

CITATION: *NT Police v AB [2017] NTLC 011*

PARTIES: Neil Stephen Hayes

V

AB

And

Juanita Marg Bauwens

V

AB

TITLE OF COURT: LOCAL COURT OF THE NORTHERN TERRITORY

JURISDICTION: LOCAL COURT OF THE NORTHERN TERRITORY EXERCISING CIVIL JURISDICTION

FILE NO(s): 21614729 and 21616782

DELIVERED ON: 11 APRIL 2017

DELIVERED AT: Alice Springs

HEARING DATE(s): 13, 14, 15 February 2017

JUDGMENT OF: JUDGE Morris

**CATCHWORDS:**

DOMESTIC VIOLENCE - - APPLICATION - - SUFFICIENCY OF EVIDENCE  
test to be applied - objective test - “reasonable grounds” - “fear” - commission of  
domestic violence - “intimidation” - defendant police officer

*Domestic and Family Violence Act* (NT), s5, s6, s7, s8, s18, s19, s21

*Police v Giles* [2013] SASC 11

*Briginshaw v Briginshaw* [1938] HCA 34 (1938) 60 CLR 336

*Bonney v Thompson* [2011] NTSC 81

**REPRESENTATION:**

*Counsel:*

Applicant:	Mr John McBride
Defendant:	Mr Raymond Murphy

*Solicitors:*

Plaintiff:	John G McBride, Barrister and Solicitor
Defendant:	Murphy & Associates, Barristers and Solicitors

Judgment category classification:	B
Judgment ID number:	[2017] NTLC 011
Number of paragraphs:	87

IN THE LOCAL COURT  
AT ALICE SPRINGS IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 21614729 and 21616782

BETWEEN:

**Neil Stephen Hayes**  
Applicant

AND:

**AB**  
Defendant

And

**Juanita Marg Bauwens**  
Applicant

AND:

**AB**  
Defendant

REASONS FOR JUDGMENT

(Delivered 11 April 2017)

JUDGE: Morris

- 1) Northern Territory Police have applied to this Court for two domestic violence orders pursuant to the *Domestic and Family Violence Act*. Mr AB<sup>1</sup> is the Defendant in both applications.
- 2) Domestic violence is defined in *the Act* at s5:

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<sup>1</sup> The names of the Protected Persons and the Defendant are suppressed in these proceedings. Non-representative letters have been used for the parties.

## 5 Domestic violence

**Domestic violence** is any of the following conduct committed by a person against someone with whom the person is in a domestic relationship:

- (a) conduct causing harm;

*Example of harm for paragraph (a)*

*Sexual or other assault.*

- (b) damaging property, including the injury or death of an animal;
- (c) intimidation;
- (d) stalking;
- (e) economic abuse;
- (f) attempting or threatening to commit conduct mentioned in paragraphs (a) to (e).

*Note*

*Under Part 2.2, a DVO may be sought, and made, against a person if the person counsels or procures someone to commit the domestic violence, see section 17.*

## 6 Intimidation

- (1) **Intimidation** of a person is:

- (a) harassment of the person; or

*Examples of harassment for paragraph (a)*

- 1 *Regular and unwanted contacting of the person, including by mail, phone, text messages, fax, the internet or another form of electronic communication.*
- 2 *Giving or sending offensive material to the person.*

- (b) any conduct that causes a reasonable apprehension of:

- (i) violence to the person; or
- (ii) damage to the property of the person, including the injury or death of an animal that is the person's property; or

*Example of conduct for paragraph (b)(i)*

*Sexually coercive behaviour.*

- (c) any conduct that has the effect of unreasonably controlling the person or causes the person mental harm.

- (2) For deciding whether a person's conduct amounts to intimidation, consideration may be given to a pattern of conduct (especially domestic violence) in the person's behaviour.

## 7 Stalking

**Stalking**, a person, includes engaging in any of the following conduct on at least 2 separate occasions with the intention of causing harm to the person or causing the person to fear harm to the person:

- (a) intentionally following the person;
- (b) intentionally watching or loitering in the vicinity of, or intentionally approaching, the place where the person lives, works or regularly goes for a social or leisure activity.

**8 Economic abuse**

**Economic abuse**, of a person, includes any of the following conduct (or any combination of them):

- (a) coercing the person to relinquish control over assets or income;

*Example of coercion for paragraph (a)*

*Using stand-over tactics to obtain the person's credit card.*

- (b) unreasonably disposing of property (whether owned by the person or owned jointly with the person or someone else) without consent;
- (c) unreasonably preventing the person from taking part in decisions over household expenditure or the disposition of joint property;
- (d) withholding money reasonably necessary for the maintenance of the person or a child of the person.

3) Noting that the term ‘satisfied’ is defined in the Act as meaning “satisfied on the balance of probabilities”<sup>2</sup>, the test to be applied is:

**18 When DVO may be made**

- (1) The issuing authority may make a DVO only if satisfied there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant.

*Note*

*Because of the objective nature of the test in subsection (1), the issuing authority may be satisfied on the balance of probabilities as to the reasonable grounds even if the protected person denies, or does not give evidence about, fearing the commission of domestic violence.*

- (2) In addition, if the protected person is a child, the authority may make a DVO if satisfied there are reasonable grounds to fear the child will be exposed to domestic violence committed by or against a person with whom the child is in a domestic relationship.

**19 Matters to be considered in making DVO**

- (1) In deciding whether to make a DVO, the issuing authority must consider the safety and protection of the protected person to be of paramount importance.

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<sup>2</sup> *Domestic and Family Violence Act s4*

- (2) In addition, the issuing authority must consider the following:
- (a) any family law orders in force in relation to the defendant, or any pending applications for family law orders in relation to the defendant, of which the issuing authority has been informed;
  - (b) the accommodation needs of the protected person;
  - (c) the defendant's criminal record as defined in the *Criminal Records (Spent Convictions) Act*;
  - (d) the defendant's previous conduct whether in relation to the protected person or someone else;
  - (e) other matters the authority considers relevant.

#### 4) What an order may provide for is prescribed:

##### 21 What DVO may provide

- (1) A DVO may provide for any of the following:
- (a) an order imposing the restraints on the defendant stated in the DVO as the issuing authority considers are necessary or desirable to prevent the commission of domestic violence against the protected person;

##### *Examples of DVOs for paragraph (a)*

- 1 *An order restraining the defendant from contacting (directly or indirectly) the protected person.*
- 2 *An order restraining the defendant from approaching the protected person or premises stated in the DVO.*
- 3 *An order requiring the defendant to refrain from harassing, threatening, verbally abusing or assaulting the protected person.*

- (b) an order imposing the obligations on the defendant stated in the DVO as the issuing authority considers are necessary or desirable:
  - (i) to ensure the defendant accepts responsibility for the violence committed against the protected person; and
  - (ii) to encourage the defendant to change his or her behaviour;
- (c) other orders the issuing authority considers are just or desirable to make in the circumstances of the particular case;

##### *Example of other orders for paragraph (c)*

*An order requiring the return of personal property to the defendant or protected person.*

- (d) an order (an **ancillary order**) that aims to ensure compliance by the defendant with another order under paragraph (a), (b) or (c).
- (1A) An ancillary order may:
- (a) prohibit the defendant from engaging in specified conduct; or

(b) require the defendant to take specified action.

*Example for subsection (1A)(b)*

*An order that the defendant submit to testing to ensure compliance with an order prohibiting consumption of alcohol or certain drugs.*

(1B) The Regulations may make provision about a matter relating to an ancillary order.

(2) Subsection (1) is not limited by the specific orders provided in this Part.

*Note*

*Under sections 39 and 40 of the Firearms Act, a licence, permit or certificate of registration is automatically suspended or revoked on the making of a DVO.*

- 5) When determining whether to grant an application, the Court must be satisfied that there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant. Such a determination is ordinarily informed by findings of fact about past events or behaviour, made on the balance of probabilities.
- 6) Considerations of safety and protection of the protected person are to be of paramount importance.
- 7) Secondly any restraints that are imposed when an order is made are ones that the Court considers necessary or desirable to prevent the commission of domestic violence against the person.
- 8) Whilst the test is an objective one, in that the grounds for the fear of the protected person are ‘reasonable’, it is not necessary, in my view, for the defendant to intend, or for a Court to find that a defendant ‘intended’ by their actions to commit a domestic violence offence, or domestic violence by their behaviour or that such offences occurred.

“Proof that the defendant has committed an act of abuse in the past is not expressly made a precondition to the making of an intervention order. It is at least theoretically possible to hold a prescribed suspicion without making any finding of fact, or any firm finding of fact, as to past events. However the act appears to contemplate that the court will make findings of fact about past events and provides that it is to make those findings on the balance of probabilities.”<sup>3</sup>

## **Relationship history**

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<sup>3</sup> *Police v Giles* [2013] SASC 11 para 29 (noting the South Australian equivalent Act has a slightly different test – *Intervention Orders (Prevention of Abuse) Act 2009 SA s18*)

- 9) Mr AB is a police officer, currently stationed in Alice Springs. He was born on the xxxxx and is now 54 years of age. Ms CD is his wife. She was born on the xxxxx and is now 35 years of age. EE is the daughter of Ms CD. She was born on the xxxxx and is now 17 years of age.
- 10) Mr AB and Ms CD met in Country A around 2007. They continued their relationship by email and phone, as well as meeting in person in Country A and the Northern Territory. In 2011 their son HH was born. At this time they were in Alice Springs and Ms CD had been granted a visa of some kind. Her daughter, EE had also come to Australia and lived with them. Mr AB and Ms CD married in 2012 in Alice Springs. At some stage Ms CD opened a small business in Alice Springs. Mr AB continued to work as a police officer.
- 11) After a number of incidents involving the three parties, the NT Police made application to the Court for orders pursuant to the *Domestic and Family Violence Act* with Mr AB as the defendant. The first of these was an application by Superintendent Hayes for an order under s28 of the Act, where EE was the protected person. The second was an order pursuant to s41 of the Act where the applicant was Senior Constable Bauwens and the protected persons were HH and AB. S41 provides for a police officer to make an order with immediate effect, which is later either confirmed or dismissed in Court.
- 12) On the first return date of the s28 application (29 March 2016) interim orders were made by consent and without any admission of liability. Various other orders were made to prepare the matter for a contested hearing. Several hearing dates were set and vacated. The reasons for the delays are not clear from the court file. At one stage on 12 August 2016, final orders were made in the absence of Counsel for the Defendant, causing an application to set aside those orders which was ultimately successful. A final hearing date was set for 13 and 14 February 2017.
- 13) The s41 application was first mentioned in Court on 11 April 2016 and thereafter was managed and dealt with alongside the s28 application. An order pursuant to s41 remains in place until otherwise decided by the Court. Whilst the presiding Judge on 22 September 2016 ruled that the orders of 12 August 2016 were now to be interim orders across both applications, there is no provision for a s41 order to be an ‘interim’ order, and it remains in place until either confirmed (with or without variations) or revoked by the Court.<sup>4</sup> However it is clear that the effect of the Judge’s orders was intended to put the parties back to the position prior to the 12 August orders.

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<sup>4</sup> S82 of the Act



- 14) The hearing commenced in Alice Springs on 13 February 2017 and continued on 14 and 15 February 2017. The Court was closed during the proceedings pursuant to s6 of the *Act*. The evidence consisted of various tendered statements, agreed facts, items, and oral evidence. The evidence of EE was tendered as two visually recorded statements, with accompanying transcripts. Pursuant to the *Act*, children cannot be cross-examined in relation to their evidence.<sup>5</sup>
- 15) Ms CD also gave evidence and was cross examined. She was assisted by an Interpreter in the language of Country A. Unfortunately the interpreter was neither present in Court nor with Ms CD in the vulnerable witness facility but was a telephone interpreter. Indeed as Ms CD's evidence continued, different telephone interpreters were used, despite the Court's request for the same person. This is certainly not ideal and it would be appropriate for future hearings involving interpreters to arrange for the attendance of an interpreter in person. Apparently there was no qualified person available in Alice Springs, however given the length of the hearing and the importance of the witness's evidence, attendance from inter or intra state suitably qualified person should have been arranged.
- 16) Mr AB gave evidence and was cross-examined. Several affidavits were also exhibited and formed part of his evidence. He was in attendance throughout the proceedings. In Court he appeared slightly dishevelled and emotional, wearing a crumpled t-shirt and pants. Whilst giving evidence in the witness box, for the most part he had his eyes closed and answered questions with his eyes closed. He rarely made eye contact with either his own Counsel or Counsel for the Applicant. He cried and appeared emotionally labile.
- 17) The Applicants rely on several key incidents. Some of these incidents are relevant to both applications, and some are more pertinent to one or the other. These incidents include the discover of a camera pen by EE, various actions of the Defendant in the family home, including his level and frequency of intoxication, and a particular incident with a hose. There was also evidence of sexual activity outside of the relationship, including the possession of a large number of explicit photographs, some of which included CD.

### **The camera pen**

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<sup>5</sup> Ss107, 108 and 109 of the Act

18) The following events outlined in the s28 application are supported by photographs, are not disputed by the Defendant and I accept from the evidence are an accurate summary of what occurred.

“On the 19<sup>th</sup> of February 2016, EE went to the bathroom to take her morning shower. EE noticed a Northern Territory Police uniform shirt belonging to AB hanging in the bathroom. EE found this strange as this is the only time she can recall a police uniform shirt being hung-up in the bathroom. When she looked at the shirt closely she saw a small camera lens which was focussed outward towards the shower. The camera had been taped into the shirt using black electrical tape. EE took photographs of the camera in situ and then removed the camera which was disguised as a pen. EE took the pen apart and continued to take photographs. Inside the pen were an 8 gigabyte memory card and a USB output. EE put the pen back together and placed it back in the shirt the way she found it. EE was unsure if the pen was recording at the time she located it. EE has not seen the camera pen since. EE called her mother Ms CD, who was visiting family in Country A and told her what she had found. Ms CD told EE to go and stay with other family in Alice Springs until she returned from Country A.”

19) The photographs taken by EE of the camera pen have been tendered in evidence.<sup>6</sup>

20) AB did not become aware of the substance of this allegation until later. When CD returned from her trip to Country A it seems as though whilst she raised the matter with him, AB was under the apprehension that he was being accused of installing CCTV cameras to watch his stepdaughter in the bathroom. He was under this misapprehension when he spoke to police who arrived at his home on 9 March 2016.

21) Police’s arrival on that evening was at the request of AB. He had called them because he wanted to report that his stepdaughter had assaulted his son. HH had dermatitis or some form of skin condition, which required the application of a blue coloured medication. This was uncomfortable for him and AB reported that whilst trying to apply the medication EE had slapped HH, evidenced by the blue medication on his face. AB rang police and two officers, one with a body worn camera, attended at his residence.

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<sup>6</sup> Exhibit P1, Annexure to the Statement of Carmen Butcher 13 June 2016

- 22) AB admitted to attending Police that he had installed CCTV outside his home and that he was going to install it inside to monitor the behaviours of Ms CD and EE in relation to HH.<sup>7</sup>
- 23) AB has attempted to discredit the evidence and actions of EE. Initially he has told police attending at the house that she was a liar and dishonest.<sup>8</sup> At that time it is clear that he was not aware that she had taken photos of the camera pen. It is open to infer that he thought there would be no proof of her allegations and that it would only be his word against hers. It is also open to infer that he was ignorant or had forgotten about the camera pen or had not turned his mind to how it would appear to someone using the bathroom.
- 24) However, once her evidence and the photographs were disclosed, Mr AB, in his affidavit, explains the camera pen thus:

“I confirm that I had ordered a camera pen over the internet. It was my intention to use the pen to surreptitiously record “return to work” meetings between my employer’s human relations officer and I. I felt this was necessary given previous instances of apparent miscommunication between us both.

The camera pen had arrived in the post the day before (18 February 2016) my step daughter had found in the bathroom (19 February 2016). When I opened the box containing the camera pen I was very disappointed to see how large and garish it was. I thought that the pen, when placed into my shirt pocket, would draw attention to itself thereby defeating the purpose for which I had purchased it.

To confirm whether this would be the case, I took the camera pen into the bathroom and placed it inside of the chest pocket of my police issue uniform. Upon doing so, I found that the camera-pen’s brass top and clasp and its size drew attention to itself and was simply not fit for the purpose I had brought it for.

I had considered returning the pen but had another return to work meeting scheduled in a few days’ time and would be unable to order and receive a more suitable camera pen within that time. Consequently, I got some black tape and covered the brass cap and clasp of the phone to see if that would make the camera pen less obvious. I applied the tape to the shirt over then

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<sup>7</sup> Exhibit P5, Affidavit Philip Emmett 26 March 2016 para 10 and Exhibit P10: Body Worn Camera Footage

<sup>8</sup> Exhibit P10; Body Worn Camera Footage

pen rather than the pen itself as it was late at night (about 11.00pm) and I just wanted a quick indication as to whether the blacking out of the brass components of the camera pen would it less conspicuous. Had this have made it less conspicuous, it was my intention to paint or mask the brass portions of the camera pen itself. However, upon cover the pen with tape over the shirt, I discovered that the camera lens became even more visible. That being the case, I just left the pen in the shirt and went to bed.

The following morning, 19 February 2016, I had a shower and shave in the bathroom then went to my bedroom, got dressed and left for work. I did so without turning my mind to the two work shirts that I had hanging up in the bathroom at the time or the camera phone that I had left in the shirt pocket<sup>9</sup>.”

- 25) In his evidence in Court Mr AB attested to not knowing where the memory card from the pen was and that he had never opened the pen to see it, nor recorded anything on it. That particular memory card does not appear to have been found in the Police search of his premises. I do not accept his evidence in relation to never having opened the pen or dealt with the memory card. It would be farfetched to assume that upon its unpacking he did not either put the pen together, or pull the pen apart to see how it worked. However there is insufficient evidence for me to infer that because the card is missing, there may have been something untoward recorded on it, and I make no such inference.
- 26) After consideration of the evidence surrounding the pen, and despite a number of factors of concern, including that the uniform had never been hung in the bathroom before, I am unable to find that the Defendant intended to use the camera pen to photograph or record EE. I accept his evidence that he had intended to use the pen to secretly record a meeting between himself and an employee of the Police.

### **Other actions by the Defendant**

- 27) Other matters that the Applicant relies on include allegations that the Defendant walked around the house naked in the presence of EE, including whilst intoxicated, exposed her to pornographic films on his laptop and unwanted physical contact, including coming into her bedroom on two or more occasions and touching her and buying alcohol for her. The Defendant denies all of these matters. Whilst admitting to one occasion in 2011, where

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<sup>9</sup> Exhibit D1: Affidavit, AB 8 July 2016 paras 7,8,9,10,11

he had walked late at night from his bedroom to the toilet naked and EE had stepped out of her bedroom unexpectedly, all other instances alleged were denied by him. He says he was asked by his wife not to walk around naked again, and he purports not to have.

- 28) The Defendant does admit to having pornography on his laptop but denies knowingly exposing EE to it. He also says that he locks his laptop when he is not using it. The evidence of EE regarding the pornography was that whilst she was aware he was watching it, it was on occasions when she came home early from school, or that she saw him watching it through a window. She does not allege that he invited her to watch it or deliberately showed it to her. However she was aware of him watching it on more than one occasion.
- 29) EE's evidence was by way of two video recorded statements, which were played and tendered in Court. She appeared to be comfortable in answering the questions and endeavouring to provide her best recollection of events. At times her English was confused, for example alternating the pronouns 'he' and 'she'. I also note that in the second statement when an interpreter was used, this was a telephone interpreter, which should not be best practice for the taking of such a statement, particularly in relation to a young person.
- 30) In endeavouring to provide her best recollection I find that she was not attempting to embellish her evidence. For example EE corrected the interpreter during her interview as to the Defendant sitting down next to her rather than laying with her on her bed:

“Translator: Yeah um look when also when he's drunk um I am scared so I go to my room and I lock my room so although – even though I locked my room already he still used a coin to open the door and then he goes into my room he lay um he lay down with me, hugging me and that's make – that's make me very scared.

EE: No he not lay down. He no lay down.

Carmen: Not lay down he's stand- up and hugged you?

EE: um sit...Sit down here

.....

Translator: I'm sorry yeah so he hugged me but he would basically sitting there with me. He didn't lie down with me to make that clear, yep.<sup>10</sup>

- 31) EE then goes on to describe how he sat next to her on the bed one night, patting her stomach area and saying that he loved her. She confirmed that this had happened two or three times when EE first came to Australia and that the Defendant was drunk at the time. She was scared when he drank, although describes his drinking as only one or two bottles during the working week but on weekends or holidays he would drink half a box.
- 32) EE describes one occasion, which occurred some three months prior to her interview:

“Translator: ....my younger sibling was sound asleep but I was still awake so basically he was drunk but again I am not too sure whether he was drunk or not drunk but anyway he went into my room and he was um wearing only an undie and that make me very scared um but then you know after that he just went out of the room again that time, that particular time I didn't tell mum but then when he repeat it, it happen again when he went to the room again um the next time I did tell mum um perhaps mum told him but you basically um whenever he's drunk that make me very scared.<sup>11</sup>”

### **Matters specific to Ms CD**

- 33) Ms CD gave evidence before me and was cross-examined, as well as a previous statement being tendered.<sup>12</sup>
- 34) Also relevant to consider in relation to the application where Ms CD is the protected person, is the evidence of Police Officer Juanita Bauwens, both in Court and via statement.<sup>13</sup>
- 35) The Act recognises that an order may be made even if the Protected Person denies or does not give evidence about fearing the commission of domestic violence.<sup>14</sup>
- 36) In Ms CD's statement she attests to instances of behaviour that have disturbed her about her relationship with Mr AB. These include the camera

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<sup>10</sup> Transcript of CFI: p6 of 43

<sup>11</sup> Transcript of CFI p11 of 43

<sup>12</sup> Exhibit P2 on file 21614729

<sup>13</sup> Exhibit P1 on file 21614729

<sup>14</sup> Domestic and Family Violence Act s18 (1) Note

pen on his uniform in the bathroom (related to her by her daughter), him walking around the house naked when he is drunk, him going into her daughter's bedroom when drunk, wetting her and hitting her with a garden hose during an argument causing bruises. She also expressed concern in relation to his visit to Country B whilst she was in Country A, and his continued sexual relationships or sexually suggestive behaviour with women in Country A and Country B. She attests to seeing photographic evidence of this activity and retaining a memory stick of these photos. She was unable to find the memory stick when requested to do so by Police. She was also concerned he was sending money to young women in Country A.

### **The hose incident**

37) CD describes one relatively recent incident prior to the end of their relationship where she was hosed and assaulted by the Defendant. In her statement to police she describes it thus:

“He was outside watering the garden with a hose and saying to me that if I had a boyfriend I should leave the house. I said to him “I know you police but you so stupid. If I really had a boyfriend I wouldn't tell you.” He then wet me with the hose, water went all over me. He followed me into the house and kept wetting me. He then hit me with the hose and keep telling me to leave the house if I already have a boyfriend. I threw a lunch box at him to try and stop him from hitting me.

I got a bruise on my arm from where he hit me with the hose. The next day I went to work and a police officer's wife, who gets her nails done at my shop, saw the bruise.....I sent AB an email saying if I did report it he'd be in big trouble. I also sent him photos of the bruises on my arm”<sup>15</sup>

38) The photo of the bruise was shown to the court during evidence, however unfortunately does not appear to be tendered. It was on CD's mobile phone. It was a substantial bruise.

39) In her evidence in chief Ms CD expanded on this account, testifying that after she had asked him to stop watering her, and he didn't, she picked up a stick (also described as a piece of wood) and threw it at him, and he then strangled her. She said to him “if you are a good man what are you doing with your hands on my neck?” He then let go and she was still angry so she

threw a stick. He then picked up the hose and struck her with it, causing the bruise that she later photographed.

- 40) In cross examination Ms CD denied allegations of instances where it was put to her that she had assaulted or attacked Mr AB. Any instances of her violence were, she said, in response to his violence or being pinned down by him. An instance of scratches on him was caused by gardening, not by her. It was put to her that in relation to the hose incident; she had walked up to the Defendant with a lump of concrete over her head, yelling and swearing at him and then threw the concrete with it landing on his foot. This was denied.
- 41) EE also gave evidence about the hose incident but it is difficult to ascertain whether she saw the incident or whether she is relaying what her mother has told her about it, as at some stage she takes her younger brother inside as she is concerned for him seeing his parents arguing.
- 42) From the evidence I am unable to determine what actually occurred during the hose incident. Both accounts were unsatisfactory. It is unlikely that CD would not have mentioned that AB had attempted to strangle her with his hands around his throat in her statement to police. Although English language skills and unfamiliarity with the process may have contributed to this. Likewise in my view it is unlikely that the incident unfolded as Mr AB said, with CD approaching him carrying a large lump of concrete above her head. Certainly it is clear from their evidence and that of EE, that their relationship is a volatile one. I am also satisfied that the bruise she received was as a result of this incident and the interaction between them.
- 43) From Ms CD's evidence it appears that she herself does not fear the commission of domestic violence against her by the Defendant, but that she has strong concerns in relation to her daughter. It is also very clear that she has been upset and emotionally hurt by his behaviour, including his infidelity and sexual activities in Country A and Country B after their marriage.
- 44) She attests "If I was gonna go back to AB I'd be very worried about my daughter. He drinks a lot, we fight a lot....I would like a Domestic Violence Order to protect my children from AB, especially my daughter. I don't want him to have any contact with her and I want my son and my daughter to live with me.....I still love him but I want him to fix his head so he's not a sick man anymore...."<sup>16</sup>

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<sup>15</sup> Exhibit P2, Statutory Declaration of Thi TRAN dated 22 March 2016 para's 21 and 22

<sup>16</sup> Exhibit P2 on file 21616782, para's 32,34,35



- 45) Detective Bauwens gave evidence before me. She is an officer gazetted to the Domestic Violence Prevention Unit as a Detective Senior Constable. She has, in that role had between five and eight meetings with CD since taking her initial statement. Her evidence was that CD was quite fearful because the Defendant was a police officer, so consequently his version of events would be believed over hers, and that CD believed there was the possibility of deportation. In Detective Bauwens' view, and with her knowledge and training in domestic violence, she considered that there had been controlling and intimidatory behaviour. She also considered there was still a risk to CD by further information she had been provided about the Defendant's behaviour, including telephone calls whereby the Defendant had somehow obtained CD's new private number and called her repeatedly despite a request not to and instances of standing near the shop where CD worked.
- 46) In cross examination it was put to her that she had not 'investigated' the claims of CD, by seeking to confirm from alternate sources that what she was being told by CD was true. She confirmed that she had no reason to doubt what CD had told her. She also confirmed that her role and the role of the Unit was to assist and help protect victims of domestic violence; that domestic violence was not a clear cut issue and that if a victim or protected person was in fear, then it was their role to do something in relation to the matter.
- 47) Mr AB in his affidavit denies choking Ms CD, but admits to using the words "I'm a good man I don't hit women". Indeed he attests that he has said this to her 'many times'.<sup>17</sup> He restated this in his evidence in Court. That this has been said many times indicates a relationship of high conflict and is very concerning. He admits to pushing Ms CD away from him and restraining her wrists. In Court he confirmed that he had restrained her upper arms on many occasions, when, he says, she was attacking him. When it was put to him that he responded by using force against her, he replied "not always, sometimes I go away".
- 48) In his evidence in Court he claims that on one occasion Ms CD clawed at him, scratching up and down his arm and spat at him. He said he did report this to police not more than two days later. He did not wish to be the protected person in a domestic violence order as he was concerned for her and the consequences of any future breach of the order by her as "she couldn't keep it due to her temper".

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<sup>17</sup> Exhibit D2, file 21616782, para 5.

- 49) Mr AB denied he had any kind of drinking problem or alcohol problem, and tendered his bank statements to show the amounts of money he had spent on alcohol for a period. It is difficult to draw any firm conclusion from the financial records, as the time period of consumption (all at once or over an extended period, or for several concentrated periods) would be needed to estimate any drunken effects.
- 50) Mr AB did attempt to minimise or downplay his use of alcohol and its effect. For example in his evidence of his recollection of a time he drove to Ms CD's shop where it was alleged that he drove whilst affected by alcohol, he explained that he had, the day before been prescribed Endone for a pinched nerve. On the day in question he had taken the drug, and drank it with a stubby of beer. He said that 'as it was a quick trip it had no effect' on him. Endone is a strong painkiller and it is certainly not recommended that it be taken with alcohol, indeed it is usually prescriptively precluded from being used with alcohol. In his affidavit of 8 July 2016 he also responds:
- “At point 10 she asserts that I drink too much beer and vodka. I accept that I drink beer and that from time to time (certainly not regularly) I get drunk but NOT to the point where I am falling over myself or am having memory blackouts. As to drinking spirits I hardly if ever drink hard liquor, and never drink vodka. I have some minor liver damage as a result of hard drinking from some years ago before entering into a relationship with my wife. I am not able to drink regularly nor large amounts anymore”<sup>18</sup>.
- 51) When cross examined about the rock/hose incident Mr AB denied there had been an argument as a precursor but blamed Ms CD. “She just lapsed into her many psychoses”. He claimed she needed medical help. His evidence was that he had tried and exhausted every possible avenue in relation to 'getting help' for her. In evidence he said that hosing her in the face was absolutely appropriate and he 'totally disagreed' that it was demeaning. He said that she came at me with a rock and had done so with weapons 'many many times'.
- 52) Mr AB has in his evidence, sought to embellish and exaggerate the behaviour of Ms CD. That she had come at him with weapons 'many many' times was not mentioned in any of the documents or affidavits filed by him. It is not supported by any other evidence including the evidence of EE. Whilst she attests to her mother and Mr AB fighting, there is no support for the level of violence from her mother to Mr AB that he describes.

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<sup>18</sup> Exhibit D1 on file21616782, para 7

53) He denies that the large bruise in the photo sent to him was as the result of any of his behaviour, and whilst admitting he applied a restraint hold to her, says that the ‘bruise was inconsistent with the physical restraint I applied’.

### **Sexually explicit photos**

- 54) During the evidence of Ms CD it became clear that there were a large number of sexually explicit photographs that had been or were in Mr AB’s possession. Shortly after the allegations leading to these applications arose, all of Mr AB’s computers and storage items had been seized by police and forensically examined. These had only recently been returned to him prior to this hearing. I note the agreed fact that “all digital devices seized throughout the search have been analysed and found to have contained no child abuse material”.<sup>19</sup>
- 55) However it was admitted through his Counsel that Mr AB currently had in his possession a USB with a large number (over 600) of sexually explicit photographs. Some, indeed he claimed, a large number of these photographs were of Ms CD.
- 56) The existence of these photographs was brought to the Court’s attention because of the evidence given by CD. In her evidence she said that AB had sent money to Country A and Country B to women to take photographs of their “breast and bum for him to look at”. She admitted that prior to their marriage they did have ‘romantic filming’ but that after they were married when he asked her (to participate in photographs) she said no. In cross examination she confirm that she refused to have ‘sexy photos’ taken, and if he had taken them, they were without consent, taken whilst she was sleeping or sitting.
- 57) During this evidence it became apparent that a large number of these type of photos were in the possession of Mr AB and there was discussion as to how best to manage their tender. All parties, including both Counsel and the Court were anxious to avoid tender if possible given the potential for future detriment and further embarrassment.
- 58) During an adjournment, in the presence of Counsel these photographs were shown to Ms CD. Upon resumption of her evidence it was put to her that ‘sexy photos’ had been taken since marriage. She responded that “I took photos with him and that’s when I drank wine so I don’t remember.” She then admitted that there had been some photos taken but that she had erased them

already. She then said “I don’t remember, I work seven days a week, very hard, come home, kids, work hard”. And finally conceded, “we were husband and wife, why take and (now) share?” She was neither candid nor truthful in her evidence about the existence and provenance of the photos.

- 59) It is very clear that the existence of the photographs was a huge embarrassment to Ms CD, one that now the relationship had ended, she did not want to acknowledge. So much so that she did not tell the truth to the Court about how they came into existence. She was clearly hurt and embarrassed by their production in these proceedings. I find that was the reason she was not truthful about the photographs, not, as was put to her, because she was exposed and embarrassed about perjuring herself, but because they were something private that she thought should have remained so, particularly after the end of the relationship.
- 60) I am satisfied that that at the time the photographs were taken, they were consensual as per the evidence of Mr AB. I am also satisfied that there are a large number of photographs, and whilst the Court has been advised that many of them do not show the participants’ faces, they are sexually explicit and they involve the protected person.

### **The Balance of Probabilities**

- 61) In civil cases there is assistance in relation to consideration of an application of the balance of probabilities. It is commonly called the *Briginshaw*<sup>20</sup> test. His Honour Dixon J stated that “when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence...It cannot be found as a result of a mere mechanical comparison of probabilities”. His Honour explained that the standard is one of “reasonable satisfaction”:

“but reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer....In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.”

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<sup>19</sup> Exhibit P11 Agreed Fact

<sup>20</sup> *Briginshaw v Briginshaw* [1938] HCA 34 (1938) 60 CLR 336 at 361-362

62) This common law test is reflected in the Northern Territory in the *Evidence (National Uniform Legislation) Act*, s 140

#### **140 Civil proceedings – standard of proof**

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

- (a) the nature of the cause of action or defence; and
- (b) the nature of the subject-matter of the proceeding; and
- (c) the gravity of the matters alleged.

63) Counsel for the Defendant put in closing submissions that the allegations were serious against the Defendant, would have an impact on his reputation and an impact on his employment as a Police Officer. There is little evidence before me in relation to the impact on his employment. It was not put before me any current employment status (serving, suspended or on leave of various kinds) or the effect or consequences of an order on that status. However, I do find that the gravity of the matters alleged is serious and that for any person whose employment relies on their character and integrity, the impact of any findings or orders is grave.

#### **Reasonable Grounds for Fear**

64) As outline above, for an order to be made I need to be satisfied that there are ‘reasonable grounds’ for the Protected Person to ‘fear’ the commission of domestic violence against them.

65) This is an objective test. There is clear evidence from EE that she subjectively does fear the Defendant. She states this many times in her interview, using the word ‘scary’ both in relation to his actions towards her and how she feels about him (scared). She is scared that during the time she has resided with him (some five years) he has come into her room uninvited and intoxicated on a number of occasions, that he has sat on her bed and patted her during one instance, that he has walked around the house naked or in his underwear, again intoxicated, that she has seen him looking at pornography on his laptop computer, that she has seen sexually explicit

photographs of women (albeit not shown to her by him, but by her mother) purported to be on his phone or account, that he has placed a recording device in a bathroom that she commonly uses, that he argues with her mother and makes her mother unhappy, including by being with other women, and that he has offered to buy and did buy her alcohol when her mother was away, which she did not want and which she knew her mother would not approve of. Her Aunty has also told her that AB has made unwanted sexual advances towards the Aunty. All of these behaviours combined have contributed to her fear.

- 66) Despite the Defendant's denials or explanations, I do accept her evidence in relation to the above. I am satisfied she is telling the truth as to these particular instances. I am satisfied that he came into her room whilst intoxicated on more than one occasion. The evidence of Ms CD, whom EE told at the time, also supports this. I can find no advantage to her to tell lies about these occurrences, indeed her behaviour and evidence is that whilst she is scared she does not want AB to get into trouble.
- 67) She is also very aware that the Defendant is a police officer and in her view has not acted as a police officer should, for example in buying alcohol for someone underage and in placing the camera pen in the bathroom.
- 68) Her concern did not cease upon leaving the residence, and in her interview EE speaks of a video message sent to her Aunty by the Defendant of her younger brother crying and her concerns about what this could be used for in relation to her future relationship with her brother.
- 69) Her feelings towards him are not simple however, as when asked about how she feels about the Defendant she says "He's good guy but um sometime he selfish with me."<sup>21</sup>
- 70) Despite that statement, from all of the evidence I find that EE does fear the commission of domestic violence from the Defendant. That domestic violence being intimidation and harassment by regular and unwanted contact. Of course each instance of unwanted contact or conduct by itself may not amount to domestic violence, but the pattern of conduct over a period of time that is clear from the evidence before me, falls within the definition in *the Act*.
- 71) In relation to EE, it was put on behalf of the Defendant that (as well as other considerations pertinent to the facts) there had been no breach of the current order and that other changed circumstances meant that the commission of any future domestic violence was unlikely. This included that she no

longer lived with Mr AB, had no reason for any contact with him and thus the kind of instances alleged (the nakedness, exposure to pornography and mistaken room instances for example) were no longer possible.

- 72) Counsel for the Defendant quite rightly states the position that simply because there has been no breach, does not mean an order should not be made. Her Honour Justice Kelly summarises the law thus:

“If the thrust of the learned magistrate’s remarks is understood to mean that application to extend a DVO could not, as a matter of law, be granted solely on evidence of past domestic violence occurring before the date of the original order, then it seems to me that that too would amount to an error of law. The question for the court is whether it is satisfied that there are reasonable grounds for the protected person to fear the commission of domestic violence against her or him.

There may well be circumstances in which the Court could be so satisfied based solely on past conduct occurring before the making of an earlier order. (Though equally, there may be cases in which the Court may not be so satisfied.) To hold that an application to extend a DVO could never be granted solely on evidence of past domestic violence occurring before the date of the original order, would be tantamount to saying a DVO can never be extended unless it has been breached. There is no warrant in the Act for limiting the discretion to extend a DVO.”<sup>22</sup>

- 73) The Defendant either denies the allegations made about his behaviour by EE, reduces them to a once off occurrence of some years ago, minimises his behaviour, or provides another explanation for his actions (such as with the camera pen).
- 74) I do not find that the Defendant was a particularly credible witness, certainly around his consumption of alcohol and behaviour in the family home. I do accept that his intention with the camera phone was not to film his step-daughter; indeed I also accept that for the most part he did not intend to perpetrate domestic violence against her. However I am also not satisfied that he necessarily has or had any awareness or understanding about the effect of his behaviour on her. This inability, for whatever reason, contributes to the reasonableness of the fear.

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<sup>21</sup> Exhibit P1, transcript of Recorded Statement p42 of 43

- 75) His evidence and affidavits included not just his own response and version of various events, but pointed out what he considered to be discrepancies or inconsistencies in the evidence for the applicant. Whilst he consistently denied most of the allegations against him his general emphasis was not on his own actions, but the actions of others.
- 76) It is of concern that during his evidence under cross-examination in Court he claimed that it was EE who behaved inappropriately by demonstrating ‘sexualised’ behaviour, by ‘flicking her wet hair at him’, or sitting so he said he could see under her pyjama bottoms. He claimed EE assaulted HH on ‘regular occasions’ and that she was constantly ‘playing with HH’s penis’. I find that these are fabrications or vast exaggerations. If the allegations in relation to HH were true the Defendant, as a responsible father would have taken more action than he did. It was put to him by Counsel for the Police that these allegations were being used by him to deflect away from his own behaviour, and whilst this was denied, in my view that is precisely the reason for them.
- 77) In my view her fear is a reasonable one in all the circumstances. The Defendant is a person with whom she was in a parental domestic relationship, and yet who has an ignorance and/or denial of the cumulative and intimidatory nature of his behaviour towards her. She is aware that he is a member of the police force and it is reasonable for her to assume that he has the authority, the influence and the access to information that being a member of the police carries.
- 78) Mr AB, by his own admission is someone who would secretly record a conversation with a fellow employee of the Police Force. His intent to do so exemplifies a lack of judgment in matters of conflict.
- 79) Even though they are no longer residing together, the above findings are sufficient for me to be satisfied that there are reasonable grounds for her to fear the commission of domestic violence against her.
- 80) In relation to the fear of commission of domestic violence against CD the evidence comes from CD herself, her daughter and also Detective Bauwens.
- 81) Despite the tumultuous nature of the relationship between Ms CD and Mr AB I am not satisfied on the balance of probabilities on all of the evidence that there is a reasonable fear of physical violence now that they are separated. However I am satisfied that there is a reasonable fear, particularly

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<sup>22</sup> *Bonney v Thompson* [2011] NTSC 81 at paras 18 and 19



regarding the photographs which are in his possession, of intimidation or threatened intimidation as defined in the Act, that is, any conduct that has the effect of “unreasonably controlling the person”.

82) Whilst the Defendant maintains control over the sexually explicit photographs, and in light of the evidence around his controlling conduct, I am satisfied that there is a reasonable fear that he may use those photographs or threaten to use those photographs to continue to control the actions of Ms CD. Particularly so given they have a young child together whom they are both caring and providing for.

83) I note that HH is also a protected person on the current s41 order and the order being sought to be confirmed. There are of course concerns about the presence of small children during domestic disputes, even if they are not directly physically threatened. Witnessing domestic violence is recognised in the *Act* and included in the definition of ‘exposure’ to domestic violence as well as various criteria for the making of an order. Whilst Ms CD has expressed some misgivings about neglect of HH should he be in the Defendant’s care if he was intoxicated, there is insufficient evidence that would lead me to conclude that he would be harmed by domestic violence. I am not satisfied that I should confirm the order in relation to HH.

## **Orders**

84) In relation to EE (file 21614729) I make the following order:

- a) That for a period of 12 months the defendant is restrained from contacting or approaching the protected person directly or indirectly.

85) In relation to CD (file 21616782) I make the following order:

- a. That the s41 order is confirmed with the following variations:
- b. The only protected person is CD
- c. All conditions are removed and replaced with the following condition:
  - i. That for a period of 2 months and within that period the defendant is required to delete and/or destroy all images of a sexual nature of the protected person,

including from any computer, recording device, storage device or cloud storage facility within his possession or control and not deal with or publish those images in any other way.

86) The time period for the first order is, in my view, sufficient period for the order, as the protected person matures and continues to live away from and separate from the influence of the Defendant as well as grow other community and familial supports. The time period for the second order is, in my view, sufficient for the Defendant to carry out the required obligation.

87) I also order, pursuant to s57 of the *Evidence Act*, the suppression of the Defendant's name in these proceedings as well as the Protected Persons' names and any other details that would identify them.

Dated this 11<sup>th</sup> day of April 2017

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LOCAL COURT JUDGE