

IN THE CHILDREN'S COURT OF VICTORIA
FAMILY DIVISION

APPLICANT: Department of Health and Human Services

CHILDREN: C1, C2 and C3

MAGISTRATE: GAIL HUBBLE

DATES OF HEARING: 2-5 March 2020, 25-27 November 2020

DATE OF JUDGMENT: 11 December 2020

CASE MAY BE CITED AS: DHHS and C1, C2 and C3 [2020] VChC 7

REASONS FOR DECISION

Catchwords: Child protection – applications allege that the children are in need of protection on the basis that they have suffered or were likely to suffer, sexual, physical and emotional harm – application for Family Preservation Order placing the children in the care of their mother – allegations of sexual misconduct made by C1 and C2 against the father subject of intervention order contest in 2019 – intervention order made to protect C1 and C2 – issue estoppel – breach of Interim Accommodation Order – question of whether any of the grounds under s.162(1) of the Act are established – construction of s.274 of the Act – ability of the court to take into account events which post-date the filing of a protection application in determining the question of whether a child is in need of protection.

REPRESENTATION:

<u>PARTY</u>	<u>LEGAL REPRESENTATIVE</u>
<u>Department of Health and Human Services:</u>	Ms Sheridan-Smith
<u>Mother:</u>	Mr Kuan
<u>Father:</u>	Mr Barton
<u>C1:</u>	Ms Woodfall
<u>C2:</u>	Mr Bates

HER HONOUR:

1. C1 (born 8 August 2004), C2 (born 1 December 2005) and C3 (born 21 April 2012) are the [daughters] of the mother and the father. The children are currently in the care of their mother pursuant to Interim Accommodation Orders made by this court.

Current Applications

2. On 5 March 2019, the Department of Health and Human Services (**the Department**) filed applications for emergency care in respect of each of the children.¹ The applications allege that the children are in need of protection on the basis that they have suffered or were likely to suffer, sexual, physical and emotional harm, pursuant to sections 162(1)(c), 162(1)(d) and 162(1)(e) of the *Children, Youth and Families Act 2005* (**the Act**).
3. The Department submits that the court should make a Family Preservation Order which places the children in the care of their mother, and which prohibits the father from residing in the same house as the children. The Department further submits that the father's contact with the children should be subject to strict limits.

Protective Concerns

4. The protective concerns relied on by the Department in the protection applications relate to disclosures made by C1 and C2 to police in December 2018 that their father had, for some time, been subjecting them to unwanted sexual attention. Both girls completed a Visual and Audio Recording of Evidence (**VARE**) which detailed numerous incidents of sexualised behaviour by the father, including inappropriate touching and acts of sexual harassment, over the course of the previous year or so.² The disclosures made by the two girls prompted the police to file an application for an Intervention Order against the father under the *Family Violence Protection Act 2008*, which names C1 and C2 as affected family members. The father opposed the police application for an Intervention Order. After a contested hearing before myself conducted on 14 and 15 October 2019³ I found that it was more likely than not that the father did commit family violence against C1 and C2, and that the girls should be protected by an Intervention Order until 7 November 2021, comprised of the following two conditions:

¹ The Department also filed protection applications in respect of siblings C4, C5 and C6. On 5 March 2020 I found that those applications were not proven.

² The acts are detailed in my written reasons in case number J13181126 (unpublished). They include in relation to C2 trying to pull down her pants, pushing her onto a bed, rubbing her breasts and asking for intimate photographs. They include in relation to C1 unwanted touching, inviting her to watch a sexy movie and spying on her when she was in the bathroom.

³ See written reasons in case number J13181126 (unpublished).

- a. the usual condition that the Respondent not commit family violence in relation to C1 and C2.
 - b. a condition that the Respondent must comply with any restrictions on contact with C1 and C2 which is contained in a child protection order.
5. At the beginning of this hearing, I determined that the principle of issue estoppel precluded the court reconsidering the question of whether the allegations of sexual misconduct made by C1 and C2 against the father were proven on the balance of probabilities. Accordingly, this hearing proceeded on the basis that the factual matters which formed the basis of the Intervention Order contest were proven.

Alleged breach of the Interim Accommodation Order in May 2020

6. In addition, on or around 27 May 2020, a further protective concern arose when the Department received a report that C1 had been subject to physical abuse by her father. On 27 May, the allocated worker Ms B attended the family home in the company of a colleague to investigate the allegations. Ms B gave evidence⁴ that when she asked to speak to C1, the mother told her that C1 was not home and that she was out with her friend doing some work on a school project. Ms B and her colleague briefly left, only to return a short time later to inform the mother that they wanted to see if C1 was in fact in her room.⁵ At that point, the mother allegedly became heightened and angry, and informed the workers that C1 was asleep in her room and had asked the mother to lie about her whereabouts as she did not wish to talk to child protection. The mother eventually called C1 who came down and agreed, without hesitation, to speak to the workers outside the house. C1 presented with bruising to her face.⁶
7. In her evidence to this court, the mother disputed Ms B's version of events regarding the conversation at the house. She said that she knew Ms B wanted to speak to C1, but denied saying that C1 was not home. She told the court that she asked Ms B for an interpreter. She said that when the workers returned to the home, she told them that C1 was home but did not want to talk to them. She told the court that she said this as C1 had told her that she did not want to talk to child protection.
8. I accept the evidence of Ms B that the mother told them that C1 was not home, and that this information was untrue. The mother had a strong motivation to prevent child protection from discovering the injuries sustained by C1. I accept Ms B's evidence that the mother clearly told her that C1 was not at home and was out working on a school project, and that is why

⁴ Ms B adopted the summary set out in Addendum Report, 3 June 2020 (exhibit 26).

⁵ Addendum Report, 3 June 2020, page 5 (exhibit 26).

⁶ Photographs of the bruising were tendered in evidence (exhibit 30).

she and her colleague left the house. I am satisfied that the mother did not want child protection workers to speak to C1, and that she told them C1 was not home in an attempt to prevent that occurring. I also think it highly unlikely that C1 asked her mother to lie to child protection because she did not want to speak to the workers. According to Ms B, C1 showed no hesitation at all in coming to speak to Ms B, once the workers established that C1 was at home. It is likely, in my view, that the mother got angry and heightened with the workers as she was unhappy about C1 speaking with them. I also think it likely that the reason the mother did not want C1 to speak to child protection is because she was concerned about what C1 would say.

9. When Ms B spoke to her, C1 disclosed that:

- her parents have arguments with her every day, and that 'a few days ago stuff got really hard';
- three days earlier, her father physically assaulted her by punching her face and punching her hand, which left a bruise on her wrist;
- her mother had asked her to lie to child protection about the incident.

10. C1 was then transported to the SOCIT Fawkner police station and completed a VARE which was conducted by Detective Sergeant L. In the VARE, C1 stated⁷:

- the arguments have been nonstop;
- the assault occurred three nights earlier on the Saturday night at around 6 or 7pm;
- the assault followed an argument about what C1 was watching on television;
- the assault was preceded by C1 saying 'I hate him' quietly, which the mother communicated to the father;
- during the incident, the father slapped her hand and her face once, punched her eye, and punched her head on multiple occasions;
- the mother told her that if she told anyone about the incident 'my future will be gone';
- she had trouble sleeping at night as 'dad was at home at nights' and that she worries when he walks around the house at night as she is worried he will come to her room.

11. The mother gave evidence that the disclosures made by C1 were untrue. She stated that:

- on the day the incident occurred, C1 and C2 ran to the garage to see their father when they heard his car arrive;
- C1 was standing behind her father and sustained the bruising to her eye when she was accidentally hit in the eye by the father's elbow as he closed the boot of his car;
- the car door then hit her eye as the door had not closed properly;

⁷ Addendum Report, 3 June 2020, page 7 (exhibit 26).

- the mother witnessed the incident from the doorway of the kitchen;
- after the incident, ice was put on C1's eye and she was laughing and crying about it;
- she thought C1 had fabricated the assault as she was upset about not being allowed to go out with her boyfriend.

12. When child protection workers separately interviewed C2, C4, C3 and C5, they told the workers an explanation for C1's injuries that was similar to the version of events provided by the mother. Indeed, C4 stated that he not only saw the event but was out at the car helping the father at the same time as C1. This was clearly not true as, according to the evidence of the mother, and the disclosures made by C1, C4 was not even at home when the incident occurred.

13. In my view, it is likely that the mother provided child protection and the Court with a false explanation as to how C1 sustained her injuries. I am also satisfied on the balance of probabilities that the mother coached the children to tell child protection the same false story. In coming to this finding, I take into account:

- the inherent implausibility of the injuries occurring in the manner alleged by the mother – the father's elbow would have had to connect with C1's eye socket in precisely the right place and with the right force to result in the 'black eye' which C1 suffered;
- the improbability that C1 would have been laughing about the incident when it occurred, but would then have concocted a false story of assault three days later when child protection conducted an unannounced home visit;
- the fact that the mother took active steps to try and prevent child protection workers from interviewing C1;
- the improbability, given the strained relationship⁸ between C1 and her father, that she ran out to the car to greet him when she heard him come home;
- the fact that the mother's version does not account for the bruise which C1 suffered on her arm;
- that the similarity in the stories provided by the children (notwithstanding that they were not present when the incident occurred), and the story provided by C4 where he inserted himself into the narrative, is suggestive of coaching;
- that the mother's version of events has not remained consistent - she told the Court she saw the incident from the kitchen door, but she had earlier told a child protection

⁸ C1's disclosure that her father constantly fights with her is corroborated by C3's disclosure to child protection that C1 and her father 'always argue' and they 'scream to each other': Addendum report, 3 June 2020, page 9 (exhibit 26).

worker that she was in the kitchen when it occurred and went out when she heard a noise and saw C2 and C1 laughing at what happened.⁹

14. I also note that the father did not give evidence in this proceeding. In my view, there was no satisfactory reason provided for the failure of the father to give evidence and, accordingly, I infer on the authority of *Jones v Dunke*¹⁰ that his evidence would not have assisted his case.
15. Accordingly, I am satisfied on the balance of probabilities that the father physically assaulted C1 on or around 24 May 2020.

Are the children in need of protection?

16. The protection applications allege that the children are in need of protection on the grounds set out in section 162(1)(c), (d) and (e) of the Act. Section 162(1)(c) of the Act requires proof that a child has suffered, or is likely to suffer, significant harm as a result of a physical injury, section 162(1)(d) requires proof that a child has suffered, or is likely to suffer, significant harm as a result of sexual abuse, and section 162(1)(e) requires proof that a child has suffered, or is likely to suffer, significant emotional or psychological harm of such a kind that the child's emotional or intellectual development is significantly damaged.
17. The question of whether any of the grounds under s.162(1) of the Act are established is to be determined objectively. It has also been said that the question is to be determined as at the time when the protection application was made: see *MS & BS v DOHS* [County Court of Victoria, unreported, 18/10/2002] per Judge Cohen at p.18. In my view, it is by no means clear that the decision of Judge Cohen on the timing of 'proof' is correct. In fact, I lean towards the view that the court can take into account events which post-date the filing of a protection application in determining the question whether a child is in need of protection. The grounds set out in section 162 simply provide the statutory criteria for a finding that 'a child is in need of protection.' The question whether a child is in need of protection arises in several contexts. First, a protective intervener who has reasonable grounds for a belief that a child is in need of protection may file a protection application under the Act.¹¹ Secondly, a finding that a child is in need of protection enlivens the court's jurisdiction to make a protection order by virtue of section 274 of the Act. The terms of the power conferred on the court differ from the terms of the power conferred on the protective intervener in one material respect – the protective intervener need only have reasonable grounds for their belief that a child is in need of protection at the time a protection application is filed. By contrast, under

⁹ First visit case note, MG, page 3 (exhibit 31).

¹⁰ (1959) 101 CLR 298.

¹¹ Pursuant to sections 240 and 241.

section 274, the court is required to consider whether a child *is* in need of protection before going on to make a protection order. This means first that the court is not required to embark on an inquiry whether the grounds relied upon by the protective intervenor were reasonably held at the time the protection application was filed. Secondly, the use of the present rather than past tense in section 274 points towards a consideration of the protective concerns at the time the court is contemplating the making of a protection order. The purposes of the Act, which include the protection of children, are promoted by such an interpretation. It would be a nonsense if the court is required to disregard protective concerns which arise subsequent to the filing of a protection application when the court is considering the question whether a child is in need of protection for the purposes of making a protection order.

18. It is also well established that proof that a child is in need of protection may be based on either actual harm or a likelihood of harm.
19. In *In re H. & Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 Lord Nicholls of Birkenhead¹² held that in the similar provision in s.31(2)(a) of the *Children Act 1989 (Eng)*, the phrase ‘likely to suffer’ means a real possibility that cannot sensibly be ignored having regard to ‘the nature and gravity of the feared harm in the particular case.’ [p.585].
20. My findings as to whether each of the children is in need of protection is as follows:

C1: I have previously found that the father engaged in sexualised behaviour towards C1 in the manner disclosed by her to the police when she participated in the VARE. There is little doubt in my mind that C1 has suffered significant emotional harm due to the unwanted sexual attention of the father, and the consequences that flowed from her disclosure of that abuse, which include being subject to duress and hostility by family members. I heard evidence from Ms LK, a Registered Psychologist from the Gatehouse Centre of the Royal Children’s Hospital, who assessed and counselled C1 between May and July 2019.¹³ She administered psychometric testing to C1 and reported that C1 experienced clinically significant levels of depression, anxiety, anger and disruptive behavior, and significant disruption to her primary attachment relationships.¹⁴ C1 also reported recurrent thoughts of self-harm. I am satisfied that C1 has suffered significant harm as a result of sexual abuse, and accordingly ground s.162(1)(d) is made out. I am also satisfied that the father physically assaulted C1 on or around 24 May 2020, and that the physical assault caused C1 significant

¹² (with whom Lord Goff of Chieveley & Lord Mustill agreed).

¹³ Report of Ms LK, 11 October 2019 (exhibit 18).

¹⁴ Report of Ms LK, 11 October 2019 (exhibit 18), page 6 and page 12.

harm as a result of a physical injury.¹⁵ While there was no medical evidence tendered to the Court, the photographs disclosed significant bruising on C1 and at least one abrasion. Accordingly, ground s.162(1)(c) (physical injury) is proven on the basis of actual harm. I am also satisfied, on the basis of the evidence given by Ms LK, that ground s.162(1)(e) is proven, on that the basis that C1 suffered emotional or psychological harm which has significantly damaged her emotional development.

C2: I have previously found that the father engaged in sexualised behaviour towards C2. However, there is little evidence before me regarding the impact of this behaviour on C2. I am not satisfied that the father's behaviour caused C2 to suffer actual harm in the manner required by the Act, but I am satisfied on the balance of probabilities that C2 is *likely* to suffer harm in the manner contemplated by sections 162(1)(d) and (e) of the Act. However, in my view the evidence falls short of establishing a likelihood that C2 is at risk of suffering significant harm as a result of a physical injury at the hands of the father. Accordingly, s.162(1)(c) is not proven.

C3: In light of the findings I have made regarding the father's behaviour towards C1 and C2, it is my view that C3 is also exposed to a risk of sexual abuse that cannot be ignored, and that C3 is in need of protection on the grounds that she is likely to suffer harm in the manner contemplated by sections 162(1)(d) and (e) of the Act. I have taken into account that C3 is only eight years of age, but in my view there remains a risk that C3 will be exposed to sexualised attention by the father. However, as with C2, I also find that the evidence falls short of establishing a likelihood that C3 is at risk of suffering significant harm as a result of a physical injury, so s.162(1)(c) is not proven.

The wishes of the children

21. C1 and C2, who were both represented in this proceeding, instructed that they wished their father to return home, and for things to go back to normal.

Risk Assessment of the father by Ms C

22. Ms C, a psychologist, conducted an assessment of the father and produced a psychological assessment report dated 5 July 2020.¹⁶ Ms C administered the Sex Offender Risk Appraisal Guide (SORAG), the Sexual Violence Risk Inventory 20 (SVR 20) and the Ontario Domestic Assault Risk Assessment (ODARA). She concluded on the basis of that testing that the

¹⁵ In *Director-General of Community Services Victoria v Buckley & Others* [Supreme Court of Victoria, unreported, 11/12/1992], O'Bryan J. said: "The word 'significant' means 'important', 'notable', 'of consequence'.

¹⁶ Exhibit 22.

father is at a low risk of further sexual violence, and a medium risk of committing domestic violence against a partner or child.

23. I was left with significant reservations about the accuracy and usefulness of the risk assessment completed by Ms C. The actuarial risk assessment tools are, Ms C conceded, flawed in certain respects. For example, while the tools presume that the person subject to the assessment has committed a sex offence of some sort in the past, the matters formally taken into account in respect of offending history only include actual convictions. Accordingly, the tools do not take into account the volume of offences committed against a single complainant, the length of time over which the offences took place, or the number of victims, unless convictions are recorded in respect of those matters. In my view, the risk assessment tools were not well suited to the circumstances of this case, where multiple acts of sexual harassment have been established on a civil standard of proof in respect of two victims, over an extended period of time.
24. Ms C told the court that the father has engaged in approximately seven counselling sessions with her, and that they have made positive progress. She said that they have covered topics including anger management, understanding teenagers, problem solving and communication techniques. I take into account the father's engagement with Ms C, but it is difficult for me to determine if he has developed any real insight into the protective concerns, and whether the risks have been moderated to any significant degree. The father continues to deny committing sexual acts in relation to C1 and C2, so the counselling sessions have limited ability to address the risks around this behaviour.

Protective capacity of the mother

25. At the conclusion of the hearing I was left with serious reservations about the mother's protective capacity. At the conclusion of the contested hearing over the Intervention Order application, I found that the mother had prompted C1 and C2 to retract their allegations against the father on 8 December 2018, when she accompanied the girls to the police station. I also found that the father had attended the home in breach of the interim Intervention Order. The mother did not take steps to prevent these breaches, nor did she report them to the police. I also note that C1 disclosed further breaches of the Interim Accommodation Order (and therefore the final Intervention Order) when she disclosed to child protection and the police in May this year that the father was attending the home at times not permitted by the current orders.
26. The evidence before me disclosed numerous examples of the mother demonstrating resentment towards the girls – particularly C1 – for making disclosures against the father. For

example, on 5 February 2019, the mother informed the allocated worker Ms B that she did not want assistance transporting the children as she wanted the children ‘to suffer’. I am also satisfied that it is likely that the mother took active steps to try and conceal the physical assault of C1 by the father in May this year, by lying to child protection about C1’s whereabouts when the workers came to the home, and by coaching the children to provide an untruthful version of events to child protection. I understand that the father’s absence from the home is extraordinarily difficult for the mother. I heard evidence from Dr X, a psychiatrist who has been treating the mother since 2014, that she suffers from depression, and that she complains bitterly about the father leaving the house. The mother gave evidence to the Court that she also suffers from back problems, and that she requires the father’s assistance. She told the court that she was exhausted, and that her physical and mental health had been adversely affected by the father’s absence. She said that the children did not listen to her, and that she was terrified at home. I do accept that the father’s absence from the house has taken a large toll on the mother, and that things would be considerably easier for her if he was able to reside in the home again. However, I have no confidence whatsoever that she would protect the children from inappropriate and harmful behaviour by the father.

Decision

27. I have determined that the father has not adequately addressed the protective concerns, and that he remains a risk to C1, C2 and C3. The risk assessment conducted by Ms C failed to consider the actual nature of the father’s sexual misconduct towards his daughters, and the counselling which the father engaged in with Ms C has not addressed these behaviours. In addition, I am not satisfied that the mother is able to protect the children from the risks posed by the father.
28. I have decided to make a Family Preservation Order which places the children in the care of their mother for 12 months. The order will include conditions which prevent the father from residing with the girls and which regulate his contact with them.

FAMILY PRESERVATION ORDER CONDITIONS

1. Mother and Father to accept visits and co-operate with DHHS.
2. Mother and Father to accept support services as agreed with DHHS.
3. Father must continue to go to a psychologist and/or psychiatrist as agreed with DHHS and as recommended by the treating psychologist/psychiatrist and allow reports to be given to DHHS.
4. Mother and Father must not expose the child to physical or verbal violence.
5. Mother must engage in a course or counselling which addresses protective parenting and allow reports to be given to DHHS.
6. Mother and Father must engage in family therapy through an appropriate service as agreed with DHHS and encourage the children to participate in the therapy. The mother and father are to follow recommendations of the service and allow reports to be given to DHHS.
7. Child may have respite as agreed between the parties.
8. Father must not live with or have contact with the child other than Court ordered contact, unless DHHS assesses otherwise.
9. Father's contact:

C1

Father may have contact with C1 at a location in the community other than a private home if C1 requests it and subject to her wishes. Contact will occur at times and places as agreed between C1, the father and DHHS. Contact will be supervised by DHHS or its nominee unless DHHS assesses that supervision is not necessary. Mother is assessed as suitable to supervise contact.

C2

Father may have unsupervised contact with C2, at a location in the community other than a private home, at times and places as agreed between the father, mother and C2, with DHHS to be informed at least 24 hours prior to contact occurring. If C2's mother is not present at contact, C2 must have access to a mobile phone and be contactable whilst contact is occurring.

C3

Father may have supervised contact with C3, at a location in the community other than a private home, at times and places as agreed between the father and the mother, with DHHS to be informed at least 24 hours prior to contact occurring. Mother is assessed as suitable to supervise contact.