

The Canadian Abridgment eDigests -- Family Law - Atlantic

2006-28
July 10, 2006

FAM.IV.3.j.ii

Subject Title: Family law

Classification Number: IV.3.j.ii

Support -- Child support under federal and provincial guidelines -- Variation or termination of award -- Change in circumstances

Retroactive variation.

R. (R.) v. C. (A.) ([2006](#)), [2006 CarswellNB 268](#), [2006 CarswellNB 267](#), [2006 NBCA 58](#), Deschênes J.A., Larlee J.A., Richard J.A. (N.B. C.A.) [New Brunswick]; reversing in part *R. (R.) c. C. (A.)* ([2005](#)), [2005 CarswellNB 820](#), Léger J. (N.B. Q.B.)

FAM.V.2.a.i

Subject Title: Family law

Classification Number: V.2.a.i

Domestic contracts and settlements -- Validity -- Essential validity and capacity -- General principles

Parties married in 1986, had one child of marriage in 1988 and separated in 2003 -- Husband had two work place accidents and was in receipt of workers compensation benefits and Canada pension disability benefits totalling \$30,000 per year -- Wife held various part-time jobs throughout marriage earning approximately \$3,800 to \$6,800 per year -- Parties' most significant asset was mobile home on lot

deeded to couple by wife's father -- Wife took separation badly and husband resided in matrimonial home with child while mother moved in with B -- In order to settle parties' financial affairs, wife requested that husband pay her \$15,000 as her interest in matrimonial assets and for waiver of any claim by her to spousal support -- Wife claimed she made offer on basis of oral agreement that husband would by will leave matrimonial home to son -- Husband's lawyer prepared separation agreement and wife had independent legal advice before signing it -- Agreement was full and final release of all rights regarding ownership of property and spousal support -- Since agreement wife had separated from B and lived alone in apartment, and had suffered injuries in fall which she claimed meant she could not work full-time -- Wife brought proceedings challenging validity of separation agreement -- Petition dismissed -- Agreement was negotiated by parties and not lawyers and there was no evidence that wife was mentally incompetent at time -- Full disclosure had been made and there was no evidence that wife did not understand agreement, which was clear and certain and did not contain any provision whereby husband leave matrimonial home to son -- Wife was not under duress or practical compulsion, there was no evidence of undue influence and wife had independent legal advice -- Agreement was fair and reasonable and in fact favoured wife -- Waiver in agreement acknowledged that drastic and unforeseeable changes may occur in future in parties' incomes, assets, debts, health and employment, but there was to be no future review on basis of those events -- In circumstances, wife had not discharged onus of showing that agreement at time it was executed was not in substantial compliance with Divorce Act.

Day v. Day ([2006](#)), [2006 CarswellNS 138](#), [2006 NSSC 111](#), Warner J. (N.S. S.C.) [Nova Scotia]

FAM.V.5

Subject Title: Family law

Classification Number: V.5

Domestic contracts and settlements -- Termination

Parties married in 1986, had one child of marriage in 1988 and separated in 2003 -- Husband had two work place accidents in and was in receipt of workers compensation benefits and Canada pension disability benefits totalling \$30,000 per year -- Wife held various part-time jobs throughout marriage earning approximately \$3,800 to \$6,800 per year -- Parties' most significant asset was mobile home on lot deeded to couple by wife's father -- Wife took separation badly and husband resided in matrimonial home with child while mother moved in with B -- In order to settle parties' financial affairs, wife requested that husband pay her \$15,000 as her interest in matrimonial assets and for waiver of any claim

by her to spousal support -- Husband's lawyer prepared separation agreement and wife had independent legal advice before signing it -- Agreement was full and final release of all rights regarding ownership of property and spousal support -- Since agreement wife had separated from B and lived alone in apartment, and had suffered injuries in fall which she claimed meant she could not work full-time -- Wife brought proceedings asking court to override agreement with regard to support on basis that her injuries constituted situation which agreement did not contemplate, so that it was no longer in substantial compliance with Divorce Act -- Petition dismissed -- There was no evidence that wife's condition brought about by injury was permanent -- Also, agreement did contemplate kind of change of circumstances upon which wife currently claimed support, so that wife had failed to establish material change in circumstances unforeseeable by parties when agreement was signed -- Wife's employment income since accident had not changed from what she earned before separation or when agreement was made -- Wife's separation from B and financial consequences thereof was not significant departure from what people in her situation could or should reasonably expect -- Therefore, none of circumstances met threshold of establishing significant departure from range of reasonable outcomes anticipated by parties, or which could reasonably have been anticipated by parties when agreement was made, so as to put them at odds with objectives of Divorce Act.

Day v. Day ([2006](#)), [2006 CarswellNS 138](#), [2006 NSSC 111](#), Warner J. (N.S. S.C.) [Nova Scotia]

FAM.VIII.2.c.i

Subject Title: Family law

Classification Number: VIII.2.c.i

Divorce -- Grounds -- Adultery -- Definitions

Husband alleged wife engaged in intimate sexual acts with another woman -- Wife did not contest allegations -- Husband brought petition for divorce based on wife's adultery -- Petition granted -- Adultery was ground of divorce regardless of whether sexual misconduct was homosexual or heterosexual -- Definition of adultery must be consistent with governing legislation and values enshrined in Canadian Charter of Rights and Freedoms -- Confining statutory right to divorce on basis of adultery only to spouses whose partners engaged in heterosexual extra-marital activity would have been discriminatory in more than one respect -- Homosexual spouses should be bound by same legal constraints as heterosexual spouses, and homosexual violation of marriage vows should have same consequences under Divorce Act as heterosexual violation -- Evidence established wife had engaged in intimate sexual acts outside of marriage.

Thebeau v. Thebeau (2006), 2006 CarswellNB 224, 2006 NBQB 154, Wooder J. (N.B. Q.B.) [New Brunswick]

FAM.VIII.6

Subject Title: Family law

Classification Number: VIII.6

Divorce -- Effect of Charter of Rights and Freedoms

Husband alleged wife engaged in intimate sexual acts with another woman -- Wife did not contest allegations -- Husband brought petition for divorce based on wife's adultery -- Petition granted -- Adultery was ground of divorce regardless of whether sexual misconduct was homosexual or heterosexual -- Definition of adultery must be consistent with governing legislation and values enshrined in Canadian Charter of Rights and Freedoms -- Confining statutory right to divorce on basis of adultery only to spouses whose partners engaged in heterosexual extra-marital activity would have been discriminatory in more than one respect -- Homosexual spouses should be bound by same legal constraints as heterosexual spouses, and homosexual violation of marriage vows should have same consequences under Divorce Act as heterosexual violation -- Evidence established wife had engaged in intimate sexual acts outside of marriage.

Thebeau v. Thebeau (2006), 2006 CarswellNB 224, 2006 NBQB 154, Wooder J. (N.B. Q.B.) [New Brunswick]

FAM.IX.1.a

Subject Title: Family law

Classification Number: IX.1.a

Custody and access -- Jurisdiction of courts -- General principles

Parents married in 1993 and separated in 2005 -- Interim joint custody order specified that primary residence of two children of marriage was with mother, that generous access be given to father, and that independent custody and psychological assessment be done by court-appointed psychologist -- Expert filed report which recommended that sole custody be given to father -- Father moved successfully to vary interim custody order in accordance with report -- Motion judge determined that special circumstances may warrant variation of interim custody order -- Expert said that joint or shared custody was not recommendable -- Compelling expert evidence for varying custody order existed which showed that father had best ability to have primary care since he could maintain distance and protect children from undue pressure with respect to loyalty and conflict fed by breakdown of marriage -- Mother argued that court lacked jurisdiction to vary interim custody order -- However, motion judge concluded that children's best interests required giving effect to expert's recommendations and granting sole custody to father -- Mother appealed -- Appeal dismissed -- Divorce Act does not provide specifically for variation of interim custody order and it is rare for motion judge to do so -- However, judge always has jurisdiction to decide custody of child as it relates to best interests of child, particularly where there is change in circumstances and compelling reasons that mitigate in favour of immediate action rather than waiting for hearing -- Expert pointed out children's anxiety over parents' conflict and fact that father's home presented most stable environment for children -- Also, divorce hearing was not scheduled for another six months -- In circumstances, motion judge made no error in determining that there were compelling reasons to vary interim order.

F. (H.) v. G. (D.) (2006), 2006 CarswellNB 201, 2006 CarswellNB 200, 2006 NBCA 36, Daigle J.A., Deschênes J.A., Larlee J.A. (N.B. C.A.) [New Brunswick]; reversing in part (2005), 2005 CarswellNB 674, 2005 NBQB 428, Savoie J. (N.B. Q.B.)

FAM.IX.3.a

Subject Title: Family law

Classification Number: IX.3.a

Custody and access -- Interim custody -- General principles

Parents married in 1993 and separated in 2005 -- Interim joint custody order specified that primary residence of two children of marriage was with mother, that generous access be given to father, and that independent custody and psychological assessment be done by court-appointed psychologist -- Expert filed report which recommended that sole custody be given to father -- Father moved successfully to

vary interim custody order in accordance with report -- Motion judge determined that special circumstances may warrant variation of interim custody order -- Expert said that joint or shared custody was not recommendable -- Compelling expert evidence for varying custody order existed which showed that father had best ability to have primary care since he could maintain distance and protect children from undue pressure with respect to loyalty and conflict fed by breakdown of marriage -- Mother argued that court lacked jurisdiction to vary interim custody order -- However, motion judge concluded that children's best interests required giving effect to expert's recommendations and granting sole custody to father -- Mother appealed -- Appeal dismissed -- Divorce Act does not provide specifically for variation of interim custody order and it is rare for motion judge to do so -- However, judge always has jurisdiction to decide custody of child as it relates to best interests of child, particularly where there is change in circumstances and compelling reasons that mitigate in favour of immediate action rather than waiting for hearing -- Expert pointed out children's anxiety over parents' conflict and fact that father's home presented most stable environment for children -- Also, divorce hearing was not scheduled for another six months -- In circumstances, motion judge made no error in determining that there were compelling reasons to vary interim order.

F. (H.) v. G. (D.) ([2006](#)), [2006 CarswellNB 201](#), [2006 CarswellNB 200](#), [2006 NBCA 36](#), Daigle J.A., Deschênes J.A., Larlee J.A. (N.B. C.A.) [New Brunswick]; reversing in part ([2005](#)), [2005 CarswellNB 674](#), [2005 NBQB 428](#), Savoie J. (N.B. Q.B.)

FAM.IX.3.b

Subject Title: Family law

Classification Number: IX.3.b

Custody and access -- Interim custody -- Practice and procedure

Parents married in 1993 and separated in 2005 -- Interim joint custody order specified that primary residence of two children of marriage was with mother, that generous access be given to father, and that independent custody and psychological assessment be done by court-appointed psychologist -- Expert filed report which recommended that sole custody be given to father -- Father moved successfully to vary interim custody order in accordance with report -- Motion judge determined that special circumstances may warrant variation of interim custody order -- Expert said that joint or shared custody was not recommendable -- Compelling expert evidence for varying custody order existed which showed that father had best ability to have primary care since he could maintain distance and protect children from undue pressure with respect to loyalty and conflict fed by breakdown of marriage -- Mother argued

that court lacked jurisdiction to vary interim custody order -- However, motion judge concluded that children's best interests required giving effect to expert's recommendations and granting sole custody to father -- Mother appealed -- Appeal dismissed -- Divorce Act does not provide specifically for variation of interim custody order and it is rare for motion judge to do so -- However, judge always has jurisdiction to decide custody of child as it relates to best interests of child, particularly where there is change in circumstances and compelling reasons that mitigate in favour of immediate action rather than waiting for hearing -- Expert pointed out children's anxiety over parents' conflict and fact that father's home presented most stable environment for children -- Also, divorce hearing was not scheduled for another six months -- In circumstances, motion judge made no error in determining that there were compelling reasons to vary interim order.

F. (H.) v. G. (D.) ([2006](#)), [2006 CarswellNB 201](#), [2006 CarswellNB 200](#), [2006 NBCA 36](#), Daigle J.A., Deschênes J.A., Larlee J.A. (N.B. C.A.) [New Brunswick]; reversing in part ([2005](#)), [2005 CarswellNB 674](#), [2005 NBQB 428](#), Savoie J. (N.B. Q.B.)

FAM.XV.7.b.iii.B

Subject Title: Family law

Classification Number: XV.7.b.iii.B

Children in need of protection -- Practice and procedure in custody hearings -- Commencement of proceedings -- Parties -- Grandparents

KD was mother of three-year-old J and CM was his father -- PD was mother of KD -- KD had serious drug abuse problem and her relationship with PD was factious -- J was subject of protection proceedings brought by children's services agency -- With consent of his parents, J was found to be in need of protective services as of September 2005 -- By disposition order of December 2005, with consent of parents, J continued in day to day care of his father CM subject to supervision of agency and limited access to KD -- PD sought leave to intervene in protection application -- Application dismissed -- There was no role for such third party application unless it was first determined that on temporary or permanent basis, child was to be removed from parental care for reasons under s. 42(2) of Children and Family Services Act, and that it was necessary to grant application to enable issue of alternate placement to be properly dealt with -- Any evidence by third party in support of need for protective services or for removal of child from home was for that person to submit to agency -- Premature addition of another party with own agenda could only worsen matters -- Agency was not seeking temporary or permanent care of child, and thus PD's application was premature.

Family & Children's Services of Kings (County) v. D. (K.) [\(2006\), 2006 CarswellNS 124, 2006 NSFC 8,](#)
Levy Fam. Ct. J. (N.S. Fam. Ct.) [Nova Scotia]



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