May 14, 2010

Questions About the Role of Reasonableness and Mutual Restraining Orders in Family Violence Cases

By Jennifer Koshan

Cases Considered:
Petropoulos v. Petropoulos, 2010 ABQB 296; *Andres v. Andres*, 2009 ABQB 26

The *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27 (*PAFVA*) has been in force since 1999. One of the motivations behind the *PAFVA* was to make it easier for victims of family violence to obtain emergency protection than the previous system of civil restraining orders had allowed for. Nevertheless, the practice of issuing restraining orders in family violence cases has not disappeared. In fact, there are a number of cases where judges have issued "mutual restraining orders" when deciding whether to confirm emergency protection orders issued under the *PAFVA*. This comment will raise some concerns with that practice. It will also review the propriety of an objective component to proving family violence in order to obtain relief under the *PAFVA*. Both of these issues arise in two recent decisions of Justice Joanne Veit of the Alberta Court of Queen's Bench.

Emergency protection orders (EPOs) are available on an *ex parte* basis on application to a Justice of the Peace or Provincial Court Judge. Before an EPO can be made, s. 2(1) of the *PAFVA* requires the claimant to show:

> (a) that family violence has occurred,
>
> (a.1) that the claimant has reason to believe that the respondent will continue or resume carrying out family violence, and
>
> (b) that, by reason of seriousness or urgency, the order should be granted to provide for the immediate protection of the claimant and other family members who reside with the claimant.

Family violence is defined to include, amongst other acts:

> (i) any intentional or reckless act or omission that causes injury or property damage and that intimidates or harms a family member,
>
> (ii) any act or threatened act that intimidates a family member by creating a reasonable fear of property damage or injury to a family member (s. 1(1)(e)).

If an EPO is made, it must be reviewed by a Queen's Bench justice within 9 working days of the order being granted. The reviewing justice can either confirm or revoke the order or replace it

with a Queen's Bench Protection Order (QBPO), and may order that an oral hearing be held (s.3(4)).

In *Petropoulos v. Petropoulos*, 2010 ABQB 296, Justice Veit reviewed an EPO obtained by a woman against her ex-husband in April 2010. She noted that there was a "tangled history" of orders granted against Mr. Petropoulos, including two previous EPOs in 2006 and 2009 and a restraining order, "perhaps a mutual restraining order", issued in 2006 and extended in 2009 (at para. 6). The basis for the April 2010 EPO application was that Mr. Petropoulos showed up at his ex-wife's place of work to demand that she pay him money owing pursuant to a Provincial Court order issued in January 2010. He was not bound by any no-contact provisions at the time.

Justice Veit found that there was no basis for issuing the April 2010 EPO, as there was no proof that family violence as defined under the *PAFVA* had occurred. There was clearly no injury or property damage, and Ms. Petropoulos' evidence was said to fall short of showing that her ex-husband's conduct amounted to a threat that intimidated her by creating a "reasonable fear" of property damage or injury under s.1(1)(e)(ii) of the *PAFVA* (at para. 18). Further, there was no evidence to show that Ms. Petropoulos had reason to believe that her ex-husband would "continue or resume carrying out family violence" as required by s.2(1)(a.1) of the *PAFVA* (at para. 23). Mr. Petropoulos was seen to have every right to attend at his wife's place of work to collect on his debt, and Justice Veit stated that "his attempt to deal with Ms. Petropoulos as a creditor would presumably end if Ms. Petropoulos were to pay him the money required…" (at para. 23). According to Justice Veit, "the Legislature obviously did not intend to protect family members from debt actions within the family" (at para. 26).

While at first glance the facts of this case as related do not seem particularly compelling in terms of the need for a protection order, it is difficult to view the parties as being in a simple debtor / creditor relationship after a long marriage with previous instances of family violence. There is very little context in the judgment about the relationship between the parties and the basis for Ms. Petropoulos' perceptions around the need for an EPO. Surely the element of "reasonable fear" required in s.1(1)(e)(ii) of the *PAFVA* must be interpreted in light of the circumstances of the claimant and the surrounding context. As noted by Justice Bertha Wilson in *R. v. Lavallee*, [1990] 1 S.C.R. 852 at para. 38:

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".

The requirement of "reasonable fear" also features in an earlier judgment of Justice Veit in *Andres v. Andres*, 2009 ABQB 26. In that case, Justice Veit declined to confirm an EPO or replace it with a QBPO, finding that the claimant Ms. Andres had "not established an objective basis for her subjective fear of her husband" (at para. 3). In spite of Ms. Andres' evidence that her estranged husband had choked her, Justice Veit found that there was no objective basis for her to fear for her safety, pointing to the following factors: Mr. Andres did not have a criminal record, he was acquitted of an assault charge in relation to the choking incident, and he contested the alleged breaches of the no-contact order made after that incident (at para. 40). Further, Mr. Andres was bound by a recognizance in relation to a criminal charge against him (for uttering threats, criminal harassment and breaching a no-contact order against his estranged wife). Justice Veit reasoned that "it is counter-intuitive to assume that an individual who does not respect

criminal law standards which place him in jeopardy of criminal sanctions will more highly respect a civil law standard, the long term implications of which … are less onerous than the criminal ones" (at para. 41). Lastly, she noted that the "emotionally charged Christmas holiday period has presumably passed without incident" (at para. 42). The "reasonable conclusion" was thus not one that supported Ms. Andres' subjective sense of fear, but rather the case was seen to be "one of the vast majority of situations in which the breakdown of a marriage, and its attendant feelings of anger, betrayal, guilt, and anxiety, produces outbursts which gradually subside over time as the partners each adjust to their new situations" (at para. 42).

With respect, this purely objective approach to the consideration of the claimant's fear of family violence ignores the ruling in *Lavallee* that reasonableness must be looked at contextually in cases of intimate partner violence. The absence of a criminal record on the part of the respondent should be irrelevant, as it is a well known part of the context surrounding such violence that numerous incidents often occur before the matter is reported or acted upon by the victim. Nor should an acquittal for a charge related to domestic violence suggest that a fear of future violence is unreasonable, given the different standards of proof for criminal and civil matters. Further, while Mr. Andres was under a recognizance, the *PAFVA* itself indicates that the existence of another order in relation to the family violence should not preclude the granting of an EPO (*PAFVA* s. 2(2.1)(a)). Although Justice Veit cites this section, she notes that "equally, however, the existence of a parallel order does not preclude the denial of an order" (at para. 36). This is not what that section of the *PAFVA* was intended to mean. Section 2(2.1)(a) was added by amendment in 2006, and was intended to avoid the situation where an EPO would be denied because another order existed, only to have the other order overturned in another proceeding, leaving the complainant without any protection (see Leslie Tutty, Jennifer Koshan, Deborah Jesso, and Kendra Nixon, *Alberta's Protection Against Family Violence Act: A Summative Evaluation* (Calgary: RESOLVE Alberta, 2005) ("*PAFVA Evaluation Report*") at 94).

Overall, Justice Veit's insistence on a purely objective standard in these cases is problematic. However, even on a purely objective basis, some of her findings do not accord with what one would expect of the reasonable person in terms of their fear of family violence.

It is true that *Lavallee* dealt with the issue of self-defence to a criminal charge of homicide, and reasonable apprehension of death or grievous bodily harm in that context. However, domestic violence researchers and front-line workers have for years been advocating the need to understand such violence in context – why women stay with abusive partners, why they may downplay or deny the violence against them, and why they are the best judges of the level of risk of future acts of violence. This is not to deny that there must be a judicial process for determining whether protection orders are warranted, but such processes should be informed by the context of domestic violence and the circumstances of the parties rather than taking a purely objective approach. A purposive interpretation of the *PAFVA* would allow for that kind of contextual approach to be taken.

The second issue related to the propriety of granting mutual restraining orders in family violence cases. As Justice Veit notes in *Petropoulos v. Petropoulos*, family violence is a mandatory component of EPOs and other orders made under the *PAFVA*, but not a mandatory component of restraining orders (at para. 6). As stated above, one of the motivations behind the *PAVFA* was to provide a more accessible alternative to

restraining orders, which could be obtained *ex parte*, but only before a justice of the Court of Queen's Bench on a Notice of Motion (see Alberta Law Reform Institute, *Protection Against Domestic Abuse* (Report No. 74) (Edmonton: ALRI, 1997) at 1). Nevertheless, restraining orders continue to be used in family violence cases, both when those cases appear before the Court of Queen's Bench for confirmation of EPOs and as an alternative to EPOs (see *PAFVA Evaluation Report* at 46). These orders are issued pursuant to the inherent jurisdiction of superior courts rather than under the *PAFVA* itself. One practice of particular note is the granting of mutual restraining orders.

In *Andres*, Justice Veit decided not to confirm the EPO or grant a QBPO, and instead, on her own motion, granted mutual restraining orders proscribing each party's direct contact with the other. This was because, as noted above, she was not convinced that Ms. Andres reasonably feared for her safety, and further, because Mr. Andres' version of events was that Ms. Andres had engaged in assaultive behaviour towards him. In such circumstances, Justice Veit held that "it would be inappropriate to stigmatize only Mr. Andres and not Ms. Andres" (at para. 48). She argued that this remedy was to "put the parties on a footing of equality" (at para. 51).

The "equality" implied by mutual restraining orders is a form of formal equality, where both parties are treated the same regardless of potential differences in their circumstances which may require differential treatment. There are several difficulties with mutual restraining orders more generally. They suggest that both parties are equally at fault and in need of restraint, rather than probing into the actual circumstances between the parties. They do not clarify, for example, whether the alleged assaultive behaviour of one of the parties was in self-defence, or whether one of the parties was alleging violence as a litigation tactic. Such orders may give the wrong message to the authorities when enforcement is at issue – they will not have a clear sense of who is the dominant aggressor, which has implications for arrest, charging, child custody and access, and possible re-victimization (see Mary O'Brien, "Mutual Restraining Orders in Domestic Violence Civil Cases" (1996-1997) 30 Clearinghouse Rev. 231).

It does not appear that Justice Veit exercised the option of holding an oral hearing under s.3(4) of the *PAFVA* to determine whose version of events was more credible. This would have been preferable to granting a mutual restraining order.

The practice of granting mutual restraining orders does not appear to have been considered by the Alberta Court of Appeal. In one recent case, *L.L. v. D.G.*, 2009 ABCA 387, the Court referred to the fact that mutual restraining orders had been granted by the Court of Queen's Bench on the consent of the parties at the EPO confirmation hearing (at para. 9). The jurisdiction of the Court of Queen's Bench to do so was not challenged at the Court of Appeal, as this case concerned a different issue (namely the reviewing justice's grant of supervised access to the father during the confirmation hearing, which was done without notice to the mother and was found to be beyond his jurisdiction). It is to be hoped that the Court of Appeal will eventually consider the propriety of this practice. Even where the parties appear to consent to mutual restraining orders, caution must be exercised in light of the fact that coercion is often an element of relationships where domestic violence has occurred.

cc BY NC ND