Cite as: Lucas v. Lucas, 1993 NSCO 8

CANADA

PROVINCE OF NOVA SCOTIA

1992 S.H. 71694

CARLA KIM LUCAS (NOW WARD)

Petitioner/Respondent

- and -

GARY WILLIAM LUCAS

Respondent/Appellant

HEARD BEFORE:	The Honourable Justice Nancy Bateman
PLACE HEARD:	Halifax,Nova Scotia
DATE OF DECISION:	February 10th 1993 (Orally)
COUNSE::	Ms. C. Christie, for appellant W.I. Yeadon, Esq., for the respondent

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PROVINCE OF NOVA SCOTIA

1992 S.H. No. 71694

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

CARLA KIM LUCAS (NOW WARD)

Petitioner/Respondent

- and -

GARY WILLIAM LUCAS

Respondent/Appellant

BATEMAN, J.: (Orally at conclusion of hearing)

This is an appeal by Gary Lucas of a decision by a Judge of the Family Court, dated August 12th 1992. At that time the learned trial judge found that Mr. Lucas had not shown cause why he had not complied with an order for maintenance for his son, entered judgement against Mr. Lucas for the full amount of the arrears being Seventy-five Hundred Dollars ($7,500.00) and put into effect an ongoing garnishee order for the monthly support and directed the issuance of an execution order for the arrears.

In addition the judge ordered that Mr. Lucas pay Eight Hundred Dollars ($800.00) on or before September 5th 1992, or be incarcerated for 30 days.

Mr. Lucas appealed the order in its entirety. He obtained a stay of the committal order on September 3rd 1992 from the County Court pending his appeal.

The appeal was set for February 10th 1993, with the appellant's factum to be filed 30 days in advance.

While a transcript was prepared at the request of Mr. Lucas' then counsel, Mr. Lucas did not otherwise perfect the appeal. No factum was filed. On my direction, staff made efforts to contact Mr. Lucas to determine the status of matters, leaving a message on his machine about two weeks ago. There was no response.

Apparently Mr. Lucas retained counsel yesterday and she asked this morning that the matter proceed by oral argument only. As the respondent did not object, I heard oral representations.

As is common in these Family Law appeals, there appears to be some confusion on the part of Mr. Lucas as to this Court's role. My power on appeal is, to a limited extent, to re-examine and reweigh the evidence, to determine if it supports the conclusions reached by the trial judge. I am not, however, to simply substitute my view for that of the trial judge.

Mr. Lucas must demonstrate that the trial judge erred at law, or made a finding of fact not supported by the evidence. Findings of credibility are the province of the trial judge.

The proceeding before the trial judge was an enforcement

hearing, pursuant to s. 43 of the Family Maintenance Act. This is commonly known as a "show cause." It was a proceeding to determine if Mr. Lucas could provide a reasonable excuse for his failure to comply with the divorce corollary relief order.

There were several adjournments of the proceeding to accommodate Mr. Lucas. He did not comply with directions from the Court to provide financial information.

The judge heard the witnesses and expressly did not accept the evidence of Mr. Lucas, to the effect that he was unable to respond to the maintenance order. I quote her finding at page two of her decision: "For purposes of this hearing, his credibility is almost non-existent." She found that it was extremely difficult for counsel to get a straightforward answer from Mr. Lucas, under oath, and that he was evasive. The transcript and history of proceedings in the Family Court support those findings.

The trial judge rejected Mr. Lucas' evidence as to his business expenses and found his evidence as to finances, "highly unreliable." She found it incongruous that Mr. Lucas, while protesting his ability to pay, bought a new, luxury, vehicle, jewellery and clothing and boasted of his financial success to friends. Again, her findings in that regard, were supported by the evidence.

Independent evidence was called from a Mr. Pettie, a friend of Mr. Lucas, to the effect that Mr. Lucas boasted of

thwarting his obligation to pay maintence and said he was earning Forty Thousand Dollars ($40,000.00) per year, as well as a car bonus.

The Judge accepted Mr. Pettie's evidence, as she was entitled to do. Indeed it is a rare case when a Court has the luxury of such independent evidence.

Mr. Lucas submits that the Court should have rejected Mr. Pettie's evidence, of Mr. Lucas' comments to him, on the basis that Mr. Lucas was overstating his position, or to put it bluntly, lying to Mr. Pettie to impress him; that is a two edged sword.

Significant is the fact that Mr. Lucas did not take the witness stand to contradict Mr. Pettie. His evidence went unrebutted.

Counsel for Mr. Lucas submits that I am to consider the devastating effect that the garnishee order has had on Mr. Lucas since the August trial. That, however, even should I accept that the order has worked a hardship, is not before me. That is a matter for review by the Family Court, on motion of Mr. Lucas. I can only adjudicate upon the circumstances as presented to the trial judge, culminating in the August 12th decision. I must put myself in her place at that time and not consider matters transpiring subsequently.

I am satisfied that, as regards to the findings that Mr. Lucas had not shown cause; on the entry of judgement; and on the garnishee order, the learned trial judge made no error of

law.

In addition I am satisfied that there was ample evidence to support her findings of fact and the inferences she drew from those facts.

There remains the appeal of the committal order. It is to be noted that Ms. Lucas made it clear at the outset of this appeal that she was not seeking compliance with the committal order. In my view, however, unlike other orders of the Court, it is questionable whether parties have the ability to consent to the setting aside of a committal order, which type of order is really one upholding the Court's own process.

The Family Court has acted upon the execution order, in partial satisfaction of the judgement. Apparently funds that were held by a lawyer, in trust, for both parties were levied upon, to the extent of Twenty-nine Hundred and Fifty Dollars ($2,950.00) and applied to the credit of Mr. Lucas. Technically, then, the Eight Hundred Dollars ($800.00) payment by Mr. Lucas to forestall the incarceration has been satisfied. In my view, then, the propriety of the committal order is no longer a live issue. I refrain from adjudicating specifically on that point. As to prospective committal orders, generally, however, there may be an argument on the basis of Clyburn v. Clyburn, (1987), 78 N.S.R. (2d) 334, Nova Scotia Supreme Court Appeal Division, as it then was, that a

Family Court Judge acting under s. 43 of the Family Maintenance Act, which was then s. 39(1), must incarcerate immediately, or hold a second show cause hearing prior to actual committal. In this regard then, if there was an error by the trial judge here, it was ironically an error in Mr. Lucas' favour, by permitting him time to comply with the order to pay Eight Hundred Dollars ($800.00). Had the issue not been moot, I would have varied the trial judge's order, insofar as permitting Mr. Lucas time to pay and ordered immediate incarceration.

These latter comments are however, gratuitous, as the committal order has been vacated by payment.

In the interests of completeness of the Family Court file, I direct that the clerk of this Court shall arrange to have this decision transcribed and submitted to the Family Court for filing.

In these circumstances, given that Mr. Lucas is on a certificate, I am not going to make an order for costs. Normally however, it would be my view that Mrs. Lucas, even though represented by Legal Aid, would be entitled to her costs, to be retained by Legal Aid, to defray their costs in representing her in this case. However, I make no order as to costs.

Nancy Bateman
J.

Halifax, Nova Scotia
February 10th 1993