

CANADA / JUDGMENT

Dowling v. Dowling

2024 BCSC 985

COURT

Supreme Court of British Columbia

DECIDED

11 April 2024

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2024 BCSC 985 Dowling v. Dowling

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dowling v. Dowling,

2024 BCSC 985

Date: 20240411

Docket: E200688

Registry: Vancouver

Between:

A.R.D. also known as A.R.A.

Claimant

And

M.J.D.

Respondent

Before: Associate Judge Robinson

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

In Person

Counsel for the Respondent:

R.P. Hamilton

Place and Date of Hearing:

Vancouver, B.C.

April 4, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 11, 2024

- [1] THE COURT: These reasons for judgment are given in respect of an application brought by the claimant heard on April 4, 2024. I reserved my decision until today.
- [2] I am providing these reasons orally in the interests of time. In the event that a transcript is ordered, I reserve the right to make revisions to address any grammatical issues and also to include citations and other changes where applicable. However, those revisions, if made, will not affect the substance of my decision.
- [3] Accordingly, given the haste with which I was required to provide my reasons, I will not recite in any detail all of the evidence that was presented on this application. The parties can however be assured that I have reviewed the affidavits in their entirety in arriving at my decision.

BACKGROUND

- [4] Very briefly, this application arises in the context of a family law dispute. Following a period of cohabitation which began in January 2017, the parties were married on July 6, 2019. They remained married until February 21, 2020, at which time they separated. In the meantime, on January 2, 2020, the claimant gave birth to a child of the marriage. That child is now four years old.
- [5] The ensuing litigation has been acrimonious. Notwithstanding that acrimony, the parties have been able to resolve many of the outstanding issues and entered into a consent order on March 30, 2021. The consent order was varied by consent on November 17, 2021, and the varied consent order remains in effect. Neither party seeks to vary its terms on this application. The consent order in its present form addresses, inter alia, child support, spousal support, and interim parenting arrangements whereby the child of the marriage is to reside with the claimant and have supervised visits with the respondent.
- [6] On the present application, the claimant seeks to extend an order made on March 28, 2023, by Master Robertson, as she then was. Specifically, on March 28, 2023, Master Robertson heard an ex parte application by the claimant for what is commonly referred to as a protection order under s. 183 of the Family Law Act, SBC 2011, c. 25. On hearing the application, Master Robertson granted the application and ordered that, inter alia, (1) the

respondent be restrained from directly or indirectly communicating with or contacting the claimant, specifying that indirect communications include communications with the claimant's family and friends which pertain to the claimant; (2) the respondent be restrained from going within 100 metres of the claimant's residence; and (3) the respondent be restrained from being within 100 metres of the claimant, except in cases of a hearing of the family law matter.

- [7] Master Robertson's order expired one year after its pronouncement on March 28, 2024. I understand, from what was presented at the hearing of this application, that the order of Master Robertson had been extended until April 4, 2024, which is the date on which I heard this application. On an interim basis, at the conclusion of the hearing, I ordered that Master Robertson's order should be further extended until the issuance of my decision, being today, April 11, 2024.

Legal framework

- [8] The following provisions of the Family Law Act deal with family violence.

- [9] Section 1 defines family violence as follows:

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

- [10] Under s. 183(2), the court may make an order to protect a family member if family violence is likely to occur and the family member is an "at-risk family member". Under s. 182, an at-risk family member is a person whose safety and security is or is likely at risk from family violence by a family member.

[11] In considering whether or not to make a protection order, the court is required to consider the risk factors set out in s. 184(1) which provides:

184 (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

- (a) any history of family violence by the family member against whom the order is to be made;
- (b) whether any family violence is repetitive or escalating;
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
- (f) the at-risk family member's perception of risks to the at-risk family member's own safety and security;
- (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

[12] I emphasize that I am not required to be satisfied that family violence is a certainty. At the same time, I must be satisfied that family violence is more than a mere possibility. My discretion to make a protection order arises when I am satisfied that family violence is likely.

[13] The court has discussed the assessment of likelihood of future family violence in a number of decisions. A concise overview of the applicable law is found in the recent decision of Justice Fitzpatrick in *Raj v. Raj*, 2022 BCSC 110, which is reproduced at paragraph 15 of the reasons for judgment of Justice Tucker in *R.D. v. R.S.D.*, 2022 BCSC 1290, as follows:

[78] Section 183(2) of the [Family Law Act] provides that the Court may make a protection order if family violence is "likely" to occur.

[79] The purpose of this provision is to recognize the danger to vulnerable family members in volatile relationships and allow the Court to impose measures to ensure their safety . . . In *Morgadinho v. Morgadinho*, 2014 BCSC 192 at para. 59, the Court determined that the broad and inclusive definition of "family violence" recognizes harm which can extend beyond the infliction of purely physical violence.

- [80] In *Dawson v. Dawson*, 2014 BCSC 44, the Court considered an approach to assessing the likelihood of family violence occurring:
- [44] The fact that there has been an act of physical family violence, even a single act of physical family violence, may provide a sufficient basis to conclude that family violence is likely to occur in the future. Although the passage of time may serve to reduce the probative force of such evidence, to the extent the circumstances giving rise to the earlier act of violence remain at large, the predictive quality of that earlier act may not be diminished with the passage of time. Moreover, it seems to me that when assessing the "likely" threshold set out in s. 183(2)(a) regard should be had to the gravity of the harm that might follow from an act of physical family violence.
- [45] ... Given the protective purpose of orders under Part 9 of the Family Law Act, it is reasonable in my view to apply what might be termed a sliding scale to the threshold. The potential for very serious acts of violence is sufficient to engage the provisions of the Act, even if those acts of violence are, in absolute terms, not particularly likely.
- [81] In *S.M. v. R.M.*, 2015 BCSC 1344, Justice Fitch (as he then was) stated:
- [25] judges hearing applications of this kind must approach the issue from a broad and contextual perspective, taking into account a variety of factors that frame the risk analysis in determining whether family violence is likely to occur. The inquiry is future orientated but it takes its shape from past conduct and present circumstances that inform the assessment of risk.
- [14] The foregoing passages recognize the inherent difficulty in attempting to predict future events. In most cases, the court is required to refer to past events as predictors of the future. However, that reference must account for any factors which suggest or indicate that past events are less likely to recur.
- [15] In using that analysis, I have no hesitation in finding that the respondent's past actions constituted family violence as defined in the legislation. Likewise, it is readily apparent that the claimant was the target of family violence. In saying that, it is not necessary to recite the affidavit evidence in its entirety and I will not do so. Instead, I will focus my analysis on three related phases being: (1) the events which occurred during the parties' marriage; (2) the events which occurred after separation but prior to the issuance of Master Robertson's order; and finally (3) the events of the past year, since the issuance of Master Robertson's order. In this regard, I note the following.
- [16] During the parties' marriage, the claimant deposes that the respondent:
- a) yelled at her frequently;
 - b) demeaned, belittled, and criticized her;
 - c) accused her of infidelity;

- d) isolated her from her social network and controlled her;
- e) physically assaulted her on multiple occasions, including kicking, grabbing, and pushing her; and
- f) sexually abused her.

[17] It is notable, in my view, that the claimant's evidence concerning her experience during the parties' marriage is not contested. The respondent's affidavit does not address events which occurred during their marriage. Accordingly, without making any final determination, I must proceed on the basis the allegations I have just outlined are true.

[18] Turning to the next phase, in the period following their separation, up to and including the issuance of Master Robertson's order on March 28, 2023, the claimant has proffered evidence which demonstrates that the respondent inundated her with communications, primarily but not exclusively in the form of emails where he raised a number of disturbing allegations concerning the claimant's character, morality, and general fitness as a parent. In some instances, these communications were delivered to third parties who had no interest in the underlying litigation.

[19] The respondent does not deny his actions following the parties' separation. Indeed, he accepts and agrees that his communications were improper and he deposes:

... I acted poorly and in fact even shamefully. I sincerely regret reaching out to friends and relatives of the Claimant and airing our grievances with them. My actions were totally inappropriate and I have apologized and understand why the Claimant felt compelled to obtain a Protection Order.

[20] The respondent explains and attributes his inappropriate actions to having been borne of frustration, and in particular the claimant's unwillingness to finalize the terms of settlement, which he says were completed in the course of a lengthy mediation held on April 20, 2021. That mediation resulted in the issuance of a settlement agreement which purported to resolve all of the outstanding issues between the parties, including the respondent's parenting rights. It is apparent that he regarded, and perhaps continues to regard, that settlement agreement as binding. However, the claimant has refused to execute the agreement and the respondent's parenting rights remain unresolved and remain subject to an interim order made on March 30, 2021, and varied on November 17, 2021. As indicated, that order restricts the respondent to limited supervised visitation with the couple's child.

[21] The final phase to consider is the period of slightly more than one year since the making of Master Robertson's order. Although the claimant alleges that the respondent has violated the order and engaged in ongoing family violence as defined in the legislation, I do not find that to have been the case. The claimant relies on a couple of discrete examples which she says constitute ongoing family violence, including an email sent to their child's daycare operator in June 2023, and an instance when she found the respondent's business card in the child's backpack.

[22] While I do not doubt that these examples caused some angst to the claimant, on the evidence before me, I am not satisfied that the respondent has engaged in any activities which constitute family violence for the purposes of the legislation since the pronouncement of Master Robertson's order in March of 2023.

[23] With the foregoing in mind, I turn to consider the factors as outlined in s. 38.

History of family violence

[24] As indicated, there is uncontested evidence of family violence by the respondent. I find that this factor supports the issuance of a protection order.

Whether family violence is repetitive or escalating

[25] The evidence discloses that the respondent has not engaged in any family violence for more than one year. While that may be a factor which favours the respondent and indicates that a protection order is unnecessary, I am mindful of the fact that the one-year period coincides with the pronouncement of Master Robertson's order. While I am not doubting the respondent's expression of contrition, and I have no doubt he is committed to adopting a different approach in his interactions with the claimant going forward, I am unable to determine whether this approach is a result of the protection order having been made. Accordingly, this factor is neutral in my analysis.

Is there any evidence of psychological or emotional abuse or evidence of a pattern of coercive or controlling behaviour directed at the at-risk family member?

[26] Again, I reference the uncontested evidence of the claimant regarding her experiences during the marriage and following separation up to the pronouncement of Master Robertson's order. This factor favours the applicant.

The current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent intention to separate

[27] This factor is most difficult to assess. On the one hand, it is apparent to me that the respondent has resigned himself to the status quo insofar as his parenting rights are concerned. He has adopted a more conciliatory stance in this litigation, and in his affidavit he has provided an express undertaking to the court that if the protection order is not granted, he will have no contact with the claimant, except through their respective lawyers, and further that he will not repeat his actions, which he has characterized as both irresponsible and impulsive.

[28] While I do not question the sincerity of that undertaking nor the respondent's intentions, I am mindful of the fact that the litigation is ongoing and has the potential to become increasingly acrimonious.

[29] The recent disclosure of information may have implications on the parties' future parenting rights and obligations. Given the history of the parties' relationship and the potential for more hard-fought litigation, I am genuinely concerned about a recurrence of family violence as defined in the legislation. On balance, I find this factor to be neutral.

Any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence

[30] Save and except for the history of violence to which I have already referred, this factor does not apply in the present case and does not support the making of the order sought.

The at-risk family member's perception of risks to his or her own safety and security

[31] In considering this factor, I refer to the claimant's affidavit wherein she has deposed:

I feel unsafe and scared of [the respondent] and I . . . feel like he is stalking me. I am constantly on the lookout for [the respondent], or his friends, following me, as he has stated in the past that he has people watching me.

[32] I am satisfied that the claimant has accurately and honestly described her perception of the risks of family violence. At the same time, a bare assertion of a party's perception is not a sufficient basis on which to issue a protection order. The perception must be reasonable and have some basis in fact.

[33] In this case, I am satisfied there is a reasonable basis for the claimant's perception, including the respondent's prior statement of having people watch the claimant. This factor favours the order sought.

Any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health, or economic dependence

[34] Although, there is evidence of certain discrepancies between the parties' relative positions, I am unable to find those discrepancies increase the claimant's vulnerability. This factor favours the respondent.

[35] I am left with a case in which there is a compelling history of family violence, including physical violence, perpetrated by the respondent against the claimant. There are two factors which cause me to question whether family violence is likely to occur in the future. The first is that family violence has subsided and has not occurred in more than one full year. However, it is impossible to say whether the subsidence would have occurred without the issuance of Master Robertson's order.

[36] Moreover, one year without family violence should not be given undue weight when viewed against the lengthy history of violence which began during the parties' marriage and continued following separation.

- [37] The second mitigating factor is the respondent's expression of regret and contrition, accompanied by his undertaking to refrain from any contact with the respondent, even if a protection order is not made. I reiterate, I do not doubt the sincerity of the respondent's undertaking, but just as the court cannot predict the future with certainty, neither can the respondent.
- [38] Given the potential acrimony that may arise in this litigation, his future reactions are decidedly unpredictable. I expect that if the respondent had been asked to do so prior to the litigation, he would not have hesitated to provide an undertaking to comport himself with professionalism. The fact is litigation is adversarial. Litigants understandably become frustrated given the personal issues associated with a family law dispute. That frustration can manifest in troubling ways and can cause an otherwise reasonable person to engage in unreasonable and, in some cases, violent acts. Accordingly, while I have thoroughly considered the mitigating factors, I am not satisfied they constitute a sufficient basis to deny the application. I find the evidence before me requires, I make a protection order on the same terms as set out in the order of Master Robertson.
- [39] Specifically, I order that under s. 183 of the Family Law Act, with the exception of the communication through legal counsel for the purposes of this legal proceeding, the respondent is restrained from directly or indirectly communicating with or contacting the claimant, with said indirect contact including sending emails that pertain to the claimant to the claimant's friends, family members, and sending emails to her counsel which include the claimant as a respondent.
- [40] I further order that pursuant to s. 183 of the Family Law Act, the respondent is restrained from going within or engaging, hiring, or retaining third parties from going within 100 metres of the claimant's residence.
- [41] I further order that, pursuant to s. 183 of the Family Law Act, the respondent is restrained from being within 100 metres of the claimant, except in the case of a hearing relating to this proceeding.
- [42] I further order that pursuant to s. 183 of the Family Law Act, any police officer, including any RCMP officer having jurisdiction in the Province of British Columbia, who is provided with a copy of this order and who, on reasonable and probable grounds, believes that the respondent is in breach of the terms of this order, shall immediately arrest the respondent and bring him before this court on the next court day following his arrest to be dealt with on an inquiry to determine whether he has committed a breach of this order or is in contempt of court.
- [43] This order will remain in effect for one year and shall expire on April 10, 2025, subject to agreement of the parties or further order of this court.

"Associate Judge Robinson"

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