

CITATION: *RM v RS* [2022] NTLC011

PARTIES: RM

v

RS

TITLE OF COURT: LOCAL COURT

JURISDICTION: Civil

FILE NO(s): 22111326

DELIVERED ON: 28 February 2022

DELIVERED AT: Darwin

HEARING DATE(s): 1 October 2021

DECISION OF: Judge Greg Macdonald

CATCHWORDS:

Domestic and Family Violence Act – s 5, 6, 18, 19 and 21

REPRESENTATION:

Counsel:

Complainant: Self-represented

Defendant: Self-represented

Solicitors:

Complainant: Self

Defendant: Self

Judgement category classification: B

Judgement ID Number: [2022] NTLC011

Number of paragraphs: 36

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22111326

BETWEEN

RM

Applicant

AND

RS

Defendant

REASONS FOR DECISION

(Delivered 28 February 2022)

JUDGE MACDONALD

BACKGROUND

1. The Applicant and Defendant were married in November 2008 and divorced in June 2017. There are two children of the marriage. There have been three previous applications made by the Applicant for a Domestic Violence Order (DVO), two of which resulted in orders being made, with the third application being dismissed on 23 June 2020. For reasons which will become apparent, despite the terms of section 19(2) of the *Domestic and Family Violence Act 2007* (DV Act), other than the fact of previous orders having been made, I have not had any particular regard to those proceedings.¹ That is, due to the evidence filed and given in the Application by both the Applicant and the Defendant, it has been unnecessary to consider any evidence filed in previous applications. The Defendant has no criminal record for the purpose of s 19 of the DV Act.²
2. It is clear from evidence filed by the parties that the primary source of conflict and worse between them is the care, control, raising and education of their children. Arrangements for the children were a primary focus of the content of most of the evidence before the court, despite that it is sordid aspects of the communications from each party surrounding that focus which is relevant to

¹ Noting that in some circumstances this course may amount to error; *Bonney v Thompson* [2011] NTSC 81 at [17].

² Appendix D2 to one of Defendant's Affidavits sworn 15 September 2021.

determination of the Application. It is noted that, following conclusion of the hearing in October 2021, the Applicant requested the Application be amended to delete her previous surname and be entitled by the name she used prior to marriage.

3. Due to the evidence adduced in the proceeding and the potential consequences for the children, other than for the publication of any DVO or for the purpose of provision to any court exercising jurisdiction under the *Family Law Act 1975* (Cth), I prohibit the publication of the name of the parties and their children under s57(1)(b) of the *Evidence Act 1939*. In my view it is in the interests of administration of justice to do so.
4. The simplest and most effective manner in which to ensure such publication does not occur to the detriment of the children is to de-identify these reasons, which has been done. I also direct that the Court Record names the Applicant by her name used prior to marriage.
5. A proportion of the evidence included several failed attempts to secure a formal Parenting Plan under Part VII of the *Family Law Act 1975* (Cth). Such a Plan may have gone some way to ameliorating the conflict and antagonism between the parties, however recalcitrance and inability to compromise would appear to have prevented that outcome to date.

Application

6. On 6 April 2021 the Applicant made Application under s 30 of the DV Act for a Court DVO in respect of herself and the parties' two children. Clearly a sufficient domestic relationship existed between the parties to properly found the Application. On 6 April 2021 an Interim DVO was made in 'non-harm' terms for a period of 2 years, the confirmation of which is an issue in the proceeding.
7. The Application proceeded through various pre-trial processes, including several directions hearings at which various prescriptive directions were made, and was finally heard on 1 October 2021.
8. On the basis of the content of the Applicant's Affidavit of 6 April 2021 in support of the Application (apart from obligations on the Defendant concerning payment of maintenance) there would appear to be no family law orders made under Part VII of the *Family Law Act 1975* (Cth) concerning the children. If so s 19(2)(a) of the DV Act does not arise.

Principles

9. Section 5 of the DV Act defines "*domestic violence*". For reasons which will become apparent, I consider the relevant heads requiring consideration in the Application to be, firstly, "*intimidation*" and, second, "*damaging property*", in the context of "*attempting or threatening*" that proscribed conduct. Subsection 6(1) of the DV Act specifically defines intimidation to include "*harassment*". The note to subsection (1)(a) states "*giving or sending offensive material*" as one example of "*harassment*". Section 6(2) then provides that any "*pattern of*

conduct" by a defendant may be taken into account in determining whether "*intimidation*" is made out. That consideration is particularly relevant to the concept of "*harassment*".

10. Section 6(1)(c) also refers to "*conduct that has the effect of unreasonably controlling*" a person, and I note that in situations where children of a relationship reside primarily with one parent and access by the other is not formally provided by a registered Parenting Plan, there is always potential for allegations of 'unreasonable control'.
11. Section 19(1) of the DV Act provides that in deciding whether to issue a DVO, the court must "*consider the safety and protection of the protected Person to be of paramount importance*". The criteria set out by s 19(2) provide some non-exhaustive context in which to approach that paramountcy. The court must of course first be satisfied that there are reasonable grounds for an applicant "*to fear the commission of domestic violence*" before proceeding under s 18 to make a Court DVO. Obviously the usual focus in making that determination will be any relevant past actions or behaviour by a defendant. It is noted that the objects of the DV Act provided by s 3 include "*to ensure people who commit domestic violence accept responsibility for their conduct*". Although acceptance of responsibility would often bode well in relation to prospective conduct, acceptance of responsibility will often also bolster any application.
12. In relation to the criterion of "*intimidation*", which s 6 makes clear may be constituted by "*harassment*" per se, I note the Macquarie Dictionary relevantly defines those terms respectively to be "*to make timid, or inspire with fear; to force into or deter from some action by inducing fear*" and "*to trouble by repeated attacks; to disturb persistently; torment*".
13. The Federal Court in *ACCC v MUA & Ors* is authority supporting the proposition that a definite degree of persistence or frequency is ordinarily required for "*harassment*", noting that "*intimidation*" could be made out through a single event.³

Evidence and the Hearing

14. Each of the Applicant and Defendant were self-represented, which presented more than the usual challenges in relation to compilation and presentation of relevant evidence, adducing that evidence in admissible form, and in making appropriate submissions on and following 1 October 2021.
15. As is often the case with applications for a DVO, evidence in chief was by Affidavit, which is not inconsistent with s 116 of the DV Act. The Affidavit evidence essentially amounted to a total of at least 13 Affidavits filed and served over the period 6 April 2021 through to 7 October 2021. The contents of the Affidavits of both parties failed to appreciate or adhere to the distinction between evidence on the one hand, and submissions or perspectives on the

³ (2001) 187 ALR 487 at 499, although noting that the content of a single communication might in some circumstances be sufficient. For example, the threat of some immediate or future action or event.

other. In relation to facts, which were mostly text and email messages in annexures, the parties were particularly selective, which removed possibly important context.

16. The Affidavits and annexures were generally undisciplined and replete with toxic, venomous or damaging assertions and perspectives, none of which did either party any credit. In relation to annexures, neither party disputed that they were the respective authors of the offensive content.
17. In contrast, and to each of their credit, neither party sought to cross-examine the other in the venomous and destructive vein of their Affidavit evidence. That course was in the context of the court accepting that each party vehemently disagreed with the others perspectives and what they considered the court should make of the evidence. Of particular significance was also that each party made some frank and appropriate concessions. Namely, the Applicant agreed that the Defendant has never struck or assaulted her. The Defendant also made various concessions concerning the inappropriateness of things he has said and written from time to time. That was in the context of obvious contrition, remorse and regret. The Defendant also apologised on oath for those aspects of his behaviour which were wrong and unacceptable.⁴
18. It is clear that the Defendant has insight and, despite his unacceptable communication from time to time, has capacity for self-regulation and restraint when he is focused on that necessity. He has also taken steps through accessing professional services to correct and avoid repeating the sordid communications he has engaged in from time to time. Whether the Defendant ultimately succeeds in this remains to be seen.
19. It is also clear that the breakdown of the marriage, and particularly co-parenting in circumstances where one parent is providing a significantly greater proportion of daily care and control than the other, has caused significant tensions between the parties, particularly in relation to access and handover arrangements.⁵ Those tensions were frequently manifested by inappropriate, intimidating, aggressive, insulting, derisive, belittling or harassing communication by each party to the other. Of most concern is the content of some annexures in relation to asserted behaviour of the children. Although the volume of filed Affidavit material, and particularly the annexures, was significant, it is only necessary to refer to a select number of excerpts in these reasons for the purpose of determining the Application.
20. I first note that there is some evidence that the Applicant suffers some mental health challenges, however there is no evidence of "*harm*" having been caused

⁴ Paragraphs 4 and 5 of Defendant's 2 page Affidavit sworn 15 September 2021 and paragraph 3 of the Affidavit sworn 7 October 2021.

⁵ Which tensions and conflict have been exacerbated by the lack of any Parenting Plan endorsed by the Family Court. The various unsuccessful attempts to agree a Plan are referred to in the Applicant's Affidavit of 27 September 2021.

by the Defendant's actions or behaviour.⁶ Similarly, although it is freely conceded by the Defendant that he is significantly in arrears in payment of maintenance in respect of his children, there is insufficient evidence of the Defendant's conduct falling within section 8(d) of the DV Act by failing to pay those monies in a timely way. In my view proof of the "*withholding*" criterion would require some evidence of not only failure to pay, but a deliberateness in the face of a clear capacity to pay the monies. Neither of those matters are demonstrated on the evidence. I have therefore concluded that section 5(a) and (e) are not relevant to the court's consideration of the Application.

21. Despite assertions made by each party of 'unreasonable control' within the meaning of s 6(1)(c) of the DV Act, and noting no formal or compliant Application was made the Defendant, I have not proceeded to determine that criterion of proscribed conduct.⁷
22. Due to difficulties with much of the evidence provided by the Applicant referred to below, I consider the evidence of most significance in the context of intimidation, and specifically "*harassment*", is that filed by the Defendant. Particular examples are found in Appendix 2 of the Defendant's Affidavit of 15 June 2021⁸ and Annexure 3A to his Affidavit of 30 September 2021.⁹
23. Most of the content of the evidence referred to speaks for itself. Parts are antagonistic and malignant in the extreme. If any of that communication flowed in the presence of the children, it would be unacceptable and very likely harmful.
24. It is not my conclusion that the Applicant has been intimidated by the Defendants communications in the sense of being 'forced into or deterred from some action due to fear'. When viewed together, the 4 videos produced in evidence support this conclusion.¹⁰ It is clear that the Defendant's communication is prone to descend into unacceptable content more quickly than the Applicant's, despite that by various of the Applicant's initiating and reciprocating emails and text messages, she is very willing and able to advocate her position, and has also contributed to the sordid level of communications between the parties. However, regardless of who 'cast the first stone' in any of the numerous vituperative exchanges, the Defendant's communications by email and text have been 'repeated and persistent, and tormenting' in effect.

⁶ As defined by s 1A of the *Criminal Code*; see *Carne v Wride* [2012] NTSC 33 at [31].

⁷ The Defendant by paragraphs 6 and 7 of his Affidavit sworn 30 September 2021 requested a reciprocal DVO on this basis.

⁸ Emails from 29 October 2020 and 22 to 26 December 2020 contained in Appendix 2.

⁹ Emails from 22 December 2020 to 2 January 2021 contained in pages 36 to 47 of Annexure 3A.

¹⁰ Applicant's Affidavit sworn 30 August 2021 and Defendant's handwritten Affidavit sworn 15 September 2021.

25. There are aspects of the Applicant's evidence which must be rejected. Her accounts of the incidents of 21 March and 27 June 2021¹¹ at the Defendant's home are at the least inaccurate and coloured, despite that the Defendant is certainly blameworthy in relation to the first incident. I find that by 21 March 2021 the change-over arrangement in relation to the children was that exchange would occur (in the absence of any exception agreed) at the front gate of each party's property.¹²

26. Contrary to the assertions of the Applicant's Affidavit of 30 August 2021, the Defendant did not on 21 March 2021 throw rocks at the Applicant or scratch her car. The Defendant by his actions did effectively threaten at least to scratch the Applicant's car, by pretence, so is far from blameless.¹³ However, the incident of 21 March should be viewed in light of the change-over arrangements and with the video footage of the subsequent incident in June 2021 in mind.¹⁴ That includes noting the evidence filed by the Applicant was initially simply 6 screenshots, later followed by the muted edition of the subject video (following a court direction), and the inaccuracies in the Applicant's evidence.¹⁵ There is no evidence of the gravel which the Defendant picked up being thrown, and it is clear that his actions in relation to the bonnet of the vehicle were sheer pretence, albeit carried out in a threatening fashion. I consider the Applicant's actions, and very likely her words, on 21 March 2021 were deliberately provocative and inflammatory and, given her actions and demeanour on 28 June 2021, probably intentionally so.¹⁶ Regardless, that is no excuse for those aspects of the Defendant's behaviour which were objectively unacceptable.

27. In relation to the incident of 28 June 2021, the Applicant again travelled to collect her son on that date, and attended at the front door of the Defendant's

¹¹ Noting that the incident in fact occurred on 28 June 2021 (a day after lock-down), that date being corroborated by both the Defendant's handwritten Affidavit sworn 15 September 2021 (particularly Appendix A and the USB containing footage including audio) and the NT Police report comprising Appendix G to another of the Defendant's Affidavits sworn 15 September 2021.

¹² Paragraph 4 of the Applicant's Affidavit of 30 August 2021 refers.

¹³ So is evidence for the purpose of s 5(f) of the DV Act, but probably not s 6(1)(b)(ii) in the circumstances.

¹⁴ The common features of the Applicant's video records for 21 March and 28 June is that she engaged in verbal communication with the Defendant on both occasions, and each video had the audio removed from the copies provided to the court. The video footage, including audio, provided by the Defendant's handwritten Affidavit of 15 September 2021 is telling.

¹⁵ The Affidavit of 6 April 2021 stated "*he tried to damage my car with rocks*", the Affidavit of 17 May 2021 stated "[he] *then aimed rocks to throw at us and approached the car to scratch up the bonnet with a handful of gravel*" and the Affidavit of 30 August 2021 states "*in a spilt-second [he] turns and throws a rock at my windscreen*" and "*Next [he] comes at my car with a large rock/rocks and appears to scratch my bonnet*".

¹⁶ The audio to the video of 21 March 2021 had been removed from the edition provided by the Applicant. The only audio for the incident of 28 June 2021 was filed by the Defendant (from different footage, recorded by his sister during that incident), which provided quite a different scenario to that depicted by the Applicant's sworn narrative. The NT Police record of the incident, which was reported by each of the Applicant and Defendant, is also telling, including the Applicant's reliance on use of her vehicles horn at the gate to the Defendant's property.

residence contrary to the established change-over arrangement. That attendance was also in the context of C19 public health 'lock-down' orders having come into force on 27 June 2021, so the Applicant's attendance was in probable contravention of those orders. On that day the Applicant's treatment of and communication to the Defendant's mother was rude and disrespectful, which was compounded by her subsequent conduct by email and the inaccuracies included in paragraph 5 of her Affidavit of 30 August 2021.¹⁷ The facts that the Applicant's edition of the relevant video recorded the date as 27 June 2021 and that the sound from each of the videos she tendered depicting the incidents of 21 March 2021 and 28 June 2021 had been deleted are of real concern, as is that the incident of 28 June 2021 occurred following the filing of the Application. Those matters, together with the inaccuracies referred to, cast doubt on the reliability of all evidence of the Applicant concerning anything asserted to be said or done by the Defendant or his family at those incidents.

28. I also do not consider it likely that the Defendant has ever been intent on physically harming the Applicant, despite the unacceptable content of his communications, including references to his wish that the Applicant would die in various statements set out in Appendix 1 to the Applicant's Affidavit of 6 April 2021.¹⁸ However, the paramountcy directed by s 19(1) of the DV Act does impact the standard of balance of probability and application of the *Briginshaw* principle.

29. There is also evidence before the court of the Applicant's inappropriate communication with and behaviour towards the Defendant which could at least amount to intimidation in the form of harassment.¹⁹ However, as noted, the Defendant did not make any collateral application for a DVO.

Findings

30. The Application can largely be resolved on the basis of evidence provided by the Defendant's own Affidavits, which contain examples of his communications to the Applicant over the period December 2019 to September 2021. Due to the regularity with which the Defendant's written communication to the Applicant previously descended to sordid content, I am satisfied that sufficient grounds exist having regard to s 18 of the DV Act to warrant making a DVO.

31. In particular, sufficient evidence of conduct within s 5(a), (c) and (f) and s 6(1)(a) of the DV Act in the form of "*threatening*" to damage property and "*harassment*"

¹⁷ See Appendix A1 to the Defendant's handwritten Affidavit of 15 September 2021 and page 77 of Annexure 3A of his Affidavit of 30 September 2021.

¹⁸ A more complete and contextual edition of the communications over 22 to 26 December 2020 is contained at Appendix 2 to the Defendant's Affidavit of 15 June 2021. The approach applied in *Fernando v Firth* [2017] NTSC 67 at [50] is relevant, including conditional aspects, albeit a different standard of proof applies.

¹⁹ Appendices 1-9 and 1-10 and 2 to the Defendant's Affidavit of 15 June 2021. In addition to the videos of the incident of 28 June 2021 provided by the Defendant's handwritten Affidavit sworn 15 September 2021, see Appendix A1 to that Affidavit, and email of 2:35pm on 29 June 2021 at page 77 of Annexure 3A to the Defendant's Affidavit of 30 September 2021, amongst others.

exists. In addition to the evidence referred to at paragraphs [22], [23] and [26] above, I also rely on the video of the incident of 21 March 2021 in which the Defendant pretends to scratch the bonnet of the Applicant's car. It is clear from that footage that the Defendant was not intent on actually damaging the vehicle, however his actions can objectively and properly characterised as a threat to do so if the Applicant did not remove herself from his property.

32. In relation to the children named in the Application, I infer from the documented evidence of communication between the parties that the Defendant has previously said some unacceptable things to the Applicant in their presence. An order prohibiting that conduct in the future should be made.
33. Certain and formal written arrangements for the parental care and control of the children of the parties would go a long way towards addressing the unacceptable behaviour found by these reasons. However, that objective will need to be achieved under the *Family Law Act 1975* (Cth).
34. The Application sought a DVO for 2 years, and the Applicant's subsequently requested by Affidavit that any DVO be for a period of 5 years. It is relevant that an Interim DVO was made upon filing of the Application on 6 April 2021, so has been in place for almost 11 months. Associated with that is that the Defendant has insight and has taken some steps to address his unacceptable behaviour. Although the court has jurisdiction to compel the Defendant to seek therapeutic interventions, I consider it best in this matter to permit him to pursue those interventions of his own volition. It is also relevant that the Defendant is now on notice and knows full well the consequence of engaging in the sordid communications on which this DVO will be made. In any future Application s 19 of the DV Act will permit evidence of previous conduct to be adduced, and it would be a simple matter to call up file 22111326 and the evidence contained on it for that purpose.
35. The DVO should be made for the protection of the Applicant and the parties' two children for a period of one year from today. The conditions to apply must be directed to prohibit the unacceptable conduct constituting domestic violence proven by evidence.

Orders

36. The Interim DVO made 6 April 2021 is varied and confirmed as follows;

For a period of 1 year from today the Defendant is restrained in relation to the Protected Person and their 2 children, from directly or indirectly;

- (i) threatening, intimidating, harassing or abusing the Protected Person;
- (ii) exposing the Protected Person or their children to domestic violence of any form.

Dated this 28th Day of February 2022



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Judge Greg Macdonald
Local Court Judge