



## Digital Evidence in Protection Order Matters in BC Family Court

Digital evidence, such as text messages, e-mails, and Facebook posts, may be helpful in securing a protection order under the British Columbia [Family Law Act](#). Like hard copy documents, digital evidence must follow the British Columbia rules of evidence in order to be admissible in court. The fundamental principle of admissibility is that evidence is not admissible unless it is relevant. It is important to note that there are other rules of evidence that should be complied with but are beyond the scope of this document.

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*Relevant evidence is evidence that makes the existence of a material fact (a fact that is important to prove your case) more or less probable.<sup>1</sup>*

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With the prevalence of modern technology, digital communications are everyday occurrences. This evidence is often relevant to requests for Family Court protection orders. It is important to carefully consider which evidence is relevant for the protection order application and to include only that evidence. Ensuring that only the necessary evidence is included will allow the court to focus on the relevant information and the victim can explain to the court how the evidence is relevant to the order. Including a large volume of irrelevant evidence can make the application process less efficient and more costly. However, in some cases, the volume of communications from the perpetrator is relevant (case law examples are included below).

This information sheet will help victims identify important facts needed to obtain a *Family Law Act* protection order, as well as what digital evidence may be relevant in proving these facts. The victim must identify what digital evidence they have, determine which is relevant to the case, and be able to explain its relevance to a judge. It can also be helpful to speak with an anti-violence support worker or a lawyer to learn more about what evidence might be relevant.

### Family Law Act Protection Orders

Under s. 183(2) of the *Family Law Act*, a protection order can be made against a family member (the perpetrator) for the protection of another family member (the victim) if the court determines that family violence is likely to occur and that the victim is an at-risk family member.

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<sup>1</sup> *Teunissen v Hulstra* 2017 CarswellBC 3580.



Digital evidence should be saved if it may help a victim establish that family violence is likely to occur or show that they are an at-risk family member.

A family member is defined as:

- (a) the person's spouse or former spouse,
- (b) a person with whom the person is living, or has lived, in a marriage-like relationship,
- (c) a parent or guardian of the person's child,
- (d) a person who lives with, and is related to,
  - (i) the person, or
  - (ii) a person referred to in any of paragraphs (a) to (c), or
- (e) the person's child, and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e);

## General Factors in Determining Family Violence

According to Section 1 of the *Family Law Act*, family violence includes:

- Physical abuse or attempts of abuse, including forced confinement or deprivation of the necessities of life
- Psychological or emotional abuse including:
  - intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property. Texts messages and other electronic messages containing derogatory language may amount to family violence<sup>2</sup>
  - unreasonable restrictions on, or prevention of, the victim's financial or personal autonomy
  - stalking or following
  - intentional damage to property
  - in the case of a child, direct or indirect exposure to family violence
- Sexual abuse or attempts of sexual abuse

Family violence can often include children:

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<sup>2</sup> *L (KL) v J (D)* 2014 BCPC 85.



- In *L(DN) v S(CN)*,<sup>3</sup> the father made demeaning remarks about the mother to their child. He repeatedly told the child that she had been brainwashed and manipulated by the mother. The father told the child that her mother was responsible for the conflict between the two parents. The court found this to constitute emotional abuse and therefore, family violence. Similarly in *R (K) v D(J)*,<sup>4</sup> the father made derogatory and demeaning comments regarding the mother, in their child's presence. This was recognized as family violence by the court.
- In *Fyfe v Fyfe*,<sup>5</sup> the father and mother had 2 children together. The father had been harassing several teachers, sports team coaches, and other individuals involved in the children's lives through email. The harassment was enough for the judge to conclude that the children and mother were at-risk family members.

Digital evidence (i.e., texts, emails, etc.) should be preserved where the perpetrator is making demeaning remarks. For example, in *Fyfe*,<sup>6</sup> the judge relied on the harassing emails as evidence to support the conclusion that the children and mother were at-risk family members.

All digital evidence of incidents of family violence should be preserved. Under the British Columbia *Family Law Act*, "family violence" does not just include physical violence, but also includes psychological and emotional abuse. This is supported by both the *Family Law Act* language and case law. For example, the judge in *Morgadinho v Morgadinho*<sup>7</sup> held that the definition of "family violence" is very broad and not limited to physical violence. The digital evidence of technology-facilitated violence, which the victim perceives as threatening or abusive, should be preserved as evidence of psychological and emotional abuse.

### Factors the Court Considers in Protection Order Applications

Risk factors that the court will consider in protection order applications are listed in s. 184(2) of the *Family Law Act*. Any digital evidence relevant to the factors listed below should be preserved as these factors will determine whether or not the victim receives a protection order.

The s. 184(2) risk factors include:

- History of family violence by the abusive family member towards the victim

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<sup>3</sup> 2014 BCSC 1417.

<sup>4</sup> 2017 BCSC 182.

<sup>5</sup> 2014 BCSC 1999.

<sup>6</sup> 2014 BCSC 1999.

<sup>7</sup> 2014 BCSC 192.



- Even if the family violence occurred several months or years in the past, it can still be relevant in showing that family violence is likely to occur again. If the circumstances giving rise to the previous act of violence remains, evidence of the previous violent act is helpful in proving that it will happen again.<sup>8</sup>
  - Thus, if the victim has access to evidence of past acts of violence, they should save that evidence even if a substantial amount of time has passed since the last violent act.
  - If the evidence relied on is of past violence, it is important to make it clear in the client's evidence why and how that past violence is relevant to current risk.
- Whether any family violence is repetitive or escalating
- Whether any psychological or emotional abuse is evidence of a pattern of coercive and controlling behaviour
- The current status of the relationship between the abusive family member and the victim, including any recent separation or intention to separate
- Any circumstances of the abusive family member which may increase the risk of family violence towards the victim, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence
- The victim's perception of risks to her own safety and security
- Any circumstances that may increase the victim's vulnerability, including pregnancy, age, family circumstances, health or economic dependence

The risk factors listed above are not a full list of what should be considered when applying for a protection order. The victim should save a copy of all evidence that she thinks could show that family violence is likely to occur and that the victim is an at-risk family member.

In *Dawson v Dawson*<sup>9</sup>, the court stated that even the **potential** of acts of violence can also be the basis of a protection order even if these acts of violence are not particularly likely. Thus, the victim should save threatening texts, e-mails and other digital communications even if they appear to be jokes or seem unlikely to occur.

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<sup>8</sup> *Dawson v Dawson* 2014 BCSC 44.

<sup>9</sup> 2014 BCSC 44.



## Types of Protection Orders and Examples of Digital Evidence Relevant to These Orders

Different types of protection orders may be issued under s. 183(3) of the *Family Law Act*. Digital evidence has been deemed relevant to the issuance of these orders. Possible orders include:

### **Restraining the abusive family member from directly or indirectly communicating with or contacting the victim or a specified person**

- In *X v Y*,<sup>10</sup> the victim received excessive amounts of text messages and emails. The court equated this to psychological and emotional abuse, and therefore, acts of family violence. An order limiting communications with the victim was obtained to prevent further violence. Even if the contents of the texts that a victim receives seem harmless, volume is a relevant factor in assessing whether abuse occurred.<sup>11</sup>
- In *M (MW) v K (JD)*,<sup>12</sup> the perpetrator continuously sent text messages containing sexual themes to the victim. The court held that this was evidence of psychological and emotional abuse, and therefore, family violence. The court found that over 1,000 emails and texts in a period of 3-4 months was excessive and the perpetrator was restrained from communicating with the victim.
- It is also possible to limit a perpetrator's activities on social media through a protection order.
  - In *SS v HS*,<sup>13</sup> the father tried to contact the victim and their child through electronic exchanges. The victim made it clear that she did not wish to communicate with the father and blocked him on all social media. The judge issued an order prohibiting the father from publishing any information about the victim and their child via the internet or any social media.
- The order can also protect relatives or friends of the victim.
  - In *M(MW) v K(JD)*,<sup>14</sup> a restraining order was issued to prevent communication between both the victim and her parents. The perpetrator in this case had sent large volumes of emails and text messages to the victim's mother.

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<sup>10</sup> 2015 BCSC 336.

<sup>11</sup> *M (MW) v K (JD)* 2015 BCPC 315.

<sup>12</sup> 2015 BCPC 315.

<sup>13</sup> 2018 BCPC 289.

<sup>14</sup> 2015 BCPC 315.



- Sometimes the order will allow the perpetrator to communicate with the victim under specific circumstances. This often occurs in cases where the perpetrator and victim have children together:
  - In *M(CL) v S(MJ)*,<sup>15</sup> the father was restrained from contacting the victim, except to communicate about matters related to their children.
  - In *X v Y*,<sup>16</sup> the father was prohibited from contacting the victim at work unless there was a true emergency involving their children.
  - In *M(MW) v K(JD)*,<sup>17</sup> the victim and perpetrator had a time-share agreement. The perpetrator was allowed to communicate with the victim indirectly through legal counsel only for the purposes of resolving the time-share issue.

**Restraining the perpetrator from attending, nearing, or entering a place regularly attended by the victim. This includes the residence, business, school or workplace of the victim.**

- An order can be made to prevent the perpetrator from following or locating the victim.
  - In *YZ v AC*,<sup>18</sup> The father emailed the victim indicating his wish to see her and that he had bought plane tickets. He sent several text messages seeking to contact her. The court prohibited the abusive family member from attending any place where the victim or their children are known to be.
  - In *M(MW) v K(JD)*,<sup>19</sup> the perpetrator often texted the victim, asking her to meet him. He would not agree to talk to her through an intermediary and insisted on speaking to her directly. An order prohibiting him from coming within 100 metres of her was ordered.
  - In *YZ v AC*,<sup>20</sup> a father, with an order against him, was allowed to meet his children if the meetings were initiated by the children and attended by another adult. The abusive father was permitted to meet the victim under certain circumstances.

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<sup>15</sup> 2017 BCSC 799.

<sup>16</sup> 2015 BCSC 336.

<sup>17</sup> 2015 BCPC 315.

<sup>18</sup> 2019 BCSC 1564.

<sup>19</sup> 2015 BCPC 315.

<sup>20</sup> 2019 BCSC 1564.



**Restraining the abusive family member from possessing a weapon, a firearm or a specified object and restraining the abusive family member from possessing a licence, registration certificate, authorization or other document relating to a weapon or firearm.**

- In *M(MW) v K(JD)*,<sup>21</sup> the father sent messages to the victim mentioning that he was obtaining a gun license and that he was a good shot. These messages caused the victim to be fearful of the perpetrator, however, the messages were not sent in a threatening manner. Nevertheless, the abusive family member was prohibited from possessing any firearms or weapons.

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*Technology Safety Project*

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*This document is a part of a series that details how to preserve evidence related to the misuse of technology in experiences of domestic violence, sexual assault, and stalking. The series is part of the [Preserving Digital Evidence of Technology-Facilitated Violence Toolkit](#). This document, or any portion thereof, may be reproduced or used in any manner whatsoever as long as acknowledgment to the BC Society of Transition Houses is included in the product.*

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<sup>21</sup> 2015 BCPC 315.