

CANADA / JUDGMENT

S.K. v. S.U.K.

2024 BCSC 168

COURT

Supreme Court of British Columbia

DECIDED

1 February 2024

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2024 BCSC 168 S.K. v. S.U.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.K. v. S.U.K.,

2024 BCSC 168

Date: 20240201

Docket: E69093

Registry: New Westminster

Between:

S.K.K. also known as S.K.

Claimant

And

S.U.K.K. also known as S.U.K,

SCIS Inc. and

TD Ltd.

Respondents

Before: Associate Judge Krentz

Reasons for Judgment

Counsel for the Claimant:

K.S. Atwal

Counsel for the Respondent, S.U.K.:

G.K. Tiwana

Place and Date of Hearing:

New Westminster, B.C.

January 23, 2024

Place and Date of Judgment:

New Westminster, B.C.

February 1, 2024

- [1] The claimant wife, S.K.K. also known as S.K., has applied for a protection order pursuant to s. 183(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], for herself and the child, S.R.K., born [D.O.B.], 2016 (the "child"), as against the respondent husband, S.U.K. I dismissed the application at the hearing with reasons to follow. These are those reasons.

BACKGROUND

- [2] The parties married in November 2010 and separated in April 2023. The date of separation is in dispute, as the parties continued to reside together in the family residence until early January 2024. After the marriage, the parties resided in India until they immigrated to Canada in 2015.
- [3] The claimant alleges that during the last five years of the marriage, the respondent was physically and sexually abusive towards her. There are no allegations that the respondent abused the child.
- [4] In 2013, the claimant became pregnant with their first child, however, that pregnancy was terminated at about 22 weeks. This had a detrimental effect on the claimant's mental health and resulted in her falling into depression.
- [5] After settling in Canada, the claimant became pregnant again in February 2016 that resulted in the birth of the child. Shortly thereafter, the claimant was diagnosed with postpartum depression as she had not fully recovered from the trauma associated with the termination of her previous pregnancy.
- [6] The claimant decided that she would not have any more children, which was a decision that the respondent did not agree with. The claimant alleges that, starting in 2018, the respondent would pressure her to have another child; and in February 2018, he attempted forced unprotected sexual intercourse upon her.

- [7] Soon after that incident, the respondent's mother travelled from India to stay with the parties at the family residence for approximately six months. The claimant alleges that a few days before the respondent's mother returned to India, the respondent, along with his mother, came into her bedroom to again try to convince her to have another child. When the claimant confirmed with them that she did not want to have more children, the respondent became upset and started slapping her on the face in front of his mother.
- [8] After the respondent's mother returned to India, the claimant alleges that the respondent again forced sexual intercourse upon her on a regular basis. In February 2019, the claimant became pregnant but in April 2019, she miscarried. The doctor's note indicated that this was not a wanted pregnancy and the claimant stated the respondent insisted they try to have another child.
- [9] In 2020, the respondent's mother returned to live with the parties for approximately two years. During that time, the claimant alleges that the respondent's mother continued to pressure her to have another child. In late 2021, the parties attended counselling sessions, however, the respondent was still not in agreement with the claimant's decision to have no more children.
- [10] The claimant alleges that the respondent continued to force sexual intercourse upon her. During one attempt in May 2022, the claimant alleges that the respondent slapped her, so she called the police. When the police attended the home, they took the respondent away and he was advised not to return to the home until the next day. There were no charges pursued against the respondent.
- [11] In April 2023, the respondent's mother again returned to the family residence and stayed with the parties until December 2023. The claimant alleges that the same pattern was repeated with them putting pressure on her to have another child.
- [12] On December 18, 2023, the respondent's mother returned to India. The claimant alleges that on December 20, 2023, after having gone out as a family to the child's concert and dinner with friends, the respondent again attempted to have forced sexual intercourse with the claimant.
- [13] On January 3, 2024, the claimant made an ex parte application for a protection order that was granted by the court on the condition that the order would expire on January 23, 2024, unless it was renewed by further order of the court.
- [14] On January 4, 2024, the respondent was served with the ex parte order, along with the materials in support of the application. Upon being served with the order, the respondent obtained alternate accommodations.

- [15] The respondent submits that the claimant has in making these serious allegations of abuse, both mischaracterized and exaggerated the parties' relationship. He submits that he was wrongfully ousted from the family home. However, he is prepared to maintain his own accommodations but is opposed to the protection order being renewed.
- [16] In his affidavit the respondent deposes that after the first pregnancy was terminated, he did not suggest having another child until they immigrated to Canada. He further deposes that after the child was born, they did discuss having another child on many occasions but he never pressured the claimant in the manner that she alleges.
- [17] The respondent vehemently denies any allegations that he forced sexual intercourse upon the claimant at any time or was otherwise physically abusive to her. He does acknowledge that the parties did have arguments and sometimes in the presence of the child.
- [18] The respondent further deposes that when his mother came to stay with them, she would tell both of them that they should consider having another baby so that the child would have a sibling. However, he says there was nothing malicious or in any manner meant to put pressure on the claimant. He does acknowledge that one time the claimant did become agitated and told his mother if she wanted another child she should give birth herself.
- [19] He further deposes that when the claimant became pregnant in 2019 it was because they had both agreed to try to have a second child. He further deposes that both of them were quite upset with the miscarriage of that pregnancy but he did not in any manner blame the claimant.
- [20] The respondent deposes that they attended couples counselling in an attempt to resolve their marital issues, which included that the claimant felt that the respondent had become distant from her and blamed her for the miscarriage. During counselling sessions, the respondent says that he told the claimant that only when she was ready, he would like to try to have another child upon consultation with the family doctor or a specialist. One of the issues that they tried to address during counselling was that they were having difficulty communicating properly with each other and, at times, they would have arguments in front of the child.
- [21] With respect to the May 2022 incident, the respondent denies that he attempted to force sexual intercourse upon the claimant and that he slapped her when she refused. He does acknowledge that the subject of having another child did come up and the claimant became upset and started yelling at him, complaining that he was being selfish and insensitive. The respondent deposes that when he tried to calm the claimant down, she told him she had enough and called the police. When the police attended, they spoke separately with both of them and he was told to leave for the night but he could return in the morning. The respondent deposes that he was told by the police that in these type of situations, one party is always asked to leave for the night so that things will cool down and not escalate. He was not arrested and spent the night at a friend's home.

- [22] The respondent further deposes that when the respondent's mother came here in April 2023, after discussions between the parties, it was agreed that the parties would continue residing together in the family home but maintain separate bedrooms. Therefore, the claimant and child shared one bedroom and while the respondent's mother was there, they shared another bedroom.
- [23] The respondent deposes that there was a family meeting in October 2023, that included his mother, the claimant's brother and his wife, along with other family friends. The purpose was to discuss whether the parties would attempt a reconciliation or permanently separate. During that meeting, the claimant expressed that she wanted to be permanently separated, so it was proposed that the house could be sold or she could retain it. It was also discussed, and not opposed by the respondent, that the claimant would travel with the child to India in February 2024. In the meantime, the claimant would retain a lawyer and steps would be taken to make formal arrangements with respect to their separation.
- [24] The respondent deposes that he heard nothing further until he was served with the protection order on January 4, 2024. The respondent says that if he was told during the family meeting that she wanted him to move out, all she had to do was ask.
- [25] The respondent submits that the actions of the claimant are not consistent with the actions of someone who has been physically and sexually abused. He submits that following the alleged December 2023 incident, the claimant was regularly sending text messages to the respondent such as advising him as to when she was coming home, sending him photos of the child's school work and asking him to pick up the child from activities. These text messages are attached as exhibits to the respondent's affidavit.
- [26] On the day that the claimant obtained the ex parte order, the claimant sent a text message confirming that she expected the respondent would pick up the child from a karate class at the end of the day. This is despite having just obtained an order that prohibited the respondent from having any contact with her and the child, and further restrained him from attending at the child's school or any of his activities.
- [27] The day after obtaining the order and while arrangements were being made to serve the respondent, the parties were exchanging text messages regarding unauthorized charges on a credit card. When the respondent was served, the documents were in a sealed envelope that he did not open until later in the day. Once he became aware of the order, the respondent ceased all communications with the claimant.
- [28] The respondent's mother has provided an affidavit and she denies putting pressure on the claimant to have another child. She deposes that a few days after she arrived in April 2023, the parties were having arguments and to avoid any further issues, she suggested that the respondent and her share a bedroom, so that the claimant could have her own bedroom. She further deposes that during her most recent stay, the parties were amicable with each other and shared the parenting duties. The child would alternate nights sleeping with one parent one night and the other parent the next night. She deposes that the respondent would

do the drop-off and pickup for school and take the child to his activities, as the claimant does not drive.

- [29] The respondent's mother confirms that the purpose of the family meeting in October 2023 was to discuss the parties' reconciliation or a permanent separation and that the claimant expressed a desire for a permanent separation. They discussed that they could either sell the house or the claimant could retain it. They also agreed that they would continue to co-parent the child and that the claimant could take him to India in February 2024.

ANALYSIS

- [30] Family violence is defined in s. 1 of the FLA as including:

- (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,

I 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

I in the case of a child, direct or indirect exposure to family violence.

- [31] Section 182 defines an "at-risk family member" as "a person whose safety and security is or is likely at risk from family violence carried out by a family member". In considering whether to grant such an order, the court must consider the risk factors listed in s. 184(1) of the FLA:.

- (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;

I whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behavior 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;

I 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 his or her 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.

[32] Section 183 of the FLA is prospective and requires a finding that family violence is likely to occur in the future. The provisions of the FLA relating to family violence are intended to address a serious social issue and to protect children and spouses from actual harm or danger.

[33] When dealing with interim applications, including applications for protection orders, the court often has less than a panoramic view of the case. The parties are seldom afforded more than a couple hours for the hearing and the evidence is received in affidavit form. There is no oral testimony and no opportunity to cross-examine to test credibility, particularly where there are material conflicts in the affidavit evidence. This deprives the court of subtle nuances that are often critical to the resolution of complex cases and makes it difficult for the court to make realistic assessments as to credibility: (N.N.N. v. D.E.B., 2016 BCSC 1778).

[34] If the allegations made by the claimant are true, such allegations would meet the definition of family violence, as it would constitute physical and sexual abuse or attempts of sexual abuse of a family member. However, I agree that the actions of the claimant do not seem consistent with the allegations that she makes.

[35] The court does recognize that a victim's reaction to violence and abuse may vary depending on the circumstances. Powerful forces often prevent victims from disclosing or reporting abuse. This may include, but is not limited to, fear of retaliation, economic circumstances and the prospect of reliving a traumatic experience. It cannot always be expected that victims of abuse will immediately remove themselves from the abuser.

[36] In this application, there is significant conflict in the evidence. On affidavit material alone, it is indeed difficult to determine whose version is accurate. The respondent has denied the allegations and I am left with no reason to believe that his version of the events are inaccurate.

[37] In *Cabezas v. Maxim*, 2014 BCSC 767, the court dismissed an application for a protection order as the court was not persuaded that the applicant was in fear of, or had any present reason to fear, the respondent. Therefore, the court was not persuaded that family violence was likely to occur.

- [38] The onus is on an applicant to establish, on a balance of probabilities, that family violence is likely to occur. I cannot find that the claimant in this case has met that threshold.
- [39] The claimant alleges that she has been a victim of sexual abuse for over five years, yet during that time no charges were ever pursued against the respondent. On the one occasion when police were called, the respondent's explanation as to what occurred is plausible and, again, no charges were pursued against the respondent.
- [40] With respect to the most recent incident, the claimant deposed that "the respondent again physically abused me and tried to make attempts to have forced intercourse. The child and I have been locking the door of our room at night and do not open the door despite the respondent threatening to break it open", (Affidavit #1, para. 51). This is a vague description of the incident, as she does not provide evidence as to what constitutes physical abuse. Furthermore, if they were so afraid of the respondent that they locked the door at night, the claimant does not provide any explanation as to why she continued to share the residence with the respondent for another two weeks before obtaining the ex parte order.
- [41] I am also concerned about the veracity of the claimant's evidence. She obtained from the court an order that prohibited the respondent from having any contact with the child or attending at his school or activities, yet immediately after obtaining the order she arranged for the respondent to pick up the child from his karate class.
- [42] The day before she obtained the order, the claimant signed an affidavit wherein she stated "I am seeking a protection order for myself and the child and that the respondent be prohibited from attending the family residence and from attending the child's school or any other place where the respondent has reason to believe that we may be", (para. 54). It would seem that in making arrangements for the respondent to pick up the child the next day, that would belie the assertion of the claimant that she has a legitimate fear for the safety of herself and the child.
- [43] Accordingly, as I am not satisfied that the claimant and the child are "at-risk family members", the application for a renewal of the protection order is dismissed.
- [44] In *A.B. v. C.D.*, 2020 BCCA 11, the Court considered other remedies in the event a protection order is not appropriate. The Court noted that a conduct order, rather than a protection order with its serious implications, is a tool that allows the courts to ensure that conflict between the parties is minimized. Sections 222 and 227 of the FLA have been interpreted as giving the court "broad discretion to craft appropriate conduct orders", (*R.A. v. W.A.*, 2018 BCSC 1910 at para. 219).
- [45] In his affidavit the respondent deposes that he has no intention of returning to the family home, with the exception of attending to retrieve clothes, personal items, and documents (para. 50).

- [46] In order to minimize conflict between the parties, I will order that the respondent is prohibited from attending at the former family residence, unless with the written consent of the claimant or a court order. However, there will be the following two exceptions:
- a) the respondent may attend at the residence in the company of a police officer or third party agreed upon in advance, on one occasion to retrieve his personal belongings; and
 - b) to pick up or return the child for his parenting time but the respondent shall not enter the residence.

FURTHER ORDERS

- [47] As this family law proceeding is in the early stages, the parties would likely benefit from further guidance and interventions by this Court. Accordingly, I order that by January 31, 2024, the parties shall schedule a judicial case conference ("JCC").
- [48] As there may be some delay in a JCC taking place and a party may have to obtained further orders with respect to parenting arrangements and financial support, I also grant leave to the parties to file and serve applications related to parenting arrangements or financial support prior to a JCC taking place.
- [49] As the respondent was the successful party in this application, I further order that he is entitled to costs of this application in the cause.

"Associate Judge Krentz"

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