Citation : *S.H. v. A.H.*, 2018 YKTC 46

Date: 20180706
Docket: 18-V0003
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

S.H.

Applicant

v.

A.H.

Respondent

Appearances:
Shaunagh Stikeman — Counsel for the Applicant
Paul Di Libero — Counsel for the Respondent

REASONS FOR JUDGMENT

[1] CHISHOLM C.J. (Oral): On June 29, 2018, S.H. applied on an *ex parte* basis for an Emergency Intervention Order ("EIO") pursuant to the *Family Violence Prevention Act,* RSY 2002, c. 84 (the "*Act*"). The justice of the peace who heard the application granted the requested order. A judge reviewed the order in Chambers and set it down for a rehearing.

[2] The Respondent, A.H., submits that the *ex parte* order should not have been issued by the justice of the peace, and, as a result, the order should be terminated.

[3] S.H. argues that the order should be confirmed with some tinkering of the conditions that were imposed.

Summary of the relevant facts

[4] The parties separated in early April of this year. Despite their separation, they have continued to reside in the family home with their three children. M. is four years of age, and twins, A. and B., are just shy of their third birthday.

[5] Subsequent to the couples' separation, the parties attended several mediation sessions, the last one being on June 27, 2018. The parties were unable to agree upon custody and access arrangements. A.H. wishes shared custody of the children with each parent having equal time with the children, while S.H. believes in a 70/30 split. In other words, she would have the children 70% of the time and A.H. would have them the other 30%.

[6] On July 3, 2018, S.H. filed a Statement of Claim in the Supreme Court with respect to the separation and subsequent to the events of June 29 which led to the EIO. An interim application in Supreme Court has not been heard to date.

[7] On the evening of June 28, A.H. texted S.H. with respect to how child care should unfold the following day. He indicated that he would look after dropping the children off at daycare and that it would be 'his day' with the kids. S.H. read the text when she awoke early on June 29. She replied by text that she was not in agreement with this proposal; that she would take the children to daycare; that she would pick them up after daycare and take them to swimming and then to a restaurant.

[8] It should be noted that despite the breakdown of their relationship, S.H. and A.H. continued with what they describe as date nights, which usually involve going to a restaurant with the children. I understand that such a date night had been planned for the evening of June 29, which was M.'s birthday. S.H. and A.H. had also planned a birthday party for M. with friends for the following day, June 30.

[9] On the morning of June 29, the parties did not have any meaningful discussions regarding the dispute as to parenting responsibilities for the day. Around the time S.H. was intending to leave the house to take the children to daycare, A.H. took her key fob for the truck that she normally drives. He advised her that he would be taking the children to daycare and that she could use the other vehicle. She had one of the twins with her at the time, and as a result of what had been said, she decided to place the child in the Range Rover – the second family vehicle normally driven by A.H. While doing so, she noted a problem with the child seat. She complained to A.H. about the fact that he had been transporting M. in that vehicle when the car seat was not properly installed.

[10] In an apparent reaction to her criticism, A.H. took the Range Rover keys which were on the seat of the vehicle and told S.H. that she now had no vehicle to drive. She ended up getting into the truck with him and the children and proceeding to the daycare. There was some short discussion as to whether he would take her to the police detachment, as she had indicated she intended to speak to them. She declined his offer to transport her there.

[11] Later that afternoon, S.H. obtained the EIO, which is the subject of this rehearing. In obtaining this order, she alleged that A.H. had committed family violence, as defined in the *Act*.

Legislation

[12] Family violence is defined in the definition section of the *Act* as:

> (a) any intentional or reckless act or omission that causes bodily harm or damage to property;
>
> (b) any act or threatened act that causes a reasonable fear of bodily harm or of damage to property;
>
> (b.1) conduct that, considered reasonably in the context of all relevant circumstances of the relationship, constitutes psychological or emotional abuse;
>
> (c) forced confinement;
>
> (d) sexual abuse, or
>
> (e) depriving a person of food, clothing, medical attention, shelter, transportation, or other necessaries of life.

[13] The subsections of this definition that are relevant to these proceedings are (b.1) and (e).

[14] The test for the granting of an EIO is found at section 4 of the *Act*:

> 4 (1) An emergency intervention order may be granted *ex parte* by a designated justice of the peace if that designated justice of the peace concludes that:
>
> (a) family violence has occurred or is likely to occur; and
>
> (b) by reason of seriousness or urgency, the order should be made immediately in order to ensure the immediate protection of the victim.

> (2) In determining whether an order should be made, the designated justice of the peace shall consider, but is not limited to considering, the following factors
>
> (a) the nature of the family violence;
>
> (b) the history of family violence by the respondent towards the victim;
>
> (c) the existence of immediate danger to persons or property;
>
> (d) the best interests of the victim and any child of the victim or any child who is in the care and custody of the victim.

Analysis

[15] As stated by Lilles J. in *MacNeil v. MacNeil,* 2000 YTTC 504, at para 22:

> The emergency intervention order is an exceptional remedy in that it can be obtained *ex parte*, without notice to the respondent, and by telephone.
>
> …

[16] He further stated, at para. 25:

> An emergency intervention order is not to be granted simply to alleviate an unhappy situation or to improve a less than ideal family situation. It is not to be used when remedies under other legislation are practical. It is to be used to provide protection in a real emergency.

[17] In *N.D. v. D.W.D.*, 2000 YTSC 525 at para. 10, Veale J. reiterated:

> … it is well established that the Family Violence Prevention Act is not the appropriate legislation to establish custody, access or property rights. (See MacNeil v. MacNeil, 2000 YTTC 504, [2000] Y.J. No. 1 and M.K.S. v. B.E.S., 2000 YTSC 523, [2000] Y.J. No. 100.) …

[18] It is, of course, important to be mindful of the preamble of the *Act*, which recognizes that:

- family violence continues to be a serious problem in the Yukon;
- one difficulty victims of family violence face is that the abuser often forces them to leave their own home to escape the abuse; and
- there must be effective legal procedures that victims of family violence can easily use to get immediate help and relief from the abuse.

[19] The question to be determined on this rehearing is whether the Respondent, A.H., has established, on a balance of probabilities, why the order of the justice of the peace should not be confirmed.

[20] I have considered the initial application of S.H., the Affidavit material filed, and the cross-examination of each of the parties with respect to their respective Affidavit.

[21] Firstly, I will consider the evidence regarding whether the conduct of A.H. constituted psychological or emotional abuse. S.H. alleges that over the course of their relationship her husband "has often acted in a controlling manner" with respect to her. However, aside from that blanket statement, she has not provided any further detail.

[22] Additionally, S.H. indicates in her Affidavit that A.H. has acted in a "psychologically and emotionally abusive manner". For example, she states he texts her while she is at work between two and eight times a day in what she views as an attempt to destabilize her emotionally. She says the texts concern what A.H. alleges are her various inadequacies. I note that she has not provided copies of any of these text messages, either in the original application or in her Affidavit material.

[23] S.H. also alleges that A.H. has abused her verbally by calling her a '"fucking bitch" in front of the children. He does not deny having said this.

[24] She indicates that he has stalked her at work by driving by her place of work and doing a U-turn in the parking lot on three separate occasions in the last three months. This evidence as presented is hearsay as it purportedly was received by her from receptionists at her place of work. A.H. denies he has done so.

[25] She states that he has told her that the family and rental homes are not hers and that she will be left with nothing from the divorce.

[26] Finally, she indicates that his behaviour with respect to the children and her, especially on June 29, is part of a pattern of psychological and emotional abuse towards her.

[27] On balance, I do not find that the evidence, that I accept, constitutes psychological or emotional abuse. I have come to this decision having considered A.H.'s actions and words in the context of the deteriorating relationship. The breakdown of their relationship has become acrimonious, while they are still living under the same roof, looking after three young children, and jockeying for position with respect to custody and access. They have been unable to come to a resolution satisfactory to both parties regarding custody and access or with respect to exclusive possession of the matrimonial home.

[28] Although A.H.'s words and actions may have been ill-considered, hurtful and inappropriate, I do not find that they rise to the level of psychological and emotional abuse envisioned by the *Act*.

[29] In coming to this conclusion, I have considered the allegation that A.H. is attempting to turn M. against S.H. I do not find that there is a sufficient evidentiary foundation to make this finding.

[30] Also, I have considered the circumstances leading up to and on June 29, the day on which the order was granted.

[31] It is appropriate to outline my reasoning with respect to that event, which appears to have been the tipping point in S.H.'s decision to seek an EIO. The backdrop is that on the evening of June 28 the parties argued with respect to a baby monitor that A.H. had in his bedroom, which is used to monitor the twins. Apparently he was frustrated by S.H.'s decision to take it from him that evening, after he had looked after the twins while she and M. had dinner outside the home.

[32] As indicated, he expressed to her by text the fact that he wanted to spend the next day with the children. The parties disagree as to what was meant by his text. S.H. felt that she was not going to see the children, even though June 29 was M.'s birthday. On the other hand, A.H. testified that he only meant that he wished to perform parental tasks such as dropping off and picking up the children at day care, to demonstrate that he was capable of doing so.

[33] Naturally, based on what S.H. understood A.H. to be suggesting, she expressed her dissatisfaction with this last minute plan. Unfortunately, the two did not take the opportunity to talk this matter out in a reasonable fashion in order to try to resolve what may properly be described as a misunderstanding. The situation was compounded by

A.H.'s inappropriate behaviour with respect to the couple's motor vehicles on the morning of June 29.

[34] S.H. became fearful she would not see the children based on what she understood A.H. intended. She indicated in her application and in her Affidavit that he was threatening to deny her access to the children on that day. However, A.H.'s text to her does not state that she would not see the children on the 29th. Subjectively, she believed this to be the case. However, considering the situation objectively, I find that there was a misunderstanding as to what was being proposed by A.H. I do not find that he was attempting to deny her from being with the children on that day.

[35] The plans had been that the family would eat together at a restaurant on that evening. Looking at the correspondence objectively, I cannot find that A.H.'s text on the evening of June 28 sought to change that arrangement. In fact, at 1:06 p.m. on June 29, he texted S.H. saying: "Let me know if you're going to finish work early". In my view, he would not have sent this text unless he intended to follow through on the original arrangement for the couple to take the children swimming and then out to dinner.

[36] Unfortunately, none of this was discussed and resolved by the parties on the morning of June 29. Although A.H.'s proposal for what would occur on June 29 was ill-timed and his subsequent actions that morning were ill-considered and caused S.H. concern, I do not find that they were psychologically or emotionally abusive.

[37] I now turn to the second allegation of family violence, that being whether A.H. deprived S.H. of shelter and/or transportation.

[38] S.H. relies on the definition of deprivation as set out in Black's Law Dictionary, 7th ed.,:

> … **1.** An act of taking away <deprivation of property>. **2.** A withholding of something <deprivation of food>. **3.** The state of being without something; wanting <deprivation from lack of food>. …

[39] S.H. argues that at the moment A.H. denied her access to use the family vehicles on June 29, he denied her transportation. If this is indeed a deprivation of transportation as envisioned by the *Act*, then by extension if, by way of a hypothetical situation, a couple with one shared motor vehicle has a verbal falling out leading to one party, in frustration, taking the sole motor vehicle to the exclusion of the other, an act of family violence has occurred. In my view, this cannot be what the legislators intended.

[40] Instead, in my estimation, deprivation of transportation would include a situation where, for example, one spouse left the other in an isolated area without any form of transportation or present ability to obtain transportation.

[41] The fact situation before me does not amount to deprivation of transportation under the *Act*.

[42] Regarding the allegation that A.H. locked S.H. out of the house, the parties disagree on whether or not A.H. took S.H.'s house key and intentionally prevented her entry to the house. S.H. believes that after the vehicle argument on the morning of June 29, her house key was no longer on the key chain from which A.H. admits taking her truck fob. As a result, she is of the view that when he took the truck fob, he also removed her house key. On the other hand, she admits that she does not remember

the last time she used the key to enter the house, as A.H. is generally there. A.H. adamantly denies taking her house key.

[43] S.H. relies on the decision in *M.L.A. v. R.S.,* 2000 YTSC 534, where Veale J. did find deprivation of shelter where R.S. prevented his spouse from accessing the family home by changing the locks.

[44] Veale J. stated, at para 21, that:

> Counsel for Mr. R.S. submitted that M.L.A. had an alternative residence (her parents) and this should be taken into consideration in determining the urgency of the situation. I am not prepared to consider alternative sources of shelter, be it family, friends or safe houses, as having any relevance to the deprivation of shelter. It is defined as family violence and the purpose of the *Family Violence Prevention Act* is to avoid the necessity of the victim having to consider alternative sources of shelter at all.

[45] The difference in this case and the case before me is that there is no allegation that A.H. had the locks to the house changed.

[46] Additionally, in the matter before me, the actions of A.H. after his early morning dispute with S.H. do not accord with an intention to prevent her entry to the house. I again refer to his text in the early afternoon. Although he does not directly touch on the issue, the tone of his text is not of someone who had earlier that morning intentionally locked his spouse out of their house, and who intended, going forward, to prevent her entry into the home.

[47] Also, it would not have made much sense for him to have done so, as there were at least two other people who had a key to the house, a neighbour who S.H. had

previously relied on in order to gain access to the house and a renter who works within a short walking distance from S.H.'s place of work.

[48] On balance, A.H. has satisfied me that he did not attempt to deprive S.H. of access to the home.

[49] In the result, I find that the Respondent, A.H., has demonstrated why the EIO should not be confirmed. Therefore, I terminate the order issued by the Justice of the Peace on June 29, 2018.

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CHISHOLM C.J.T.C.