IN THE SUPREME COURT OF NOVA SCOTIA
Citation: E.M.G. v. G.R.W. 2007 NSSC 356

Date: 20071219
Docket: S.H. 287917
Registry: Halifax

Between:

E.M.G.

Respondent/Applicant

v.

G.R.W.

Applicant/Respondent

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: November 27th, 2007, December 3rd, 4th, 5th, 2007, in Halifax, Nova Scotia

Oral Decision: December 6th, 2007

Written Decision: December 19th, 2007

Counsel: E.M.G., Self-represented
G.R.W., Self-represented

By the Court:

[1] This is an application pursuant to s. 12(1) of the **Domestic Violence Intervention Act**.

[2] On November 7th, 2007, Ms. G. obtained an Emergency Protection Order against Mr. W. under the provisions of the **Domestic Violence Intervention Act**. This Order was confirmed by a Justice of the Nova Scotia Supreme Court on November 14th, 2007. On November 19th, 2007, Mr. W. filed a "Request for a Hearing" asking that the matter be reviewed pursuant to s. 12(1) of the **Domestic Violence Intervention Act**. That review has now taken place.

[3] The parties to this application have had a relationship for approximately 14 years. They have a son who is presently nine years of age and have both raised Ms. G.'s daughter, who is presently 14 years of age.

[4] There have been times during the parties' relationship that Mr. W. has physically assaulted Ms. G. Mr. W., in his testimony, attempted to downplay or deny this fact. I do not accept his testimony in this regard. I found Mr. W. to be evasive

during his cross-examination on this issue and I am satisfied and find that he has physically assaulted Ms. G. on more than one occasion in the past. According to Ms. G.'s evidence, the last such incident occurred almost two years ago in January of 2006. Ms. G. testified that at that time the parties had an argument and Mr. W. grabbed Ms. G. by the throat. The police were contacted as a result of this incident and criminal charges were laid against Mr. W. Mr. W. was released from police custody shortly after being charged. A term of his release was that he was to stay away from Ms. G. and her residence. This criminal charge has not yet been heard.

[5] Ms. G. applied for and obtained an Emergency Protection Order against Mr. W. at the time that this incident occurred in January of 2006. However, she did not take any further action at that time to protect herself against him. In fact, her actions were to the contrary. For example, in March of 2006, Ms. G. participated in an application before the Provincial Court to vary Mr. W.'s release conditions so that he would be allowed to come into her home and help care for the parties' children. Further, she provided Mr. W. with a key to her home so that he could participate in the children's care. It was not uncommon, even after the January, 2006 incident, for Mr. W. to sleep at Ms. G.'s home so that he could provide child care early in the morning. All of this

continued until November 5th, 2007 when the parties had a disagreement over the last name of their son.

[6] On November 5th, 2007, Ms. G. requested that Mr. W. leave her home and not return. Apparently, Mr. W. was unwilling to do so without the parties' son. Mr. W. contacted the R.C.M.P. on the evening of November 5th, 2007. During his testimony, Mr. W. indicated that he made this telephone call as Ms. G. was being "erratic". During summation, he indicated that he telephoned the police that day as he saw a "situation" developing. In any event, Mr. W. left Ms. G.'s home on November 5th, 2007 without the parties' son and without further incident.

[7] On November 6th, 2007, Ms. G. applied for another Emergency Protection Order against Mr. W. The recording of this application is in evidence and I will not repeat here all of Ms. G.'s testimony given in support of this application. In general terms, Ms. G. raised two concerns. First, she was concerned that Mr. W. would unilaterally take the parties' son to Toronto and not return. She gave evidence to the Justice of the Peace that Mr. W. had threatened to do this in the past. In addition, she expressed concern for her safety. She testified that Mr. W. had been violent in the past, she suggested that his mental state was declining and she indicated that she

feared that he may harm her. The J.P. that heard the matter determined that there was no immediate danger to Ms. G. and suggested that she make an emergency application to court for custody of the parties' son.

[8] Ms. G. did not follow this recommendation. Instead, on November 7th, 2007, she made another application for an Emergency Protection Order. Her concerns remained the same. She was worried that Mr. W. would take the parties' son to Toronto. In addition, she feared for her own safety. This application was heard by a different J.P. and concluded with a different result. An Emergency Protection Order was granted against Mr. W. ordering, *inter alia*, that he remain away from Ms. G.'s home and place of employment as well as their son's school. Ms. G. was awarded temporary care and custody of the parties' son and Mr. W. was granted access to the said child, supervised by his mother - at the discretion of Ms. G. I should indicate that Ms. G. did advise the second J.P. that she had applied for and was denied an Emergency Protection Order the previous day. I should also indicate that there is no suggestion in the evidence that Mr. W. has ever harmed either of the children.

[9] Mr. W. argues that there was no reason to grant an Emergency Protection Order on November 7th, 2007. He notes that Ms. G.'s request for such an Order was denied

on November 6th, 2007 and submits that there was nothing that occurred between November 6th and November 7th, 2007 that would justify a different decision. He suggests to the court that Ms. G. is attempting to use the **Domestic Violence Intervention Act** to prevent him from having full contact with his children.

[10] Ms. G. submits that she requested an Emergency Protection Order on November 7th, 2007 as she felt unsafe. She notes that Mr. W. has been physically violent in the past. She says that she doesn't know what she is "going to get from Mr. W." and questions his mental stability. She indicated that some days he is normal and some days he is not.

[11] The **Domestic Violence Intervention Act**, as its name suggests, is designed to protect individuals from domestic violence. It is, in my view, an extraordinary piece of legislation in that it allows a Justice of the Peace to grant significant remedies to an Applicant without any notice to, evidence from or representations from the Respondent. The legislation is designed to deal with urgent situations which require immediate relief in order to protect against domestic violence.

[12] Section 5 of the **Domestic Violence Intervention Act** defines domestic violence for the purpose of the **Act**. It reads:

> **Occurrence of domestic violence**
>
> 5(1) For the purpose of this Act, domestic violence has occurred when any of the following acts or omissions has been committed against a victim:
>
> (a) an assault that consists of the intentional application of force that causes the victim to fear for his or her safety, but does not include any act committed in self-defence;
>
> (b) an act or omission or threatened act or omission that causes a reasonable fear of bodily harm or damage to property;
>
> (c) forced physical confinement;
>
> (d) sexual assault, sexual exploitation or sexual molestation, or the threat of sexual assault, sexual exploitation or sexual molestation;
>
> (e) a series of acts that collectively causes the victim to fear for his or her safety, including following, contacting, communicating with, observing or recording any person.
>
> (2) Domestic violence may be found to have occurred for the purpose of this Act whether or not, in respect of any act or omission described in subsection (1), a charge has been laid or dismissed or withdrawn or a conviction has been or could be obtained. *2001, c. 29, s. 5*.

[13] It should be noted that physical violence does not have to have occurred in order for there to be a finding that domestic violence has occurred. For example, a series of acts such as contacting, communicating with, observing or recording a person that collectively causes the person to fear for his or her safety constitutes domestic violence under the **Act**.

[14] Section 6 of the **Domestic Violence Intervention Act** sets out the circumstances when an Emergency Protection Order may be granted by the Justice of the Peace as well as some of the matters that the JP must take into consideration when determining whether to grant such an Order. It states:

> **Emergency intervention order**
>
> 6(1) Upon application to a designated justice of the peace, the justice of the peace may make an emergency protection order to ensure the immediate protection of a victim of domestic violence if the justice of the peace determines that
>
> (a) domestic violence has occurred; and
>
> (b) the order should be made forthwith.
>
> (2) In determining whether to make an order pursuant to this Section, the justice of the peace shall consider, but is not limited to considering,

> (a) the nature of the domestic violence;
>
> (b) the history of domestic violence by the respondent towards the victim;
>
> (c) the existence of immediate danger to persons or property; and
>
> (d) the best interests of the victim and any child of, or in the care and custody of, the victim.
>
> (3) In determining whether to make an order pursuant to this Section, the standard of proof is to be on a balance of probabilities. *2001, c. 29, s. 6.*

[15] It is important to note that the fact that domestic violence has occurred is not, in itself, sufficient reason to grant an Emergency Protection Order. In order to grant such an Order the Justice of the Peace must determine that domestic violence has occurred *and* that the Order should be made forthwith. The term "forthwith" is not defined in the **Domestic Violence Intervention Act** itself although regulation 2(2) of the said **Act** states:

> **Interpretation**
>
> **2(1)** In these regulations
>
> .....

> **(2)** For the purposes of clause 6(1)(b) of the Act, "forthwith"means without waiting for the appropriate relief from the Provincial, Family or Supreme Court.

[16] The Nova Scotia **Domestic Violence Intervention Act** has been considered on a number of occasions since its inception. In **T.L.T. v. R.T.**, [2003] N.S.J. No. 491 Tidman, J. quoted with approval from **Bella v. Bella**, [1995] S.J. No. 253 where Justice Gerein of the Saskatchewan Court of Queen's Bench stated in relation to the Saskatchewan **Victims of Domestic Violence Act**:

> Any violence, including domestic violence, is by its very nature serious. However, the degree of seriousness will vary and this is recognized in Section 3(1). By having reference to the seriousness of the violence, the Legislature acknowledged that not all incidences of domestic violence should trigger the extreme remedy provided by the Act. The violence must be of sufficient seriousness as to justify an emergency intervention. Alternatively, the situation must be of such urgency, which I read as meaning a real likelihood of violence occurring or being repeated, as to justify an emergency intervention.
>
> Put otherwise, an order is not to be granted simply to alleviate unhappiness or discomfort or to improve a less than ideal situation, but only to provide protection in a situation of emergency.

[17] Justice Tidman in **T.L.T. v. R.T.**, *supra*, went on to state at ¶29-35:

> ¶29. It is clear from the wording of S. 6(1) of the Nova Scotia Act that a determination of the occurrence of domestic violence alone is not sufficient to warrant the making of an order. Section 6(1) provides that upon finding that domestic violence has occurred, the justice of the peace must go on to determine whether the order should be made forthwith.

¶30 Unlike the Saskatchewan legislation, there is nothing further in Section 6(1)(b) of the Nova Scotia Act to guide either the justice of the peace or the reviewing court as to what additional circumstances should be considered in deciding whether the order 'should be made forthwith'.

¶31 In determining the meaning of the phrase 'should be made forthwith', the court must look at the whole of the Act and extract a meaning consistent within that context.

¶32 Some guidance is given by the Legislature's use of the limiting word 'forthwith'. The use of forthwith connotes a sense of urgency or immediacy. The use of the word forthwith in that sense is consistent with the use in Section 6(1) of the phrase 'to ensure the immediate protection of a victim'. The same phrase is included in the residual clause (1) of Section 8(1) of the Act whereby the justice of the peace may 'do any other thing that the designated justice of the peace considers necessary to ensure the immediate protection of the victim or any child'.

¶33 Perhaps most importantly in attempting to obtain some guidance from the provisions of the Act in determining whether an order should be made forthwith is the description of the order itself, ie. an 'emergency protection order'. The term 'emergency'is not defined in the Act. The Concise Oxford Dictionary, 7th Edition, defines emergency as 'a sudden state of danger, etc.' and 'condition needing immediate treatment'.

¶34 I am in agreement with Kennedy C.J. that the Saskatchewan legislation although not identical is very much the same as ours as he stated in J.M.J. v. C.L.J. (supra) adopting the reasoning set out in paragraphs 12 and 13 of Bella (supra).

¶35 In my view, the Nova Scotia Act, like the Saskatchewan Act, is intended to provide a zone of safety for abused spouses in those cases where there is a realistic threat of immediate harm to the spouse or child. It is not the intent of the Act to provide a speedy alternative remedy to a spouse seeking exclusive possession of a matrimonial home.

[18] In **S.(M.C.) v. S.(R.A.)** 2004 NSSC 60, Associate Chief Justice MacDonald (as he then was) held that the **Domestic Violence Intervention Act** is designed for "true emergencies". (¶18). The logic of this seems obvious. It is only in true emergencies that one would be justified in granting the relief that is available under the **Act** without any notice to or representations from the opposing party.

[19] I return now to the specifics of this case. I am satisfied from the evidence presented that domestic violence had occurred against Ms. G. The issue, as I see it, is whether the Order should have been made "forthwith" i.e: without waiting for the appropriate relief from the Provincial, Family or Supreme Court. Section 6(2) of the **Act** lists a number of factors that the Justice of the Peace had to consider in determining whether to grant an Emergency Protection Order.

[20] In my view, the facts of this case did not support the granting of an Emergency Protection Order. According to Ms. G.'s evidence, Mr. W. had not assaulted her since the incident that occurred in January of 2006. Further, according to Ms. G.'s evidence, from November 5th, 2007 (when she asked Mr. W. to leave her home and

not return) until the time the Emergency Protection Order was granted, Mr. W. did not assault her in any way – nor did he threaten her in any way.

[21] It is true that the police were contacted on a number of occasions during this three day period but, the fact is, it was Mr. W. who contacted the police on each occasion. In addition, these contacts were not made because of threats or fears of violence. They were made to deal with issues relating to custody of the parties' son.

[22] It is also true that there were occasions when Mr. W. attended at Ms. G.'s property during the period November 5th to November 7th, 2007 as well as occasions when he telephoned her home. In addition, Ms. G. raised the fact that Mr. W. attended at a parent-teacher meeting that she was at during this period of time. This caused Ms. G. concern as it was her understanding that the police had told Mr. W. not to contact her.

[23] I have carefully reviewed the evidence relating to these visits and telephone calls and I am satisfied that Mr. W.'s conduct during this period did not justify the granting of an Emergency Protection Order. In fact, it appears to me that during this time Mr. W. was being careful not to get into further trouble with the police (for

example: when he attended at Ms. G.'s property on the morning of November 6th, 2007 to pick up the parties' son to take him to school, he stayed out on the street rather than attempt to come into her home.) In my view, neither his conduct nor the situation was such that justified the granting of an Order "forthwith".

[24] While I accept that Mr. W. had physically assaulted Ms. G. in the past and I accept that at the time that Ms. G. made the November 7th, 2007 application for an Emergency Protection Order she was fearful of Mr. W., I am not satisfied, viewing the totality of the evidence, that the facts that existed at that time justified an emergency intervention.

[25] As indicated previously, when Ms. G. contacted the Justice of the Peace Centre on November 6th and 7th, 2007 she raised two primary concerns. The first was that she was worried that Mr. W. would take the parties' son to Toronto and not return. In my view, the **Domestic Violence Intervention Act** is not designed to deal with this type of situation and the initial Justice of the Peace was correct when he suggested to Ms. G. on November 6th, 2007 that she should make an emergency application [to the Family Division of the Supreme Court] for custody.

[26] Ms. G.'s second concern related to her own safety. There are various mechanisms available to Ms. G. to deal with these concerns such as an application to Provincial Court for a peace bond. The **Domestic Violence Intervention Act** allows for immediate relief in appropriate circumstances but, as indicated above, in my view such circumstances did not exist in the case at Bar.

[27] I have concluded that the Emergency Protection Order that was issued by the Justice of the Peace on November 7th, 2007 should not have been issued and I hereby order that it is terminated.

Deborah K. Smith
Associate Chief Justice