

**ANY PUBLICATION OF A REPORT OF THESE PROCEEDINGS MUST  
COMPLY WITH S 139 OF THE CARE OF CHILDREN ACT 2004**

**IN THE FAMILY COURT  
AT**

**2007-000843**

BETWEEN MB  
Applicant  
AND EW  
Respondent

Hearing: 20 January 2009

Appearances: R Deane for Respondent  
Applicant appears in Person  
D Evans, Lawyer for Child

Judgment: 30 January 2009

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**JUDGMENT OF JUDGE V H ULLRICH QC  
(S 60 Care of Children Act – findings of fact)**

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[1] The parties have a 5 year old daughter. The mother has a final protection order and a final parenting order granting her day to day care. Although the father denies that the protection order was justified, he has taken no steps in those proceedings.

[2] The issue before the Court is the appropriate contact provisions. The mother seeks supervised contact for one day over the weekend. The father seeks unsupervised contact every second weekend from Friday evening until Sunday evening and he also seeks a variation of the protection order to have his daughter removed from the protection order to facilitate that contact.

[3] Before the contact arrangements can be determined the Court has directed a hearing under s 60 Care of Children Act 2004. Section 60 provides that the Court may not order unsupervised contact for a violent party unless the Court is satisfied that the child will be safe. The issues are therefore whether there has been any domestic violence in terms of s 58 Care of Children Act, ie physical abuse or sexual abuse and secondly, to make findings as to whether the child will be safe if the father has contact with her. In this connection the Court must have regard to the matters as set out in s 61 Care of Children Act.

### **Physical Abuse**

[4] The mother first described incidents of physical violence when she applied to the Court for a protection order in November 2007. She described an event in late 2002 when the father came home from work very angry, pushed her hard so that she hit the bed and received a bruise which lasted for some three months. After this incident they separated, but the mother then found she was pregnant and they reconciled. She alleged that he became very controlling during her pregnancy and after the child was born.

[5] She alleged a further incident of physical violence on 25 April 2006, when there was an altercation between them and he dropped her on her head. This arose when he came home drunk and lay on the child's bed. She asked him to get out of

the bed. She got angry after three or four attempts and called him names and he then attacked her. They were wrestling and he got her upside down and dropped her on the head. She said the only reason the assault stopped was that she played dead, so he did not continue. She acknowledged that she had tried to hit him with a thermos.

[6] She annexed a report of a consultation with her general practitioner on 4 May 2006, where she described a domestic incident when she had been dropped on her head and sustained a frontal contusion to the scalp, with pain in her spine and early morning headaches. She also complained of nausea and visual changes and difficulty in concentrating. The doctor stated that her spine and her scalp were tender and her examination implied a head injury/concussion. She was sent for an x-ray, but there was no fracture or mass evident. There were some mild degenerative changes in her spine, but no evidence of subluxation or fracture.

[7] The mother also alleged, for the first time in her affidavit sworn 31 July 2008, that when she first asked the father to leave the former family home, which must have been some time in 2006, he became angry and pushed the child away from him so hard that she hit the wall behind her.

[8] In cross-examination the mother described this situation as occurring when the father returned from a holiday and she had moved his stuff into a spare room. He stormed around the house and the child wanted to talk to him and was chasing him around. It was in this context that he pushed her against the wall. The mother also alleged, in that evidence, that if the child hit the father, then he would hit her back harder.

[9] The father denied that he caused the injury to the mother's leg in 2002 or that he had ever pushed the child.

[10] These are the only incidents of physical violence alleged.

[11] I am satisfied that the three incidents of physical abuse alleged did occur. It is clear that each of those incidents arose in the course of an abusive altercation

between the parents, which escalated into physical pushing and shoving. The mother has a clear recollection of these events and was able to give surrounding detail.

### **Psychological abuse**

[12] The mother also makes allegations of verbal abuse and yelling by the father. She acknowledges that she also yelled at the father during their relationship and that these altercations took place in front of the child. The child also reported to her lawyer that she remembered her parents shouting at each other and that although she told them to stop, they did not stop. Psychological abuse, which includes verbal abuse, is not covered by s60.

### **Sexual abuse**

[13] The other type of domestic violence covered by s 60 and 61 is sexual abuse.

[14] The mother made no allegation of sexual abuse in her affidavit evidence. In her affidavit sworn on 27 November 2007 in support of her application for a protection order, the mother said that she had been given reason for concern of the relationship between the father and his daughter and she had documented these concerns with CYFS, CAFS and her lawyer. She was not more specific.

[15] At the hearing Mrs Evans referred to this part of her affidavit, noted that a s 15 referral was made in September 2007 and asked why the referral was made. The mother said that on one occasion her daughter came home from contact with an ice cream, saying she was frightened of her father and of his house and that she refused to see him. She was 3 years old at the time. The police had interviewed the child, but there was no disclosure. The mother said she was not prepared to make accusations herself and she was not qualified to ask questions.

[16] The mother then described a situation when their child was about 6 months old and the father was bathing her and was pouring water on her genitals. The mother said she told him that the sexual area was not to be stimulated.

[17] She described another situation when the child and the father were in bed together. The child was asleep and the father was masturbating beside her. She said this was a morning when she was on her way to work and she told the father to get the child out of the bed. When he did not respond, she took the child out of the bed.

[18] Mrs Evans asked her about the charges that had been laid against the father in relation to his step-daughter. The mother said she had believed that this child had been malicious in making accusations as this was at a time when Accident Compensation was paying a lump sum to the complainants.

[19] The mother said after she contacted CYFS she spoke with the father's sister and also alleged that the father's mother told her not to allow the child in bed with her father. The mother then said that the only reason that the charges in respect of the step-daughter were thrown out was that the step-daughter could not come up with the dates. The mother said she still supported the father having contact with the child as long as it was during the day and it was supervised.

[20] The mother said that on one occasion when the child came back from contact she told her mother the next day that she did not want to see her father "because he hurt me lots". The mother said she did not want to believe that the father would "do that", presumably referring to some type of sexual interference.

[21] As this information surfaced for the first time when the mother was cross-examined, the father was recalled so that he could respond to this evidence. He did not believe that his mother would have said any such thing to the respondent mother. He understood there was a time when the child had said that he had touched her bottom and he said he had done that as she had an accident and he had cleaned her. He denied that he had ever poured water deliberately on her genitals and he denied ever having masturbated when the child was in bed with him. He said that some of her reluctance, after a contact visit, may have been an occasion when they went for a walk together. He complained that she does not exercise enough when she is with her mother and can only walk about a hundred metres before she does not want to walk any further.

[22] A s 132 report was directed to ascertain any information held by CYFS or the police. That report states that a s 15 referral was made in September 2007 when there were allegations of possible sexual and emotional abuse of the child by her father. The allegations were reported to have been of concern both when the parents were together and more recently when the child had contact with her father. There was an evidential interview through the A police, but no disclosures were made. There were attempts to contact the father, but they had no response. The social worker stated that if abuse had occurred it may possibly be disclosed under a more therapeutic approach. The child was only 4 years old at the time and was assessed as being too young to be put through another evidential interview and the case was closed.

[23] When the mother first applied for a parenting order in March 2007 she proposed that the father have contact for the day each weekend. When she filed a further affidavit in August 2007 she still supported the father having contact and proposed reasonable contact, the time and place to be arranged by telephone. A final parenting order was made on 28 August 2007 after a formal proof hearing granting day to day care to the mother, with reasonable contact reserved to the father.

[24] The first time there was any reference to any sexual abuse issues in the Court proceedings was when the mother applied for the protection order in November 2007. In her affidavit in support of that application she referred to concerns for the child she had documented with CYFS and CAFS and her lawyer. It appears she was referring to the notification she made to CYFS in September 2007. That was the notification referred to in the s 132 report, where the child did not make any disclosures after an evidential interview. She was only 4 years old at the time. The mother did not specify any particular concerns in her affidavit in November 2007.

[25] The child was included under the protection order and therefore supervised contact was directed after the protection order was made.

[26] In February 2008 the mother said that the child had returned from a contact visit extremely upset. The mother complained that the father was aggressive towards the child and made the child do things she did not want to do, such as firing a gun.

The mother filed a further affidavit in July 2008 and did not raise any issues of sexual impropriety. The bathing incident and the time the mother alleged the father was masturbating when the child was in his bed were not put in evidence until the mother was cross-examined at the hearing.

[27] There is no way of establishing whether the child's reluctance to stay overnight with her father bears any correlation with any sexual issues.

[28] The evidence does not support a finding on the balance of probabilities that the father has sexually abused his daughter.

[29] In 1994 the father was tried for sexual offences against his step-daughter. He was acquitted after a criminal trial. He went to trial on eight charges of sexual offending against his step-daughter on representative dates in December 1985, 1986, 1987, 1988, 1989, 1990 and two dates in 1991. Another six charges were not proceeded with, or were withdrawn by leave. These charges all related to the one girl. There is no other sexual offending in his police record.

[30] Section 60 only covers violence against a child of the family or the other party to the proceedings. Therefore the history in respect of the step-daughter is not relevant to this hearing. That history does however raise a matter which may need to be considered as part of any risk factors in a parenting order hearing.

[31] I have made a finding that there were two physical assaults on the mother and that on one occasion the father pushed the child into a wall. Therefore I have to consider whether in terms of s 60 (4) the Court can be satisfied that the child will be safe while the father has contact with her. I must then consider the matters set out in s 61.

### **Matters taken into account under s 61**

[32] The three physical incidents all arose out of altercations between the mother and the father while they were living together. The incident in 2002 was before the child was born. It appears the other two incidents arose in the context where the

father was refusing to leave the home, even though the relationship between him and the child's mother had ended. The mother was forced to issue a trespass notice and then ask the police to enforce that notice before the father would leave. This situation produced a number of altercations which took place in front of the child and disturbed her. The father did not take account of the impact on the child of these events.

[33] The father finally left the home in April 2007. The specific physical assaults occurred in 2002 and 2006. There have been no incidents of any physical violence against the mother since the parties have been separated.

[34] The mother has not complained of any other incidents of physical violence during the relationship and therefore the physical violence cannot be said to have been frequent. The likelihood of further violence occurring between the parents is minimal having regard to the fact that they are living apart and that the transfer of the child is done through third parties.

[35] There is evidence that the father can become angry and acts impulsively when he is angry. This could pose a risk to the child if that occurred during periods when she is having contact with him.

[36] The s 132 report attaches the Family Violence Summary Reports received in respect of the parties in 2007 and 2008. On 14 June 2007 the mother requested assistance to remove the father, who had been trespassed from her property from 17 April 2007. On 31 July 2007 there was a police call out from the mother in relation to the father to do with verbal threats, but the report notes that the police were unable to work out, due to lack of co-operation from the complainant mother. There was a further domestic dispute on 18 August 2007 reported as a wilful trespass, verbal, no injuries, with the victim being the mother and the offender being the father. On 17 December 2007 there was a report of contravention of the protection order by the father and again on 25 December, described as a verbal breach. On 25 May 2008 there was a report of a contravention of the protection order, failure to comply with the conditions of the protection order by having a firearm and a report of a manual injury to the mother. That report arose out of the mother's report to the police at that

time, referring back to the assault she alleged in 2006. Since then the father has been charged with these offences, but told the Court that the breach of the protection order and injuring with intent charges had been dropped and that the police were only pursuing the breach of the protection order involving him continuing to hold firearms. None of the police call outs in 2007 and 2008 refer to any physical violence.

[37] I have no doubt that the altercations which took place in front of the child were emotionally abusive of the child. This child wanted her parents to stop. She has remembered those events and related to them to her lawyer.

[38] The findings under s60 as to the physical and sexual abuse alleged do not in themselves warrant a finding that the child will be unsafe in the care of her father.

#### **Other risk factors**

[39] The mother says that the father does pose a risk to the child and she is wanting contact to be supervised and not to take place overnight. This is different from the position she took when she first applied to the Court when she was putting forward the possibility of unsupervised contact. She did however, propose only day time contact and not overnight contact. Some of her concerns around overnight contact relate to the way the father behaves with the child and the activities that he does with the child and her concern that he imposes his wishes on the child and does not accept her objections.

[40] There is evidence before the Court that the father is unwilling to take responsibility for the consequences of his actions. He does not accept that there is anything in his behaviour that may have caused any concerns for the child. He does not take any responsibility for the fighting between himself and the mother, which resulted from him refusing to leave the home. He has a conviction for possessing cannabis for supply, but says the cannabis belonged to someone else. He has a conviction for theft, but says that was because a friend's car was parked on his property.

[41] The father says his daughter enjoys using firearms and firing at targets while she is with him. The mother says that the child tells her that she is not happy being involved with firearms. It is difficult to know on the basis of the evidence I have before me whether the child is telling her mother she is unhappy about being around guns because she knows her mother is uncomfortable about the situation, or whether she is unable to get her father to understand her misgivings. Those are issues which can be better pursued through the report from the psychologist.

[42] A number of emotional, psychological and risk issues have been raised which are relevant to a determination as to appropriate contact arrangements. Issues around psychological abuse are not addressed by s 60 of the Care of Children Act, but will be addressed by further evidence when the Court determines the scope of contact orders. These need to be explored more fully before the Court can be confident that unsupervised contact is appropriate.

[43] These issues will in part be addressed by the proposed s133 report directed on 17 September 2008.

[44] Ms Evans is to prepare a brief for that report in consultation with the Respondent and other counsel.

V H Ullrich QC  
Family Court Judge

Signed at

am/pm on

2009