her parents/caregivers to make an application on his or her behalf, thus needs to make an application him or herself. In that case a representative needs to make the application.

[19] The issue that arises is whether an applicant under s 14(1) can bring an application without being a victim of violence him or herself on behalf of a child of the applicant's family. The plain wording of s 14(1)(a) states that there has to have been domestic violence against an applicant or a child of the applicant's family or both. Thus, on the face of it discrete violence in respect of a child is sufficient to trigger s 14(1). But that section should be read in conjunction with ss 7(2) and 9(2) which are mandatory in nature through the use of the words "must be made by a representative". However, ss 7(2) and 9(2) are triggered by the age of an applicant who is a child. Thus, its applicability is constrained by virtue of the age of the

applicant. Those sections do not address the issue of an adult applicant, and whether he or she can bring an application on behalf of the children.

[20] If the answer is yes, the consequences that flow are that the applicant is a protected person, and thus he or she is afforded the protection of an order where he or she has never been the victim of any form of domestic violence from the respondent. That is, on the face of it, inconsistent with the objective in s 5(1)(b) which is to ensure effective legal protection for victims of violence. I do not see however that that is fatal to the determination of the issue. For pursuant to s 16(1) when a protection order is made it automatically applies for the benefit of any children of an applicant's family. Thus, children who have never been the victim of violence themselves, and who indeed may be totally oblivious to the fact of parental violence are automatically afforded protection notwithstanding that they had never been the victim of violence.

[21] Additionally, s 5(2)(b) states that one of the objects of the DVA is "ensuring that access to the Court is as speedy, inexpensive and simply as is consistent with justice." Similarly, r 3(1)(a) of the FCR states as an expressed purpose that proceedings in the Family Court are to be dealt with "as fairly, inexpensively, simply, and speedily as is consistent with justice." The representative process is cumbersome, and is often a barrier to justice because of the potential liability of a guardian ad litem for costs.[5]

[22] When those objects are applied, I do not read ss 7(2), 9(2) and 14 of the Act prevent a parent/caregiver applying for a protection order on behalf of children where that parent/caregiver has never been the victim of violence him or herself. I cannot accept that Parliament intended that a parent, who comes home to find that the other parent/caregiver of his or her 18-month-old child has been physically assaulting that child, should be precluded from acting protectively. Quite clearly where a child makes an application on his or her own behalf, and in the absence of a supportive parent/caregiver, then he or she must do so through a representative if under 16, or in their own right if 16 and over (unless a 16-year-old elects to apply through a representative). Where a parent witnesses his or her child being the victim of domestic

[5] Family Court Rules 2002, r 95(1).

violence from another adult in the home, then the DVA and the FCR should not be interpreted so narrowly so as to prevent that parent from acting protectively and applying for a protection order on behalf of the children, notwithstanding that the applicant/caregiver has never been a victim of violence him or herself.

[23] Thus, the answer to the first issue is that I find there is jurisdiction for Ms [Porter] to bring her application notwithstanding that she has not been a victim of domestic violence herself. Consequently, I am not required to determine her application to be appointed as representative, and it is dismissed.

[24] Because of that finding Ms. [Porter] application for a Protection Order now needs to be progressed. Judge Parsons had consolidated that application with the parenting order proceedings under COCA. To progress those applications, the Court needs to consider the evidential disclosures allegedly made by the children.

[25] Thus, pursuant to regulation 22 of the Evidence Regulations 2007 I request the police to provide a copy of the video record of the video interviews for [Jessica] and [Zara] for the Family Court to enable the parties to the proceedings under COCA and/or counsel for those parties to view the video interview. If the police have an issue about either party viewing the evidential interview at this point in time, then I invite them to set out their reasons in an accompanying letter to the Court which I will then consider.

[26] I accordingly adjourn the proceedings for a pre-hearing conference in early February 2018. By that time the evidential interview should have been provided, and the Court would have been able to make directions in chambers as to the viewing (or not) of the evidential interview, and the Court will then be in a position to progress the setting down of the matter for determination.

S J Coyle
Family Court Judge