LEGAL BULLETIN

Issue No. 23

Protection Orders & Family Proceedings: *2023 MBKB 164*

Introduction

This case covers a Protection Order trial which occurred in the aftermath of a contentious family proceeding. With a history of family violence, stalking, previous Protection Orders, and difficulty parenting cooperatively, the Judge considered the Respondent's numerous arguments to set aside the Protection Order, which included attempting to find procedural flaws, arguing that the Applicant failed to make full disclosure, as well as attempting to diminish the necessity of the Order.

The Judge upheld the Protection Order, with some further variations carved out to assist with the parenting arrangements.

Background

The Applicant, E.T.S, and the Respondent, S.J.B, cohabited together from late 2012 until their separation in July 2019. They had a daughter in June 2015.[1]

Following separation, the parties attended mediation and agreed to a parenting schedule with the Respondent having their daughter two evenings per week and one overnight every second weekend.[2] The Respondent was ultimately not agreeable with the mediated parenting arrangements and continued to demand that parenting be shared equally. The Applicant was opposed to the parties sharing parenting as there had been a history of abuse in the relationship, making it difficult for the Applicant to communicate with the Respondent.[3]

On January 15, 2020, the Applicant applied for a Protection Order for herself and the child. The Applicant gave evidence of verbal, mental, physical, sexual, and financial abuse. As well, she submitted that the Respondent was badgering her unrelentlessly about the parenting schedule. The Applicant turned to the court for assistance after the Respondent entered the home and took the child without her consent.[4] Judicial Justice of the Peace Pillipow allowed the Protection Order, finding that domestic violence and stalking had occurred, with the Respondent showing a pattern of coercive and controlling behaviour, that was serious in nature, and likely to continue.[5] The Protection Order prohibited direct or indirect communication with the Applicant except for court appearances, and the Respondent was prohibited from attending

[1] *E.T.S and S.J.B.*, 2023 MBKB 164, at para 3.
[2] *Ibid* at para 3.
[3] *Ibid* at para 3.
[4] *Ibid* at para 4.
[5] *Ibid* at para 5.

within 200 meters of the Applicant's residence. The child was not included in the Order.[6]

On February 13, 2020, the Respondent applied to have the Protection Order set aside. He also filed a Petition seeking primary care of the child and other related relief. The Applicant opposed the Petition, seeking primary care to herself, protective relief, child support, and property division.[7] In addition to the above filings of the Respondent, he also applied to the court for an emergent hearing, alleging that the Applicant had prohibited him from seeing his daughter. The request for an emergent hearing was denied.[8]

The Protection Order set-aside hearing was scheduled to occur in April 2021. However, shortly before the hearing, the parties came to a consent order setting aside the January 15, 2020, Protection Order, and instead opted for an order of protective relief under *The Family Maintenance Act.* The protective relief included no communication except for issues of parenting, to be done through "Our Family Wizard" ("OFW") application, no attendance within areas the Applicant normally resides, regularly attends, or works, except within the context of the family proceedings, as well as police assistance in enforcing the order.[9]

The parties then progressed through a series of case conferences and were able to reach an agreement on the other issues in their matter, and entered a consent Final Order, signed July 23, 2022. It was again emphasized in the Final Order, that the only communication between the parties was to occur through OFW and was limited to discussions of parenting transition times only.[10]

Following the conclusion of the family proceedings, the Applicant applied for, and was granted a further "without notice" stalking-related Protection Order on October 26, 2022, pursuant to *The Domestic Violence and Stalking Act.*[11] The Applicant gave evidence that the Respondent was threatening to come to her home, abusing the use of OFW, following her, attended her parents home for no reason, and driving past her home frequently.[12] Before applying to the court for another Protection Order, the Applicant first attempted to engage her counsel to resolve this issue but did not receive a reply, and with the Respondent's behaviour escalating, the Applicant felt she had no other option than to seek further intervention from the court.[13] The evidence presented included the OFW messages, the previous Protection Order, the Final Order, and the "File Details" from the court registry.

The Judicial Justice of the Peace ("JJP") who heard the matter, made several erroneous comments, including that there was no history of a "no contact" order, stating that parties cannot mutually agree to get rid of a Protection Order, and that the April 2021 Order (which granted protective relief under *The Family Maintenance Act*) was superseded by the Final Order. [14]

However, the JJP was satisfied that in consideration of the history of family violence and that the ongoing stalking was escalating, a further Protection Order was necessary. The new Protection Order contained the same terms as the April 2021 Order.

The Respondent applied to have the Protection Order set aside, and on December 21, 2022, at the initial Protection Order List, the Order was varied to allow for contact through OFW on parenting issues. A trial on the remaining issues was scheduled for May 11, 2023, before Justice Mirwaldt.[15]

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[6] *Ibid* at para 6.
[7] *Ibid* at para 7.
[8] *Ibid* at para 8.
[9] *Ibid* at para 13.
[10] *Ibid* at para 14-15.
[11] *E.T.S., v. the Respondent, 2023 MBKB 164,* at para
[12] *Ibid* at paras 16-18.
[13] *Ibid* at para 19.
[14] *Ibid* at para 21.
[15] *Ibid* at paras 23-25.

Issues

Initially the Respondent tried to proceed with a without notice motion for summary judgment, only giving 10 minutes notice to the Application. However, the Judge did not allow the motion to proceed on the basis that the lack of notice was unfair.[16] The Respondent argued that he had met the onus of proof to set the order aside, basing his reasons on the following:

> "a. the Applicant's failure to make full disclosure;
> b. The JJP made a number of errors in her consideration of the April 2021 Order and had no jurisdiction to grant the order;
> c. The weight of the evidence at the hearing was insufficient to support a finding of domestic violence and stalking;
> d. The restraints on his liberty are unnecessary or too restrictive; and
> e. If his actions had amounted to stalking, there was no evidence that the stalking would continue."[17]

The Applicant sought that the Protection Order remain in place to protect her and her child, and cited provisions of *The Domestic Violence and Stalking Act* to support this.

The Judge analyzed the provisions of *The Domestic Violence and Stalking Act*, including looking at the definition of domestic violence and stalking, found in paragraph 2 of the *Act*, as well as the grounds for which a JJP can grant a without notice Protection Order, found in paragraph 6 of the *Act*.

Failure to Make Full Disclosure

The Judge heard evidence that the Applicant's counsel had never provided her with the April 2021 Order. Because of this, the Applicant had been told by the police there was no order in place and that she needed to obtain a further Protection Order.[18]

The Judge found that the requirement in the legislation is that the JJP consider "any information available from the court registries," and that there was no requirement that the Applicant provide copies of all orders that may be in place.[19]

The Judge found that the Applicant made full disclosure of all documents in her possession. She was forthcoming with the JJP regarding what had transpired in the family proceedings.[20]

The Respondent further tried to argue that the Applicant made a "without notice" Application amid family proceedings, which are to be avoided. However, the Judge pointed out that as there was already a Final Order in the matter, therefore, there were

[16] *Ibid* at para 28.
[17] *Ibid* at para 40.
[18] *Ibid* at para 42.
[19] *Ibid* at para 43.
[20] *Ibid* at para 45.

no pending proceedings.[21]

JJP's Errors and Jurisdiction

As the Applicant was not in possession of all the documents pertaining to the matter, because of them not being provided to her, the JJP was limited in what they could review in the hearing. Therefore, in reviewing the court registry to see what had previously transpired on the file, the JJP erred in determining that the April 2021 Order under *The Family Maintenance Act*, was an interim order only, and had been subsumed by the Final Order. [22]

Although the JJP had erred in their finding, the Judge found that this did not warrant the current Protection Order being set aside.[23] The JJP was limited to the information that was found on the court registry. The requirement in the legislation is only that the JJP look at the information available at the hearing. This keeps in line with the intent of the legislation, and the emergent nature of domestic hearings.[24]

The Respondent then argued that because the April 2021 Order of the Judge was still in place, the JJP did not have jurisdiction to "go behind" the Judges order, as the order of a Judge is paramount to an order of a JJP. The Judge noted that the law of paramountcy is not present with two pieces of provincial legislation (as paramountcy comes into play when a piece of provincial legislation conflicts with federal legislation), further, the two Orders were not incongruous with each other. It was not impossible for the Respondent to comply with both at the same time. The Judge further noted that in instances of family violence, and different legislation that addresses it, there is bound to be some overlap as families seek protection. [25]

Insufficient Weight of the Evidence

Most of the evidence presented by the Applicant was by way of printouts of the OFW communications.[26] In these communications, the Respondent clearly overstepped boundaries, suggesting that they parent outside of the confines of the Final Order in place, attend events together, go back into business together, and continued to indicate his wish to reunite with the Applicant.[27]

The Respondent's counsel relied on the case of *Belot* to argue that the Applicant's continued fears were not reasonable in the circumstances, and that the Respondent was trying to progress the co-parenting relationship. However, the Applicant distinguished her case from *Belot,* showing evidence that the Respondents behaviour was a continued campaign of coercive control against her.[28]

[21] *Ibid* at paras 45-46.
[22] *Ibid* at paras 47-49.
[23] *Ibid* at para 50.
[24] *Ibid* at para 51.
[25] *Ibid* at paras 52-54.
[26] *Ibid* at para 58.
[27] *Ibid* at para 59.
[28] *Ibid* at paras 63-66.

The Judge was further compelled by the Applicant's demeanour during the hearing, as she was shaking and tearful. Her testimony gave clear indication and insight into the trauma experienced in the relationship. Further her testimony was that the escalation of behaviour was a sign that he may begin to act violently again, as she had experienced these patterns during the 7-year relationship. For example, leaving a Valentine's card in the child's backpack, along with a personal vibrator for her.[29] A friend of the Applicant was also called to testify, and her evidence corroborated the Applicant's evidence. For instance, that the Applicant showed fear to be alone with the Respondent including hyperventilating. The Applicant had her friend read messages in advance to identify if they were abusive or inappropriate.[30]

The Judge found that, although the Respondent presented in a confident and direct manner, there was a lack of insight as to the circumstances. For instance, he accused the Applicant of instigating a combative custody battle, when he was the one who initiated the initial family proceedings. He stated that having the January 2020 Protection Order be set aside disproved his allegations of abuse; however, this is inconsistent with the fact that he consented to the April 2021 Order, which deals with the domestic violence under different legislation. [31]

The Respondent denied many of the allegations made by the Applicant, claiming that the OFW messages were appropriate, and denying that he was trying to rekindle the relationship or re-negotiate parenting. He further denied the instance of sending her cards and a personal vibrator. [32]
The Judge found in favour of the Applicant's evidence, citing that she was an honest witness and did not have an improper agenda.[33] With respect to testimony of the Respondent, she found that he appeared entitled and self-righteous with a lack of insight as to his impact on the Applicant, which led to the need for limits on their communication.[34]

The Restraints on S.J.B's Liberty

The Respondent did not satisfy the Judge that his liberty was restrained. For instance, he argued that having two concurrent Orders in place was restrictive. However, the Judge noted while the terms of the Orders are identical, the nature and intent of the Orders are different. The April 2021 Order was granted in the midst of proceedings to help end the difficult family proceedings related to the domestic violence and assist the parties in finding a neutral way to communicate. On the other hand, the Protection Order was to specifically address the ongoing stalking that continued after the family matter ended.[35]

Further, the Respondent alleged that he was impacted in his work, not being considered for certain government jobs due to the Order. However, despite being asked, did not file this evidence by way of Affidavit.[36]

[29] *Ibid* at para 67.
[30] *Ibid* at paras 68-69.
[31] *Ibid* at para 70.
[32] *Ibid* at para 73.
[33] *Ibid* at para 76.
[34] *Ibid* at paras 78-79.
[35] *Ibid* at para 56.
[36] *Ibid* at para 81-82.

The Stalking Would Not Continue

The Judge was not convinced that the stalking would not continue. Specifically, she noted his insistence to frequent a restaurant (along with his parents) that was not near him nor his parent's home, and to continue to drive past the Applicant's house. This indicated a continued disregard for the Applicant's sense of safety.

Further, he continued to use pet names for her, such as "Angel" and "Mama Bear," indicating his lack of respect for the Applicant's boundaries.[37]

Decision

Justice Mirwaldt found that the Respondent did not meet the onus of proving that the Order be set aside and confirmed the Protection Order with a few variations, as follows:

> "a. the Respondent may have direct communication with the Applicant by use of the "Our Family Wizard Program" in accordance with the Final Order signed July 23, 2022. The communications must be child-focused, non-personal and businesslike in nature and relate to information only pertaining to the transfer of the child;
> b. the Respondent shall not use the child as a messenger to communicate with the Applicant;
> c. the Respondent and the Applicant may share schedules using an online calendar or in writing through the Our Family Wizard website; and
> d. the Respondent shall refrain from engaging the child in any discussions or questioning about the Applicant's personal life, health, or social activities."[38]

Takeaways

This case is important as it demonstrates the need for all levels and branches of the justice system that have a role in Protection Orders to have a clear understanding of how various Orders and processes fit together. In this case there appeared to be a disconnect between the police, JJP, and Judges view of what had transpired and this led to negative implications for the Applicant. This could have had a grave impact on the Applicant had the Protection Order been set aside because of these flaws in the process. Perhaps there needs to be further training, communication, and collaboration between these different departments so that there is a cohesive understanding of the process.

This case also reminds of the importance that the court be aware of all actions and Orders in place that may have an impact on family proceedings, so that any Order that is made in the family proceedings will be consistent with any protective relief. Section 12(2) of *The Family Law Act* imposes a duty on the court to consider if there is any protective proceedings or Orders that are pending or in effect that are related to any party to the family proceedings.

[37] *Ibid* at paras 59 and 87.

[38] *Ibid* at para 89.

This case also serves as a reminder to lawyers of how important it is to keep clients informed of the stages of the matter, including explaining the implications of any orders, expiry dates and limitation periods, how various Orders on the file work together, or what recourse may be available if there are breaches made by the other party. For counsel acting for the Respondent, this includes making them aware of the consequences for violating orders that are in place, as well as the impact a violation could have on their family matter and parenting rights.

Finally, this case highlights the mechanisms available to assist with co-parenting where there is a history of abuse. Applications such as Our Family Wizard, Talking Parents, and numerous others, are useful tools not only in that they assist in the communication, but also many of these apps help to keep a record of communication that can be entered in the court as evidence if abuse occurs through the app.

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