

Court of Queen's Bench of Alberta

Citation: J.S. v. D.J.K., 2009 ABQB 426

Date: 20090715
Docket: FL03 18791
Registry: Edmonton

Between:

J.S.

Applicant

- and -

D.J.K.

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee**

[1] The Applicant in this matter obtained an *Ex Parte* Emergency Protection Order on May 4, 2009. The Respondent was properly served with the Emergency Protection Order, and was presumably aware, or should have been aware, of the date of the review hearing. The Respondent however did not appear and did not retain counsel for the review hearing which was held on May 15, 2009.

[2] The Court upon hearing submissions from the Applicant, and upon reviewing the Emergency Protection Order granted *Ex Parte* on May 4, 2009 confirmed the Emergency Protection Order. The Emergency Protection Order was directed to remain in effect until May 4, 2010.

[3] The Respondent's present counsel was retained after the confirmation hearing of the Emergency Protection Order. On June 25, 2009 counsel for the Respondent applied to set aside the Confirming Order on the basis that the Confirming Order was invalidly and improperly

granted based on s. 3 of the *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27 which reads as follows:–

Confirmation of emergency protection order

- 3(1) If a judge of the Provincial Court or a designated justice of the peace grants an emergency protection order, the judge or justice of the peace must, immediately after granting the order, forward to the Court of Queen’s Bench a copy of the order and all supporting documentation, including any notes.
- (2) A hearing referred to in section 2(6) must be based on affidavit evidence and any other sworn evidence.
- (3) The evidence that was before the judge of the Provincial Court or designated justice of the peace may also be considered as evidence at the hearing.
- (4) At the hearing, the justice of the Court of Queen’s Bench may, whether or not the claimant or the respondent is in attendance,
 - (a) revoke the order,
 - (b) direct that an oral hearing be held,
 - (c) confirm the order, in which case the order becomes an order of the Court of Queen’s Bench, or
 - (d) revoke the order and grant an order under section 4.

[Emphasis Added]

[4] Counsel for the Respondent submits that the Applicant’s failure to provide a filed Affidavit in support of the Confirming Order is a procedural irregularity, and this Court should set aside the Confirming Order. Counsel submits that s. 3(2) is a mandatory direction.

[5] Counsel for the Respondent points out that Black’s *Law Dictionary* defines “Affidavit” as follows:–

A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

[6] Counsel for the Applicant argues that the Court confirmed the Emergency Protection Order on the sworn evidence before the Justice of the Peace, as permitted in s. 3(3), and other sworn evidence as required in s. 3(2), which other sworn evidence included the Affidavit of Service of the *Ex Parte* Emergency Protection Order and of the Confirming Order. It is submitted

that the plain reading of s. 3(2) is to exclude non-sworn evidence, but is not to dictate the particular form of sworn evidence that the Court must consider.

[7] It is submitted that the reading of the Act argued by the Respondent is too narrow in that s. 10 of the *Interpretation Act*, R.S.A. 2000, c. I-8 mandates that legislation is remedial, and shall be “given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects”.

[8] It is submitted by the Applicant that the requirement of an Affidavit is merely one of form, and not of substance. The substance required by the Act is “sworn evidence” which an Affidavit is but one of several types of sworn evidence.

[9] Section 26(1) of the *Interpretation Act* allows for deviation from a prescribed form if it does not affect the substance and is not “calculated to mislead”. Section 26(1) of the *Interpretation Act* reads as follows:–

26(1) When a form is prescribed by or under an enactment, deviations from it not affecting the substance and not calculated to mislead do not invalidate the form used.

[10] Finally it is submitted that as s. 3(2) of the *Protection Against Family Violence Act* does not list a specific type of Affidavit, the section is satisfied by the filing of an Affidavit of Service.

Conclusion

[11] The Respondent seeks a *viva voce* hearing in this matter notwithstanding that the Respondent was properly served with the *Ex Parte* Emergency Protection Order, and did not appear on the date of the review hearing, at which point the Emergency Protection Order was confirmed for a further period of a year. The Respondent’s application is based on non-compliance with s. 3(2) of the *Protection Against Family Violence Act*.

[12] Since counsel for the Respondent was seeking an Order from me on June 25, 2009 setting aside the Emergency Protection Order based on a statutory procedure irregularity, I directed that Alberta Justice be advised of the argument raised by the Respondent with respect to s. 3(2) of the *Protection Against Family Violence Act* requiring that a specific Affidavit be filed at the hearing to confirm the Emergency Protection Order.

[13] The Ministry of Children and Youth Services responsible for the *Protection Against Family Violence Act* was duly informed of this application, as well as Alberta Justice Family Law. Both have replied to the Court through counsel in a letter dated July 7, 2009 that while they appreciate being advised of this application, they saw no basis for becoming involved, other than being informed of my written decision.

[14] The Applicant's response that an Affidavit of Service constitutes a sufficient Affidavit for the purposes of s. 3(2) of the *Protection Against Family Violence Act* is not a reasonable argument given that an Affidavit of Service does not deal with the substantive aspects of the Emergency Protection Order in any way.

[15] Nor do I conclude that the sworn evidence as represented by the Transcript of the Hearing before the Provincial Court that lead to the *Ex Parte* Emergency Protection Order is sufficient to comply with s. 3(2) of the Act because otherwise the Legislature would not have distinguished between the term "Affidavit" and "any other sworn evidence" in s. 3(2) of the Act.

[16] Section 3(3) is further supportive of the Respondent's position because if the Transcript of the Provincial Court hearing satisfied the requirements of the s. 3(2), then this section would be rendered meaningless.

[17] I conclude that the Legislature clearly contemplated that a substantive Affidavit by the Applicant needed to be filed in this Court in support of any Order confirming the Emergency Protection Order by using the word "and" in s. 3(2) instead of using the word "or".

[18] The Legislature specified that the confirmation hearing "must" be based on "Affidavit evidence" and "any other sworn evidence". The Transcript before the Provincial Court Judge or designated Justice of the Peace as a result of s. 3(3) of the Act does not even have to be considered as evidence at the hearing given the use of the term "may" in that section. Accordingly it cannot be argued that Transcript in the Hearing in Provincial Court satisfies the mandatory requirements of s. 3(2).

[19] I also conclude given that the requirements of s. 3(2) of the Act are specific, they cannot be over ridden by the application of general sections such s. 10 of the *Interpretation Act* or by s. 26(1) of that Act.

[20] The "fair, large and liberal" construction of any Statute is warranted where there is ambiguity, but not in the face of the plain and ordinary meaning of clear legislation. In this particular case, the remedy granted by the legislation can be extremely detrimental and intrusive on the freedom and liberties of another person, and typically is based on the allegations of one party made on an *Ex Parte* basis.

[21] While the social value and utility of the legislation in question is clear, the requirement of the Affidavit at the confirmation hearing represents a fair balance with respect to the competing interests involved in a typical Emergency Protection Confirmation Hearing, particularly since Affidavit evidence is the main basis relied upon when presenting a case in this Court in the usual course.

[22] I acknowledge in my experience that most applicants add little or nothing to the Provincial Court Transcript in support of confirmation of the Emergency Protection Order, but also in my experience more applicants should update and modify their evidence from their Transcript in the interests of accuracy and fairness. In any event, given the specific requirements of the legislation, how most applicants comply with the provisions is not my primary concern.

[23] Accordingly the application to set aside the Emergency Protection Order is granted.

[24] A later responding Affidavit filed on June 8, 2009 after the Confirmation Hearing by the Respondent sets out a clear joinder of the issues, and is sufficient to justify *viva voce* evidence to deal with the largely conflicting evidence on the record. Accordingly a *viva voce* hearing on the Emergency Protection Order is directed.

[25] Notwithstanding the Respondent's request for costs in this application, there will be no award of costs in favour of either party given that the Applicant followed what had been universally considered to be the normal practice with respect to her Emergency Protection Order application.

Heard on the 25th day of June, 2009.

Dated at the City of Edmonton, Alberta this 10th day of July, 2009.

Donald Lee
J.C.Q.B.A.

Appearances:

Len Thom
Thom Law Office
for the Applicant

Jerry D. Kiriak
for the Respondent

Reeva Parker
Alberta Justice - Family Law
for the Director, and for the Ministry of Children and Youth Services

