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A Clarification of Evidentiary Requirements under the Protection Against Family Violence Act

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Cases Considered:
J.S. v. D.J.K., 2009 ABQB 426.

Justice Donald Lee is a prolific author of judgments posted to the Alberta Courts website, and one of the only Alberta judges to post decisions made under the *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27 (*PAFVA*) (see my earlier post Family Violence Cases in Alberta: A Snapshot). In one of his recent decisions, Justice Lee helpfully clarifies the evidentiary requirements for hearings to confirm emergency protection orders made under the *PAFVA*.

The *PAFVA* allows victims of family violence to apply for emergency protection orders (EPOs) on an *ex parte* basis. If an EPO is granted, it typically restrains contact between the respondent and claimant, and may also include an order for exclusive possession of the family home and prohibitions against attending at a place of work, school, or other place (*PAFVA* s. 2(3)). An EPO must be served on the respondent before it takes effect, and must be reviewed by a justice of the Court of Queen's Bench in a confirmation hearing, to be held not later than 9 working days after the granting of the order (*PAFVA* ss. 5(1), 2(6)).

Section 3 of the *PAFVA* provides that a confirmation hearing "must be based on affidavit evidence and any other sworn evidence" (s. 3(2)). Further, it provides that "the evidence that was before the judge of the Provincial Court or designated justice of the peace [hearing the EPO application] may also be considered as evidence at the hearing" (s.3(3)).

In *J.S. v. D.J.K.*, 2009 ABQB 426, an EPO was granted against the respondent D.J.K. on May 4, 2009, and was served on him in accordance with the *PAFVA*. The respondent did not appear at the confirmation hearing on May 15, 2009, and the EPO was confirmed until May 2010. Some time after May 15 the respondent retained counsel, who applied to set aside the order on the grounds that insufficient evidence had been led by the applicant J.S. at the confirmation hearing. This argument required Justice Lee to consider the proper interpretation of ss.3(2) and (3) of the *PAFVA*.

The respondent argued that these sections should be interpreted according to their plain meaning, whereby an applicant would be required to file affidavit evidence in support of the confirmation of the EPO. The applicant countered that the affidavit of service of the EPO on the respondent, along with the sworn evidence originally presented to the Justice of the Peace who granted the EPO, should be seen as sufficient compliance with s.3(2).

Justice Lee indicates that he invited counsel for the Alberta government to make submissions on the proper interpretation of s.3 of the *PAFVA*, but government counsel declined to become involved in the matter (at para. 13).

This appears to be the first time that this issue has been considered in written reasons. Justice Lee suggests that the common practice has been that "most applicants add little or nothing to the Provincial Court Transcript in support of confirmation of the Emergency Protection Order" (at para. 22). He finds, however, that this practice is not in accordance with the requirements of the *PAFVA*.

Justice Lee first rejects the applicant's submission that an affidavit of service satisfies s.3(2) of the *PAFVA*, as this affidavit is procedural rather than substantive (at para. 14). Second, he finds that the sworn evidence from the EPO hearing alone is not a sufficient evidentiary basis for the confirmation hearing, "because otherwise the Legislature would not have distinguished between the term "Affidavit" and "any other sworn evidence" in s. 3(2) of the Act" (at para. 15). Further, "if the Transcript of the Provincial Court hearing satisfied the requirements of … s. 3(2), then [s.3(3)] would be rendered meaningless" (at para. 16). The proper interpretation of s.3(3), Justice Lee finds, is that the transcript is admissible as evidence at the confirmation hearing, but it need not be considered (given the word "may") and it is not sufficient in any event (at para. 16). Justice Lee concludes that a plain meaning approach is appropriate here given the lack of ambiguity in the provisions, as well as the consequences of orders for respondents, whose liberties are typically constrained: "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" (at para. 21).

Accordingly, Justice Lee sets aside the EPO and orders a new confirmation hearing based on *viva voce* evidence. No costs are awarded to the respondent in light of the fact that the applicant "followed what had been universally considered to be the normal practice with respect to her Emergency Protection Order application" (at para. 25).

It is difficult to dispute Justice Lee's interpretation of ss. 3(2) and (3) of the *PAFVA*. This accords with how I have always assumed the legislation was to be interpreted, and in fact I have critiqued the *PAFVA* in the past for its strict evidentiary requirements for Queen's Bench confirmation hearings (see Leslie Tutty, Jennifer Koshan, Deborah Jesso, and Kendra Nixon, *Alberta's Protection Against Family Violence Act: A Summative Evaluation* (Calgary: RESOLVE Alberta, 2005 at 92-3)). Similar legislation in Saskatchewan and Manitoba provides that confirmation hearings can be based on the evidence from the *ex parte* hearing alone (see *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s.5; *Domestic Violence and Stalking Act*, C.C.S.M. c. D93, s.12(3)). By comparison, the *PAFVA* imposes more onerous requirements on applicants seeking protection from family violence, which may affect the accessibility of the legislation and may explain its relatively low usage rates, particularly in rural areas. To address potential concerns about procedural fairness, it should be noted that even if the evidence from the original *ex parte* hearing was a sufficient evidentiary record for the confirmation hearing to proceed, it would still be open to the respondent to lead evidence at the confirmation hearing, whether by affidavit or *viva voce* evidence. In the case of conflicting affidavit evidence, a *viva voce* hearing could be ordered, as it was in this case.

Now that the proper interpretation of section 3 has been confirmed by Justice Lee, it seems the only solution is an amendment to the *PAFVA*. I advocated for such a reform along with my co-

authors in 2005 (see *Alberta's Protection Against Family Violence Act: A Summative Evaluation* at p. 93). However, while several of our recommendations were adopted in amendments to the *PAFVA* in 2006, the evidentiary requirements for confirmation hearings remained and to continue to remain the same.