IN THE SUPREME COURT OF NOVA SCOTIA

Citation: D.M.C. v. L.P.C. 2005 NSSC 77

Date: 2005 04 11
Docket: SH 243739
Registry: Halifax

BETWEEN:

D. M. C.

Applicant

and

L. P. C.

Respondent

DECISION - REVISED TO REMOVE NAMES

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Gerald R. P. Moir

Date Heard: 8th and 11th April 2005

Counsel: D. M. C. appeared without counsel
Richard A. Bureau, counsel for L. P. C.

Moir, J. (Orally):

[1] On the 7th of January 2005 domestic violence took place at the home of Ms. D. C. and Mr. L. C. in *. Ms. C. was charged with assault and she entered into a recognizance by which she promised to stay away from the home where she, her husband, her 18 year old daughter and her 13 year old son had been living for many years.

[2] The daughter continued living in the home with her father. The son had moved back and forth between parents but, most lately, he has been with his mother.

[3] Ms. C.'s father has a fully winterized summer place near * and she lived there for a time. She and her son later moved in with her sister at the south end of *. The son is a student at * Junior High. Ms. C. drives him to and from school. To drive from * to * is less onerous than to commute from * to *.

[4] An application was made for exclusive possession of the matrimonial home and the hearing was scheduled for the 12 April 2005 in the Family Division of this Court. On the 24 March 2005 the criminal charges against Ms. C.were stayed. She

immediately applied for an *ex parte* Emergency Protection Order under the *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29.

[5] Justice of the Peace Robert McCleave heard her application on the 25 March 2005, just over two weeks before the *inter partes* proceeding was due to be heard. The Justice granted the order. Mr. C. and his daughter were removed by the police. Mr. C. applied for a hearing under the *Act.* After appropriate notice to Ms. C., this Court was able to provide that hearing starting last Friday and continuing today. I now have to decide whether to confirm, terminate or vary the order.

[6] This legislation has been considered by the Supreme Court on a number of occasions. It needs to be bourne in mind that the applications before Justices of the Peace are *ex parte* applications at which only one side is heard. The Justice in this case, himself, stated the disabilities he is under when he acts on an *ex parte* basis. This gives rise to a serious risk of injustice, a risk which came to pass in this case.

[7] I follow the reasoning that has been put forward by the courts in a series of cases. Starting with *Bella* v. *Bella*,[1995] S.J. No. 253 (SQB), which was adopted by Justice Tidman in the case I will refer to next:

> 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. [para. 13]

Following the reasoning in *Bella*, Justice Tidman concluded, in *T.L.T.* v. *R.T.*, [2003] N.S.J. 491 at para. 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.

This reasoning was following by the Associate Chief Justice MacDonald, now Chief Justice of Nova Scotia, in *M.C.S.* v. *R.A.S.*, [2004] N.S.J. 96.

[8] Under the provisions of this statute, the statements made by Ms. C. to the Justice of the Peace are included in the evidence before me. In my respectful opinion, the requirement for proof of an emergency deserved a more probing inquiry than the Justice of the Peace provided. How quickly the issues could be brought to court and determined on a hearing at which both sides are given the opportunity to be heard is a relevant question going to the issue of an emergency. The scant information provided by Ms. C. on that point was not challenged or developed through questioning

by the Justice. She lead the Justice to believe that the application for an Emergency Protection Order had been adjourned or would be adjourned on her request. Indeed, Ms. C. offered ambiguous information on the point. She was in close contact with her lawyer at the time she made the application. I find she knew the adjournment had not been finalized. In fact, after the Emergency Protection Order, her position was there should be no adjournment. In my assessment, she mislead the Justice, but a more probing inquiry most likely would have revealed the truth that the issues were to be tried in just over two weeks time. That information was crucial to assessing whether an emergency existed.

[9] Ms. C. mislead the Justice of the Peace in other ways. I will not enumerate them all, but will give one example. The pivotal alleged threat that founded her application was an occasion on which Mr. C. allegedly said, “he could put a bullet between her eyes”. The Justice asked for details. Ms. C. said this happened two months earlier when she was staying at her sister’s on *. She did not volunteer that she had spirited away at night from a hockey rink the vehicle Mr. C. had been using. She did not volunteer that Mr. C.’s purpose in coming to the sister’s driveway was to retrieve from the vehicle his motor vehicle permit and other papers. She saw him at the car and would have seen the documents having been removed.

[10] Unlike the Justice of the Peace, I have heard other witnesses to this event, Mr. C. and Ms. G. In addition to finding that Mr. C. acted reasonably in going to his vehicle in the driveway of his sister-in-law's home on *, I find that there was no communication between Mr. C. and Ms. C. at that time. He made not threat.

[11] There are numerous instances of Ms. C. antagonizing Mr. C. Much of the behaviour alleged against Mr. C. has been the result of antagonization by Ms. C. She continued to confront and antagonize him after having to leave the matrimonial home. That does not suggest to me a person who has a fear for her personal safety when she is in the presence of Mr. C.

[12] Further, she had numerous alternatives for places to stay for the two weeks that were to intervene between when she became free of the recognizance and when her case for exclusive possession would be heard fairly in a court where both sides have the opportunity to present their evidence.

[13] I believe Ms. C. has no fear for her safety. There is no suggestion of any basis for fear on behalf of either of the children. On the evidence before me, there is no

emergency. The issue of exclusive possession is to be determined fairly tomorrow. I will terminate the Emergency Protection Order forthwith.

[14] When a person makes an *ex parte* application, they have a duty of disclosure. Important facts known to them that may be contrary to their position must be disclosed to the decision maker. In this case we see that the Justice of the Peace was mislead in numerous respects as a tactic to gain possession of a matrimonial home. I cannot remedy the injustice of the Emergency Protection Order. I can, however, order substantial costs. Mr. Bureau suggests $1,000. I will order that Ms. C. pay Mr. C. costs of $1,000.

J.