

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: LeBlanc v LeBlanc, 2012 NSSC 385

Date: 20121101

Docket: 1206-6424

Registry: Sydney

Between:

Caroline Ann LeBlanc

Applicant

- and -

Joseph Francis LeBlanc

Respondent

DECISION

Judge: The Honourable Justice Kenneth C. Haley

Heard: October 29, 2012, in Sydney, Nova Scotia

Counsel: Lee Anne MacLeod Archer, for the Applicant
Hugh MacLeod, for the Respondent

By the Court:

INTRODUCTION

[1] This is the Interim Application of Caroline Ann LeBlanc seeking exclusive possession of the matrimonial home located at 110 Butts Street, Sydney Mines, Nova Scotia.

[2] The Respondent, Mr. Joseph Francis LeBlanc opposes the Application and alternatively seeks exclusive possession of the matrimonial home for himself.

[3] Evidence was received by the Court on October 29, 2012 by way of Affidavit with subsequent and respective cross examination of the parties.

[4] The Court received into evidence the following exhibits, namely:

1. Affidavit of Caroline Ann LeBlanc, sworn to on July 31, 2012;
2. Medical Report regarding the Applicant prepared by D. Eugene Ignacio, M.D. dated October 9, 2012;
3. Statement of Property of Caroline Ann LeBlanc sworn to July 31, 2012;
4. Notice of application filed by the Respondent, Joseph Francis LeBlanc, with his Affidavit sworn to August, 20, 2012.

[5] Regarding Exhibit No. 4 was agreed by counsel that paragraphs 7 and 8 including Schedule “A” would not be considered by the Court for the purposes of the Interim Motion on exclusive possession.

[6] The Application is made pursuant to S. 11(1)(a) and S. 11(4) of the Matrimonial Property Act R.S.N.S. 1989, c. 275 as amended 1995-96, c.13, S.83 which states as follows:

S. 11 (1) Notwithstanding the ownership of a matrimonial home and its contents, the Court may by order, on the application of a spouse,

(a) direct that one spouse be given exclusive possession a matrimonial home , or part there of, for life or for such lesser period as the Court directs and release any other property that is a matrimonial home from the Application of this *Act*.

S. 11 (4) The Court may only make an order for possession of the matrimonial home under subsection (1) or (3) where, in the opinion of the Court

(a) other provision for shelter is not adequate in the circumstances,
or

(b) it is in the best interests of a child to make such an order.

[7] The parties were married on April 29, 1965 and although they continue to reside together there has been no meaningful interaction between them as man and wife for the past number of years.

APPLICANT'S EVIDENCE

[8] The Affidavit evidence of the Applicant in paragraphs 1 through to paragraph 17 is admitted by the Respondent, specifically:

I, Caroline LeBlanc, of 110 Butts Street, Sydney Mines, Nova Scotia make oath and say as follows:

1. THAT I am the Petitioner in this matter and as such have personal knowledge of the facts set out herein except where otherwise stated.
2. THAT I was married to Joseph LeBlanc on April 14, 1965.
3. THAT we have two adult children.
4. THAT Joseph is retired and in receipt of pension income from Marine Atlantic.
5. THAT I worked as a cleaner for several years, but have been off on a disability pension since 1986.
6. THAT I was diagnosed with rheumatoid arthritis approximately 20 years ago, and have been under the care of Dr. Ignacio since then.
7. THAT I see Dr. Ignacio twice a year for follow up and renewal of my medications.

8. THAT I am on the following medications: Arthrotec, Prednisone, blood pressure pills, Losec, Entrase, Chlorquine, Semide, Synorid, Novocloxin, and B12 supplements.
9. THAT I broke my knee approximately 11 years ago, and developed a bone infection. I was in a wheelchair for several months and now walk with a cane.
10. THAT after my broken knee and diagnosis of rheumatoid arthritis, we renovated our home to install a ramp at the front entrance, and a wheel-in shower with grab bars in my bathroom.
11. THAT the home is a one level bungalow with a finished basement.
12. THAT my bathroom, bedroom and laundry are on the main level.
13. THAT since my diagnosis of rheumatoid arthritis and my broken knee, I have become increasingly disabled.
14. THAT I use a specially fitted boot for my left foot, as the ankle is very weak.
15. THAT I cannot manage stairs well, and when I meet with my legal counsel, arrangements have to be made for a meeting in a ground floor location.
16. THAT the back entrance to my home is two steps from the ground, and I am able to negotiate those steps to enter the home.
17. THAT I am able to walk into my shower and am unable to step over the walls of a tub.

[9] The Applicant further alleges the following in her Affidavit evidence which is disputed by the Respondent.

18. THAT during our marriage, Joseph was abusive to me on numerous occasions, although he has not hit me for several years.
19. THAT approximately six years ago, he pushed me down and I was left with bruising and an injured back, which gave me problems for over a month.
20. THAT Joe and I have occupied separate bedrooms for many years.
21. THAT in approximately May 2012, I told Joe to stay out of my bedroom and he became angry, smashing a glass and threatening to hit with a broom.
22. THAT Joe becomes most violent and abusive when he is drinking.
23. THAT on June 15, 2012, Joe was drinking and called the police on our son, who he alleged was drinking and driving.
24. THAT our son Shaun resides with us in the basement and pays board.
25. THAT Shaun works at the Northside Processing Plant and had just arrived home from a shift was sitting in the car in the yard listening to music when his father made the call to 911.

26. THAT when police responded to the call, I explained that Shawn had not been drinking, but that Joe had been drinking.
27. THAT the police suggested to Joe the he go to his room and told him that if another call like this was made, charges would be laid.
28. THAT I am fearful for my safety when Joe is drinking, as he is irrational and aggressive.
29. THAT I receive income from Canada Pension Plan Disability.
30. THAT I have been pre-approved for a mortgage to purchase Joe's interest in the matrimonial home, and made an offer to do so.
31. THAT Joe has refused to sell the home to me, and instead insists that I should sell to him and move.
32. THAT I have explored the options for alternative housing, but there is nothing available on the Northside that would suit my needs.
33. THAT my family lives on the Northside and is of great assistance to me. My sister drives me to many of my appointments and assists me around the house.
34. THAT my son Shaun is also of assistance to me around the home.
35. THAT I obtain my medications through Joe's Blue Cross coverage.
36. THAT my medications cost approximately \$2,221.72 per year, but because of the Blue Cross coverage, I only pay \$420.00 per year.

37. THAT I cannot afford to pay for my medications without the Blue Cross coverage paid by Joe.

38. THAT I make this Affidavit in support of my Motion for exclusive possession and interim support.

[10] The Applicant further testified that she completed renovations to her home, specifically a walk-in shower, which is wheelchair accessible to accommodate her disability. Pictures of same were included in the Affidavit marked Exhibit #1.

[11] Further the Applicant commented on the pictures submitted in the Affidavit, which depicts a ramp that was constructed for her access to the matrimonial home.

[12] The Applicant testified that she had explored other housing options for herself; but currently there is nothing available to address her needs.

[13] She testified she fears for her physical safety when threatened by the Respondent, and has requested she be granted possession of the matrimonial home.

[14] Under cross-examination the Applicant acknowledged she never reported the alleged assault of six years ago to the police. The Applicant was notably steadfast in her evidence that she did attend the hospital for treatment.

[15] The Applicant testified that she “had nothing to do” with the Respondent for the past nine years; but confirmed her allegation in paragraph 21 of her Affidavit regarding the Respondent throwing a glass of water across the floor, and threatening her with a broom in May 2012.

[16] The Applicant testified about her health problems, and that it would be too difficult for her to move to an assisted living facility.

[17] Upon inquiry by the Court the Applicant testified her gross annual income is \$10,440.00, which is pension based.

[18] In support of the Applicant’s position her counsel filed with the Court, by consent, the report of Dr. Ignacio which was marked Exhibit #2.

[19] Dr. Ignacio's report confirms that the Applicant had a total right knee replacement, along with a deformity of her left foot. The doctor further confirmed the Applicant has arthritis in her other joints, complicated by a history of severe rheumatoid arthritis for over 30 years.

[20] In addition the doctor's report confirms that the Applicant's multiple joint problems cause severe impairment, which limits her ability to perform her activities of daily living.

[21] Dr. Ignacio concluded as follows:

“Mrs. LeBlanc's home has been modified to accommodate her disabilities. These modifications include an access ramp to her house, a wheel-in-shower and accessories such as grab bars. Should she be forced to move to a new home, there would need to be the above modifications. As well, she would need adequate space for her to ambulate with devices such as a walker or wheelchair. Ideally the home would be a single storey. Doorknobs, light switches and appliances need to be modified to her decreased grip strength. Furniture would have to be of the correct height and accessibility. Adequate railings would also have to be in place. Clearly, Mrs. LeBlanc has multiple needs as a result of her chronic disease that must be addressed in whatever home that is provided for her.”

RESPONDENT'S EVIDENCE

[22] The admissible paragraphs of the Affidavit evidence of the Respondent are as follows:

“I, Joseph Francis LeBlanc, of 110 Butt Street, Sydney Mines, in the Cape Breton Regional Municipality, Province of Nova Scotia, B1R 1R6, MAKE OATH AND SAY AS FOLLOWS:

1. THAT I admit paragraphs 1 to 17 in Caroline Ann LeBlanc's Affidavit dated July 31st, 2012.
2. THAT I deny the remainder of Caroline Ann LeBlanc's Affidavit dated July 31st, 2012;
3. THAT with respect to the allegation of abuse, once better than 6 years ago when I found out my wife's, without permission or knowledge of the time, withdrew better than \$9,000.00 from our joint bank account, I pushed her only because she was yelling in my face and took the money for herself. The \$9,000.00 which was to be used to remodel the kitchen cupboards.
4. THAT with respect to allegations relating to sex, neither Caroline Ann LeBlanc nor I have had any interest in one another for a period of better than six years;
5. THAT paragraph 21 is a complete fabrication
6. THAT with respect to Shaun and the Police and the 911 call I made this year. Shaun who has a key to the house left late at night so I locked the door. He came to the window and gave me the finger. By the expression on his face I thought there was going to be trouble so I called the Police.

The Police never sided with anyone after the discussion nor did they lay charges.

9. THAT also attached hereto is Schedule “B” is a letter of acceptance from a Bank enabling me to get a mortgage to buy her interest out;
10. THAT in the attached letters in Schedule “A” the first one shows that I met with Solicitor Hugh R. MacLeod March 29, 2012 at which time Mr. MacLeod cautioned me in the relation to the very serious position taken by Courts and how quick Police are to charge with respect to domestic violence or unwanted physical advances. I took his advice very seriously and have been on guard. I stress to the Court there was no advances by me of any form of violence or anything of a sexual nature.
11. THAT I do not challenge the Divorce but wish to be heard on the issues of maintenance and division of property.

[23] The Respondent under oath stated the parties were married for 37 years but agreed they have not had a marital relationship for many years. He testified he does the cooking as her disability requires her to stay away from the stove.

[24] Mr. LeBlanc testified presently he and the Applicant are getting along...”not too bad at all”...but placed the blame for their arguments on their son Shaun , age 44, who resides in the parties basement.

[25] Mr. LeBlanc testified that when he argues with his son, the Applicant gets upset with him, thus suggesting the hostility in the house is between he and his son not between he and his wife.

[26] Mr. LeBlanc acknowledges that he did push the Applicant some six years ago but he denied throwing a glass of water or threatening his wife with a broom in May of this year.

[27] Mr. LeBlanc testified he has not looked into alternate accommodations for either the Applicant or himself.

[28] Under cross-examination Mr. LeBlanc, although denying throwing water or threatening the Applicant with a broom, he agreed he may have “been cranky”. He further acknowledged that he was verbally abusive to the Applicant on a regular basis and that he drinks alcohol on a regular basis.

[29] Mr. LeBlanc testified he was personally able bodied; that he had no disability other than the usual aches and pains; that he did not require personal

care; that he did not have arthritis and that he did not require the use of a special shower.

[30] Mr. LeBlanc agreed he had family in the area and that there was no reason why he could not live elsewhere.

APPLICANT'S SUBMISSIONS

[31] The Applicant submits as follows:

- That there are no dependent children

- That the Applicant has a greater need to remain in the matrimonial home than does the Respondent

- That the Applicant's need to remain in the matrimonial home is based upon her physical impairment as confirmed by Dr. Ignacio

- That the Applicant relies upon family to assist her in the matrimonial home

- That there is no physical reason why the Respondent cannot vacate the premises

- That there is a history of domestic violence
- That the Applicant is nervous of the Respondent when he is drinking
- That the Respondent has demonstrated that he has a temper and can become angered very easily
- That the Respondent has sufficient income (\$45,891.00) to pay for alternate accommodations
- That the Respondent has alternatives that are not available to the Applicant
- That the Applicant has established that other living arrangements are not adequate in the circumstances
- That the Court should grant the Applicant's request for exclusive possession and that the Respondent should vacate within 48-72 hours.

RESPONDENT SUBMISSIONS

[32] The Respondent submits:

- That the Applicant has not proven her case pursuant to the test defined by Justice Jollimore in **Legg v Legg** [2010] NSJ No 453 at paragraph 2
- That the Applicant's evidence is terse and simply reflects other housing alternatives are not to her liking and that she does not want to move away from Sydney Mines

- That there is a lack of evidence on the pivotal point of proving that other housing alternatives were not adequate
- That the Applicant has not proven her case and the Application should be dismissed

LAW AND ANALYSIS

[33] The test for interim exclusive possession has been set out by Justice Jollimore in the case of **Legg v Legg** [2010] NSJ No 453 at paragraph 2 as follows:

These Applications for interim exclusive possession of the matrimonial home are governed by section 11(4) of the *Matrimonial Property Act*, R.S.N.S., 1989, c. 275 which says that I may only make an order for possession where, in my opinion, other provision for shelter is not adequate in the circumstances or it is in the best interests of a child to make the order. The *Act* limits when I can make an order for exclusive possession to these two situations.

[34] As there are no dependent children of the marriage the Applicant requests the Court to order exclusive possession as a result of Ms. LeBlanc's physical impairment which in her submission necessitates her having exclusive possession of the home because no other accommodations are available or suitable.

[35] The onus is on the Applicant to prove this on a balance of probabilities. As outlined by the Supreme Court of Canada in **C.(R.) v MacDougall** [2008] 3 SCR 41 at paragraph 40:

40 Like the House of Lords, I think it is time to say, once and for all in Canada there is only one **civil** standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

And further the Supreme Court of Canada stated at paragraphs 45 and 46:

45 To suggest that depending upon the seriousness, the evidence in the **civil** case must be scrutinized with greater care implies that in less serious **cases** the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is in all **cases**, evidence must be scrutinized with care by the trial judge.

46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[36] Justice Jollimore in **Legg v Legg**, supra, assists the Court with the following comment at paragraph 5:

The measure of alternate shelter under s. 11(4) (a) is one of adequacy. In *Dupuis*, 2000 CanLII 4386, [2000] N.S.J. No 428 (N.S.S.C.), Justice Hood dismissed an application for interim exclusive possession where Ms. Dupuis and the couple's 16 month old daughter were living with Ms. Dupuis' friend. Her Ladyship concluded that this accommodation was adequate.

[37] The case at bar differs from the **Legg** and **Dupuis** cases in that both parties remain in the matrimonial home. The applicant stipulates that there is no other adequate accommodation presently available which would address her physical needs. The Respondent has made no effort to explore other accommodation options.

[38] I agree with Justice Jollimore's comments at paragraph 14 of **Legg v Legg**, Supra where she states:

Interim applications aren't perfect. They create a holding pattern for the spouses' financial affairs until there is a final resolution of their claims. They come to Court quickly and are dealt with in a brief hearing.

[39] With that sentiment expressed I am satisfied that on a balance of probabilities that the Applicant should be awarded exclusive possession of the matrimonial home located at 110 Butts Street, Sydney Mines, Nova Scotia.

[40] I find that currently there is no other appropriately equipped accommodation that is sufficient to address the Applicant's special needs. The matrimonial home was specifically modified to adequately address the Applicant's physical impairment and as such it is appropriate in the given circumstances that she remain in the home.

[41] Justice Carver stated in **Grandy v Grandy** [1993] N.S.J. No. 538 at paragraph 14:

Having found the home to be a "matrimonial home", the question remains "whether the plaintiff should be granted exclusive possession?" Even though there are no children of the marriage as was the case in **Beaman v Beaman**, supra, and even though the home was built for the Grandy family because of the physical condition of the Defendant, the financial position of the parties is such the plaintiff should have exclusive possession of the home until the action is settled.

[42] Justice Carver went on in his decision to note that at the present time neither party was more disabled than the other and that the defendant had no present disability that required any of the special features built into the home.

[43] In the case at bar Mrs. LeBlanc, the Applicant, has both a physical disability and a financial disability, earning \$10,440.00 as compared to the Respondent, earning \$45,891.00, which precludes her from being able to secure adequate alternative housing. Alternatively, Mr. LeBlanc has the physical and financial ability to live elsewhere.

CONCLUSION

[44] I have scrutinized the evidence with care and I have relied upon evidence that was sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. Mrs. LeBlanc is awarded exclusive possession of the matrimonial home on an interim basis until all the remaining divorce issues before the Court are brought to a final conclusion.

[45] It is appropriate that Mr. LeBlanc seek out alternate accommodation at this time. It is clear to the Court that it is in the best interests of the parties to physically separate, especially so since the Petition for Divorce has been issued.

[46] In this regard I accept the evidence of the Applicant that she is fearful of the Respondent when he is drinking as he becomes irrational and aggressive.

[47] Counsel for the Applicant has recommended 48 to 72 hours for the Respondent to vacate the premises. Counsel for the Respondent has recommended 30 days in the event the Application is granted.

[48] I order and direct that Mr. LeBlanc vacate the matrimonial home on or before Friday, November 16, 2012 at 3:00 p.m. This should afford Mr. LeBlanc a reasonable period of time to make alternate living arrangements, whether it be with family, friends or renting from a third party.

[49] I would expect the parties to be cordial to one another during the transition period until such time as Mr. LeBlanc has made alternative living arrangements.

Order Accordingly

Justice