

**International Conference on Child Labour and Child Exploitation 3-5 August 2008,**

**Cairns, Australia**

**“Protecting Children from Family Violence”**

**Judge Rosemary Riddell, Family Court Judge of New Zealand**

**Introduction**

Some time on the night of 4 February 1994, Alan Bristol killed his three children, then himself. The deaths were the culmination of a bitter custody battle played out in the context of parental conflict, violence and Court involvement. That sparked an independent enquiry into the way the New Zealand Family Court had conducted proceedings between the parents, particularly given the earlier allegations of violence made by Mrs Bristol against her husband.

The inquiry was undertaken by Retired Chief Justice Sir Ronald Davison<sup>1</sup>. It led to a number of recommendations. One of the most far-reaching was subsequently incorporated into New Zealand legislation – namely that once a person has used domestic violence either to a partner or child or both, then that person must not have unsupervised contact with the child until the Court is satisfied the child will be safe.

Those changes to law introduced a more structured code to New Zealand legislation for dealing with perpetrators of domestic violence. They are provisions that are seen internationally as being far reaching because of their mandatory element.

The purpose of this Paper is threefold; first to explore the genesis of those provisions; what are they and how they have stood the test of time. Second the requirement for a violent

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<sup>1</sup> Report of Inquiry into Family Court Proceedings involving Christine Madeline Marion Bristol and Alan Robert Bristol by Sir Ronald Davison 1994

parent to have only supervised contact (or none at all) has also had some unanticipated outcomes. These too will be canvassed. Finally I offer some proposals as to the way forward.

## **History**

Alan and Christine Bristol had a tumultuous relationship punctuated by domestic violence both before and after their marriage<sup>2</sup>. At different times, Mrs Bristol had sought Court intervention, obtaining an interim non-molestation order (as it was then called) in 1986 and then an interim non-violence order (as it was called) in 1989. However she did not proceed further with her applications. The parties later reconciled and two more daughters were born in 1990 and 1992.

Mrs Bristol said the violence continued. By 1993 she decided to end the marriage. There followed Court proceedings from July 1993 with both parties seeking custody of the children. Mrs Bristol obtained a non-violence order but an application for a non-molestation order was directed to be placed on notice.

The children's lawyer advised the Judge in September 1993 that any allegations of domestic violence would be unlikely to impact on questions of the children's day to day care, relying on the fact that Mrs Bristol made no allegations against her husband in his role as parent.<sup>3</sup>

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<sup>2</sup> "I Didn't Know Just How Far You Could Fight: Contextualising the Bristol Inquiry", Ruth Busch and Neville Robertson. Waikato Law Review 1994, Vol. 2 in which Mrs Bristol described the history of the relationship

<sup>3</sup> The Courts regularly separated parental ability from domestic violence eg *Heidt v Heidt* (1976) F.L.C. 90-1077 where the Judge said "Mr Heidt's affection for his children is evident, and in assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband".

By November the parties had signed a Memorandum of Consent, providing for a shared custody regime. The memorandum stated that “all other applications before the Court relating to domestic protection and custody and access matters, are to be withdrawn.”

Before endorsing that consensual arrangement, the Court had to apply s23 of the then Guardianship Act. That section required the Court to view the welfare of the child as the first and paramount consideration and said:

The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.

On the basis of the consensus reached, Mrs Bristol withdrew her applications for non-violence and non-molestation orders.

However that agreement lasted only a matter of weeks. When Mrs Bristol left town taking the two younger girls with her, Mr Bristol applied for and obtained an interim custody order of all three girls on 11 November 1993. The three children remained in his care, despite complaints to the Police by Mrs Bristol that he had assaulted her when she was collecting or returning the children. That culminated in the Police charging Mr Bristol with indecent assault against Mrs Bristol on 3 February 1994.

Two days later the children were dead, killed by their father. He had placed the children in the family car and connected the exhaust to the interior of the vehicle. The report into their deaths found that the Court was never given the opportunity to hear the parties give evidence or to test the truth of the allegations made and so, to that extent the allegations were unproven.<sup>4</sup>

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<sup>4</sup> Davison Report, op cit, p32.

The Report concluded:

There was nothing before the Court which could have alerted it to the possibility of Alan Bristol acting as he did.”<sup>5</sup>

However the increase in incidents of domestic violence and the research into the effects of such violence on women led Sir Ronald Davison to question whether the time had come for statutory intervention to draw the link between battered women and its effect on children:

I have wondered how it can be accepted that a person can use violence to a spouse and yet so long as he has no record of violence or abuse to a child or children be regarded as no danger to the child or children if he is allowed to become the custodial parent or even have unsupervised access to them.<sup>6</sup>

The Report reflected the growing emergence of what has come to be known as the power and control model whereby domestic violence is perpetrated primarily by men against women in a continuum of a pattern of abusive behaviour.

The Report called for harsher penalties for breaches of non-violence orders and for the Court to first be satisfied about whether allegations of violence are true or not before considering consent orders. It also recommended a restriction on a violent parent's right to access to a child.

As a result the then Guardianship Act was amended with the addition of ss16A, B, C in late 1995. Section 16B created a presumption that where a parent was found to be violent, any contact with the child must be supervised until the Court was satisfied the child would be safe in the care of that violent parent.

The Domestic Violence Act came into effect at the same time. It defined violence to include physical, psychological or sexual violence. It replaced previous non-molestation and non-

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<sup>5</sup> Davison Report, op cit, p34

<sup>6</sup> Davison Report, op cit, p37.

violence orders with one order – a protection order, which required the violent party to stay away from both the victim and any child of the relationship or child of the victim, unless the victim consented to contact.

The Guardianship Act was replaced in 2004 by the Care of Children Act (the present legislation). That Act carried over almost identical provisions about restriction of contact with a violent parent. The previous s 16B provision is now contained in s 60 of the Care of Children Act.

Section 60 sets out the procedure for dealing with violence where day to day care or contact to a child is involved. It reads:

**60 Procedure for dealing with proceedings in section 59(1)**

(1) In proceedings to which this section applies in accordance with section 59 (the proceedings), the Court must, as soon as practicable,—

- (a) consider whether to appoint a lawyer to act for the child under section 7(1); and
- (b) determine, on the basis of the evidence presented to it by, or on behalf of, the parties to the proceedings, whether the allegation of violence is proved.

(2) Nothing in subsection (1) requires the Court to make any inquiries on its own initiative in order to make a determination on the allegation.

(3) If the Court is satisfied that a party to the proceedings (the violent party) has used violence against the child or a child of the family, or against the other party to the proceedings, then, unless subsection (4) applies, the Court must not make—

- (a) an order giving the violent party the role of providing day-to-day care for the child to whom the proceedings relate; or
- (b) any order allowing the violent party contact (other than supervised contact) with that child.

(4) In the situation in subsection (3), the Court may make an order in subsection (3)(a) or (b) if, after complying with section 61, the Court is satisfied that the child will be safe while the violent party—

- (a) provides day-to-day care for the child; or (as the case may be)
- (b) has contact with the child.

(5) If, in the situation in subsection (3), the Court is not satisfied as provided in subsection (4), it may make an order for supervised contact between the child and the violent party, and, if it does so, the Court must specify in the order whether the supervised contact is to occur—

- (a) under the supervision of an approved provider; or
- (b) in the immediate presence of a person approved by the Court (for example, a relative, a friend of the family of the child, or any other person whom the Court considers suitable).

(6) Despite subsection (1), the Court may make any order under this Act that it thinks fit in order to protect the safety of the child if the Court—

- (a) is unable to determine, on the basis of the evidence presented to it by, or on behalf of, the parties to the proceedings, whether the allegation of violence is proved; but
- (b) is satisfied there is a real risk to the child's safety.

The appointment of a lawyer for the child is an early and necessary step, as is a determination of whether violence is proven. Sometimes the Judge is unable to determine, on the balance of probabilities, if violence has occurred. Nevertheless the Judge may make an Order if he or she is satisfied there is a real risk to the child's safety. An inability to find violence proven is therefore no bar to an Order restricting contact. As Justice Heath put it:

Parliament could not possibly have intended that the inquiry into a child's safety should be restricted more in a case where actual violence had been found to have taken place than in a case where the Court was unable to determine, on the basis of the evidence before it, whether or not the allegation of violence was proved<sup>7</sup>

Section 61 contains a check-list of matters to which the Court must have regard before allowing a violent party to have unsupervised contact, or day to day care of a child. That section reads:

**61 Matters relevant to question in section 60(4)**

In considering, for the purposes of section 60(4), whether a child will be safe if a violent party provides day-to-day care for, or has contact (other than supervised contact) with, the child, the Court must, so far as is practicable, have regard to the following matters:

- (a) the nature and seriousness of the violence used:
- (b) how recently the violence occurred:
- (c) the frequency of the violence:
- (d) the likelihood of further violence occurring:
- (e) the physical or emotional harm caused to the child by the violence:
- (f) whether the other party to the proceedings—
- (i) considers that the child will be safe while the violent party provides day-to-day care for, or has contact with, the child; and
- (ii) consents to the violent party providing day-to-day care for, or having contact (other than supervised contact) with, the child:
- (g) any views the child expresses on the matter (as required by section 6):
- (h) any steps taken by the violent party to prevent further violence occurring:
- (i) all other matters the Court considers relevant.

Those factors allow a Judge both to look back to the history of alleged violence and forward to make a predictive assessment of safety asking whether the violence is likely to be repeated. This two step process has become known as the s60 enquiry.

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<sup>7</sup> *Blom v Mackay* High Court Auckland CIV 2004-404-2006 21 May 2004, para 59

Both the Domestic Violence Act and the Care of Children Act are currently the subject of government reviews to determine whether changes are needed to the way the Acts operate. Under the former, applications for Protection Orders have dropped since 1995.<sup>8</sup> A number of reasons have been put forward to explain this<sup>9</sup>. Proposed amendments would give police powers to issue short term Protection Orders (as already operates in some Australian states) and consideration is being given to the appointment of lawyer for child where children are likely to be affected; a provision not currently part of the Domestic Violence Act.

Review of the Care of Children Act has focussed on the definition of violence. Under the Domestic Violence Act, violence is defined to include physical, psychological or sexual violence. However the Care of Children Act defines violence as physical or sexual only. There is no proposal to include psychological violence in the definition. But recognising the interface between the two Acts, some recommendations would require judges to consider psychological abuse before making a parenting order.

Thirteen years have passed since the law changes were made. At the time they were implemented, they were seen as far reaching, even visionary in the way they tackled head-on the unacceptable face of domestic violence. But societal shifts have called into question whether the premise on which the changes were based now accurately reflects our multi-cultural more diverse society.

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<sup>8</sup> Down from 4322 in 1999 to 2392 in 2006 (cited in “Role of the Lawyer in Protection Orders in the Family Court” April-May 2007 NZLS Seminar Presenters A. Ashmore and Judge E. Smith. The Paper also contains a helpful critical analysis of the evolution of alternatives to the power and control model)

<sup>9</sup> Some say it is harder to obtain an urgent protection order or that there is a growing reticence of victims to seek help. Others argue that the Courts are now more likely to prosecute domestic violence in the criminal jurisdiction or that Judges are reluctant to make orders on a without notice basis.

## **The challenges of s 60**

The wide ambit of the Domestic Violence Act and Section 60 of the Care of Children Act presents challenges to a Court. The following are not intended to be exhaustive but they highlight some of the inevitable limitations that exist when raw human experience confronts the letter of the law.

1. Statistics show that few fathers challenge a protection order. A Ministry of Justice study of 335 Court files found that only 18% of respondents did so.<sup>10</sup> Many fathers have a protection order made against them. Contact with their children is suspended and they simply walk away. It could be argued that is a reflection on the fathers, but I think that would be simplistic. In many cases fathers are deterred by the legal costs, or dissuaded by legal advice<sup>11</sup>. The end result when the Court comes to make a parenting order is that children's relationships with their fathers have eroded or simply disappeared.
2. As a Judge, I see instances where a woman has sought and obtained a protection order, sometimes in circumstances of significant violence. The Court directs that contact may only occur in a formally supervised setting. But when the matter returns to Court, the Judge discovers the parties have made their own informal arrangements. The violent party is seeing the children, often on an unsupervised basis, and any s 60 hearing effectively becomes redundant. It may be that the parties have moved on in their relationship, or a woman has felt coerced into returning to a violent partner. But it then becomes very difficult for the Court to make a predictive assessment of safety in a realistic and meaningful way.

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<sup>10</sup> Cited in "The Domestic Violence Act 1995 and s16B of the Guardianship Act 1968 – The Effect on Childrens' Relationships with their Non-Custodial Parent" by Judge J. Doogue, a Paper presented to the Child and Youth Law Conference 2004, Lexis Nexis

<sup>11</sup> Judge Doogue's Paper, Ibid

3. Where, under the Care of Children Act the Court makes a finding of violence against a parent, a Judge may direct that contact be formally supervised. In that event, the Act provides for up to 14 sessions of contact visits to be paid for by the Court. So far so good. But not every town has an approved centre. As at 2007, New Zealand had 31 centres, leaving many areas unserved. The lack of adequate resources can pose a challenge to Judges who are mandated to keep the welfare and best interests of the child as the paramount consideration in any proceedings. Enabling a child to maintain a safe relationship with his or her father can be stymied where sufficient formally supervised options do not exist.
4. The Domestic Violence Act was predicated on the power and control model of domestic violence in vogue at the time the Act was passed. Thus the definition of domestic violence in the Act is wide and includes psychological violence<sup>12</sup>. Acknowledging another aspect of the power and control model, the Court can take a number of acts into account, even if they are seen to be minor when viewed in isolation. However that model has been the subject of increasing criticism in recent years by social scientists and commentators. Some New Zealand Judges have argued that the power and control paradigm is not a “one size fits all” model and that domestic violence should be viewed within a continuum<sup>13</sup>.
5. Section 60(3) of the Care of Children Act restricts day to day care or contact to a party who has used violence against a child or the other party. But what of the situation where both parents have been violent?<sup>14</sup> Sometimes the Court only learns of reciprocal violence at a hearing. The challenge is to assess the degree of

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<sup>12</sup> s 3(4)(b) defines psychological abuse as including intimidation, harassment, damage to property, or threats of physical, sexual or psychological abuse.

<sup>13</sup> See for example the Family Violence Courts in Manakau and Waitakere, Auckland where violence has been classified as falling into one of four categories, ranging from isolated uncharacteristic behaviour through to dangerous, psychotic or obsessive violence.

<sup>14</sup> Described as situational couple violence and examined in “Differentiation among types of intimate partner violence: Research Update and Implications for Interventions”, Kelly J.B. & Johnson M.P. (2008) Family Court Review 46,476-499

violence and put in place sufficient safeguards for the child. Specialist reports by psychologists or social workers can be crucial and close monitoring needed to ensure the child's continued safety.

6. All Courts face the challenge of implementing justice in a timely fashion. That challenge is particularly acute when legislation calls for a hearing within a specified time. The Domestic Violence Act for example requires the registrar of the Court to assign a hearing date as soon as practicable and, unless there are special circumstances within 42 days of receipt of the respondent's reply. That does not always happen. If an original order is made on an without notice basis and is silent on contact between parent and child, then delays in a hearing can see that parent excluded from the child's life. For a very young child a delay of months can be significant.<sup>15</sup> The Care of Children Act requires the Court to take into account the principle that decisions affecting a child should be made and implemented within a timeframe that is appropriate to a child's sense of time.<sup>16</sup> An admirable provision, yet one which because of limited Court resources, is more honoured in the breach.
7. And what of violence which may not be so serious? Should the same s 60 inquiry apply, for example to contextual violence confined to say the parties' separation? Arguably the wording of the section invokes a mandatory requirement regardless of the level of domestic violence involved. Some Judges have disagreed. In one recent case where the Judge allowed unsupervised contact between a father who had been violent and his four children, His Honour concluded:

I have therefore reached the view that although there may have been some violence as defined within s 60, it does not reach the threshold where I need to proceed with a further enquiry.<sup>17</sup>

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<sup>15</sup> That was foreseen by the Davison report

<sup>16</sup> s4(5)(a) of the Care of Children Act

<sup>17</sup> TRW v ED-W [2008] NZFLR 529,533

The Act is posited on the premise that any violence will trigger a s 60 enquiry. Judges have said there are occasions of limited situational violence, which do not warrant a full s 60 investigation.

8. As noted, the Domestic Violence Act defines domestic violence as physical, sexual or psychological violence. However the Care of Children Act omits psychological violence from its definition. One might conclude that a s 60 inquiry could not proceed if the violence is restricted to harassment, intimidation or threatening behaviour of a psychological nature. However only a day after the legislation was passed, a Judge was asked to ignore psychological violence when considering the appropriateness of contact by a violent party. In that case Judge Ellis said:

I cannot accept that the drafting of these clauses was intended to abnegate a history of jurisprudence in this Court developed to provide for the protection of children against emotional and psychological abuse and the destructive effects of exposure to conflict between caregivers which go well beyond the bounds of “physical abuse or sexual abuse” as defined.<sup>18</sup>

And further

Is it meant to indicate that the Court should be reluctant to interfere with perceived parental rights where the only evidence of abuse against a child or other party is of psychological or emotional abuse? That can hardly be so since the provision has been grafted onto a statute by which the welfare of the child is to be [the] first and paramount consideration.

The factors that a Judge must take into consideration under s 60 (and in s 16B in the previous legislation) include the physical or emotional harm caused to the child by the violence. One Judge observed that it would not be necessary to take account of emotional harm unless Parliament intended such harm to be captured within the concept of safety.<sup>19</sup>

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<sup>18</sup> Fielder v Hubbard [1996] NZFLR 769,779

<sup>19</sup> Blom v Mackay, op cit

Other Judges have relied on the principles set out in s 5 of the Act which are described as being relevant to the child's welfare and best interests. Principle (e) states that a child's safety must be protected and, in particular he or she must be protected from **all forms** of violence. That must surely include the corrosive effects of persistent psychological violence.

### **Where to from here**

No major overhaul of the Domestic Violence Act or the Care of Children Act is contemplated. The Courts need to apply the legislation in a way which respects the intention of the legislatures but which does justice to the complex realities of violence in family situations.

I offer the following insights gleaned from our experience.

1. In November 2006 a two-year Pilot programme began in some New Zealand courts. Known as Parenting Hearing Programmes (or PHPs), they offer a new approach for those involved in parental disputes about their children.<sup>20</sup> The parties must first consent to engagement in a PHP. The Judge conducts the hearing in an inquisitorial fashion in a much more "hands on" approach than is the case in a traditional dispute. The Judge will have input from a range of specialists and hear, at some length from the parties themselves before making a binding determination of the matter. PHPs, although still at the experimental stage in New Zealand, are an example of a different approach to resolving family conflicts. Provided it does not breach fundamental principles of natural justice, the inquisitorial approach may introduce greater efficiency to the resolution of family disputes.

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<sup>20</sup> The PHP differs significantly in structure from its Australian counterpart. For example New Zealand courts do not engage a family consultant

2. Is supervision the panacea? One Judge has described the supervised access phenomenon of recent decades as social experimentation.<sup>21</sup> There is no agreement among researchers that supervised contact is necessarily the best approach either for children or their parents.<sup>22</sup> It can result in distancing between fathers and their children and wider family members being denied an opportunity to maintain links with the child. Further research is needed to consider the appropriate ambit of supervised access, whether it should be confined to use as a transitional tool following the child's exposure to domestic violence or whether no access at all is better than supervised access.
3. We need a better understanding of the cycles of violence. The power and control model assumed that all violence fits a paradigm. A number of different models have emerged which advocate a series of classifications rather than one overriding approach. Ranged on either side of the debate are proponents for alternatives on the basis they better meet the idiosyncrasies of human situations, and opponents who say the underlying basis for the power and control model is sound and to cast it aside would be a great step backward. Judges have waded into the debate. Our Principal Family Court Judge favours an approach which recognises the complexity of a particular situation saying:

There is a clear difference between a person who has reacted violently to the circumstances surrounding separation, and one who has been using violence repeatedly and viciously over a prolonged period.<sup>23</sup>

The alternatives deserve close scrutiny and further research.<sup>24</sup>

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<sup>21</sup> Judge Doogue's Paper op cit, pg 7

<sup>22</sup> Jaffe et al consider the need for supervision, viewing it in most cases as a transition phase where there has been domestic violence in "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans", Family Court Review, Vol. 46, No. 3 July 2008

<sup>23</sup> Judge Peter Boshier in "The Domestic Violence Act: Ten Years On", NZ Family Law Journal, Vol. 5, Part 6 2006

<sup>24</sup> There are many alternative models dating back to Johnston and Campbell who were among the first to create five categories of escalating violence in 1993; others include Frederick and Tilley (2001) – discussed in Jaffe, Crooks and Bala "Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices", September 2005.

4. In New Zealand the Family Court has long been statutorily required to preserve the privacy of the parties. As a result, proceedings have not been open to the public and decisions were rarely published. It has been argued there is a need for greater transparency in the way the New Zealand Family Courts operate. That is now changing. With the implementation of the Care of Children Act in 2004, the media were granted qualified rights to attend court and publish reports of proceedings.<sup>25</sup> There is before Parliament a Family Courts' Bill that will open up the Family Court to a greater degree by extending those rights to other legislation. I believe this is an important step for the credibility of the Family Court.
5. A multi-disciplinary approach is necessary for dealing with child safety. Determining how best to protect a child from domestic violence requires that the Judge has ready input from those at the coalface. It is important that a Judge has access to the combined skills of social agencies and professionals, particularly where an inquisitorial approach is employed in hearings such as the PHPs.

## **Conclusion**

The tragic deaths of the Bristol children were the catalyst for legislative change designed to confront domestic violence in a decisive fashion. Legislation has taken New Zealand some way down that road. But the complexity of human situations coupled with changing social mores mean we have some distance still to go.

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<sup>25</sup> s139 of the Act