

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Tofflemire v Pike, 2013 NSSC 235

**Date:** 2013-07-25

**Docket:** SFHMPAY-086431

**Registry:** Halifax

**Between:**

Andrew Jay Tofflemire

Applicant

v.

Wanda G. Pike

Respondent

**Judge:** The Honourable Justice Elizabeth Jollimore

**Heard:** July 19, 2013, in Halifax, Nova Scotia  
(Oral Decision: July 19, 2013)

**Counsel:** Jay Tofflemire on his own  
Tanya R. Jones for Wanda G. Pike

## **By the Court:**

### **Introduction**

[1] This is an application by Jay Tofflemire for exclusive possession of a matrimonial home. His application is pursuant to clause 11(1)(a) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. In response, his wife, Wanda Pike, asks that I award her exclusive possession of the property.

### **Evidence**

[2] I received two affidavits from Mr. Tofflemire and one from Ms. Pike. Both contain information about the family and the breakdown of the spouses' relationship. Little of the information in the affidavits is relevant to the considerations I have under section 11 of the *Matrimonial Property Act*.

[3] Mr. Tofflemire's claim is based on financial concerns. He moved from the home in May 2013 when the R.C.M.P. told him that his wife was entitled to be at the home. He pays rent for his current accommodations. He works as a bus driver and, with the school vacation, he has been laid off from that employment. His income has decreased, and he is unsure the mortgage on the home will be paid.

[4] Ms. Pike's claim relates to her sixteen year old daughter, Ali. Mr. Tofflemire is not Ali's father.

[5] Ms. Pike says that she, Ali, and Mr. Tofflemire moved to the matrimonial home in March 2011. In June 2012, Ali went to live with her father in Elmsdale. She stayed with him until October 2012. She was performing poorly in school at that point and returned to live with her mother and Mr. Tofflemire. Ali left home again in March 2013 as result of conflict with Mr. Tofflemire and moved to Jeddore. This move didn't require her to change schools. Ms. Pike currently lives in an apartment in Sackville, and Ali is away on vacation for summer.

[6] Ms. Pike says that Ali has a learning language disability and doesn't deal well with change. Ms. Pike wants exclusive possession of the home so Ali will have a stable environment. Returning to the home would let Ali remain at her current high school and graduate with her friends next June. Ms. Pike says that Ali is highly involved in sports and is being scouted by local universities. She says, as well, that Ali has friends in the area and a part-time job waiting for her. Ali's dog had its pen at the matrimonial home.

[7] Ms. Pike says that she has a well-established support group in the neighbourhood. She says that her employment is in the area of the home, though I do not know what she does.

### ***The Matrimonial Property Act***

[8] Exclusive possession is provided for in clause 11(1)(a) of the *Matrimonial Property Act*. Subsection 11(4) of the *Act* says that I may make an order for exclusive possession only 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 an exclusive possession order.

### **The best interests of a child**

[9] “Child” is defined by subsection 2(b) to mean a child of both spouses born within or outside the marriage. This may include a person whom both spouses have demonstrated a settled intention to treat as a child of the marriage.

[10] Ms. Pike urges me to find that Mr. Tofflemire has demonstrated a settled intention to treat Ali as a child of the marriage. I cannot make this finding. The Application and Intake form that Mr. Tofflemire has filed does not list Ali as a child. Admittedly, the form asks about children who are the subject of this proceeding. Otherwise, Mr. Tofflemire makes no comment about the nature of his relationship with Ali.

[11] Ms. Pike offers much more evidence about the relationship between Ali and Mr. Tofflemire. Ms. Pike’s affidavit describes Mr. Tofflemire’s conduct toward Ali in a way that shows he does not treat her as his child. According to Ms. Pike, Mr. Tofflemire has called Ali “a selfish spoiled brat” and “bipolar” and told her to “go back to live with daddy where she belongs”. She has described Mr. Tofflemire as rejoicing in Ali’s departure from the home and his asking Ms. Pike to choose between him and Ali.

[12] In these circumstances I cannot conclude that Mr. Tofflemire has demonstrated a settled intention to treat Ali as a child of the marriage. Because she is not a child under the *Matrimonial Property Act*, I can only look to clause 11(4)(a) as a basis for making a possession order.

## The adequacy of other shelter

[13] Because each spouse seeks exclusive possession, each has the burden of proving that other provision for shelter is not adequate in the circumstances. There has been discussion of clause 11(4)(a) and the question of adequate alternate shelter in various cases.

[14] The earliest decision is *Stephens* (1980), [1981] 46 N.S.R. (2d) 310 (T.D.), where Chief Justice Cowan awarded a wife exclusive possession of a home. Ms. Stephens claimed that Mr. Stephens had become harassing, increasingly hostile and threatening and, on three occasions, had assaulted her. Chief Justice Cowan rejected the argument that for Ms. Stephens to succeed in her claim she had to search “in all available ways through advertisements, answering advertisements and personal canvassing of housing accommodation in the [local] area, to ascertain that there was no other shelter in the area which was adequate in the circumstances.” Ms. Stephens required a cane. His Lordship dismissed the suggestion that Ms. Stephens must move to a neighbouring house to live with her mother, saying that Ms. Stephens was “not required to move out into housing accommodation which is not reasonably adequate in the circumstances, having regard to the state in which she has been accustomed to live, and the housing accommodation which she has been accustomed to have during the marriage.”

[15] Justice Haley addressed the application of a spouse who needed a wheelchair in *LeBlanc*, 2012 NSSC 385. The home had been renovated to accommodate her wheelchair. Ms. LeBlanc had explored other housing options, found nothing available and said it would be too difficult to move into an assisted living facility. Mr. LeBlanc had financing available to purchase his wife’s interest in the home. He had not looked into alternate accommodations for himself or his wife. Justice Haley granted Ms. LeBlanc’s application saying, at paragraph 40, that “there is no other appropriately equipped accommodation that is sufficient to address [Ms. LeBlanc’s] special needs [her wheelchair].”

[16] In *Smith*, 2012 NSSC 432, Justice LeBlanc dismissed the husband’s claim that he needed the matrimonial home because of a medical ailment. At paragraph 18, His Lordship said he was unable to find an evidentiary basis for an exclusive possession order. He was not satisfied that alternative accommodations weren’t available and he didn’t believe that Mr. Smith had made adequate attempts to locate accommodations for himself. Justice LeBlanc said that additional evidence would be needed to establish that Mr. Smith suffered from the ailments he claimed.

[17] In *Dupuis*, 2000 CanLII 4386 (NS S.F.), Justice Hood dismissed an application for possession where Ms. Dupuis and the couple's sixteen month old daughter were living with Ms. Dupuis' friend. Her Ladyship concluded that this accommodation was adequate. More recently, in *Hublely-Swider v. Swider*, 2009 NSSC 106, Mr. Swider's application for possession was dismissed where he provided no evidence of other available shelter and did not deny that other shelter might be available. In *Legg*, 2010 NSSC 326, both spouses had found temporary rental accommodations that were adequate. Neither was awarded possession.

[18] With regard to the adequacy of alternate provision for shelter, Mr. Tofflemire has offered no evidence. It's clear from his affidavit that he has found alternate accommodations. He moved out of the home in May 2013, over two months ago. He does not describe these accommodations as inadequate in any way.

[19] Similarly, Ms. Pike moved from the matrimonial home. She was in Cuba from March 24 to April 2, 2013. When she returned from vacation, Mr. Tofflemire told her to leave the home. She did. She has lived elsewhere for more than three months. She has an apartment in Sackville. She does not describe this as inadequate in any way.

[20] In the absence of any evidence that current provision of shelter is inadequate, I dismiss the applications.

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Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia