

The Canadian Abridgment eDigests -- Family Law - Atlantic

2008-47

November 24, 2008

FAM.IV.1.f.ii

Subject Title: Family law

Classification Number: IV.1.f.ii

Support -- Spousal support under Divorce Act and provincial statutes -- Time-limited award -- Spouse to become self-sufficient

Parties married in 1983, had two children and divorced in 1999 -- Wife was homemaker during marriage whose earnings from minimum wage jobs were used for household expenses -- Corollary relief judgment in 1999 required husband to pay \$500 per month in spousal support -- Husband was entitled to review in three years -- Husband remarried and had income of \$68,000 per year -- Wife worked as manager at fast food restaurant, earning \$21,689.20 per year -- Husband applied for review and termination of spousal support -- Application granted in part -- Husband ordered to pay \$500 per month until 2013 -- Wife had not achieved self-sufficiency, despite taking reasonable steps -- Wife was not intentionally under-employed -- Wife had shown due diligence by completing secretarial courses at college and trying to secure employment as secretary -- It was reasonable in circumstances for husband to pay child support until remaining dependent child graduated high school in 2013 -- Husband had income to pay both child support and spousal support.

Bateman v. Bateman ([2008](#)), [2008 NBQB 306](#), [2008 CarswellNB 461](#), J.L. Clendening J. (N.B. Q.B.)
[New Brunswick]

FAM.IV.2.a.iv

Subject Title: Family law

Classification Number: IV.2.a.iv

Support -- Child support -- Duty to contribute -- Child at school

Parties agreed that father would pay child support of \$700 per month for parties two child to terminate when children reached 19 years of age -- Father unilaterally terminated child support for child when she attained age of 19 years -- Father's 2007 income was \$55,440.07 -- Mother brought motion to vary retroactively child support -- Motion granted -- Father was ordered to pay child support of \$300 monthly retroactive to June 2007 -- Child was still child of marriage given her full-time enrolment in university -- Child continued to reside at home with mother -- Father's child support obligation was reduced by \$200 to reflect amount child should be contributing.

MacAfee v. Garnett (2008), 2008 CarswellNB 431, 2008 NBQB 186, B.L. Baird J. (N.B. Q.B.) [New Brunswick]

FAM.IV.3.h

Subject Title: Family law

Classification Number: IV.3.h

Support -- Child support under federal and provincial guidelines -- Retroactive award

Parties agreed that father would pay child support of \$700 per month for parties two child to terminate when children reached 19 years of age -- Father unilaterally terminated child support for child when she attained age of 19 years -- Father's 2007 income was \$55,440.07 -- Mother brought motion to vary retroactively child support -- Motion granted -- Father was ordered to pay child support of \$300 monthly retroactive to June 2007 -- Mother did not unreasonably delay filing of her motion -- Father would not experience hardship with retroactive order.

MacAfee v. Garnett (2008), 2008 CarswellNB 431, 2008 NBQB 186, B.L. Baird J. (N.B. Q.B.) [New Brunswick]

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

Parties agreed that father would pay child support of \$700 per month for parties two child to terminate when children reached 19 years of age -- Father unilaterally terminated child support for child when she attained age of 19 years -- Father's 2007 income was \$55,440.07 -- Mother brought motion to vary retroactively child support -- Motion granted -- Father was ordered to pay child support of \$300 monthly retroactive to June 2007 -- Child was still child of marriage given her full-time enrolment in university -- Child continued to reside at home with mother -- Father's child support obligation was reduced by \$200 to reflect amount child should be contributing.

MacAfee v. Garnett ([2008](#)), [2008 CarswellNB 431](#), [2008 NBQB 186](#), B.L. Baird J. (N.B. Q.B.) [New Brunswick]

FAM.V.3.e

Subject Title: Family law

Classification Number: V.3.e

Domestic contracts and settlements -- Effect of contract -- Miscellaneous issues

Husband and wife married in 2001 -- Husband executed last will and testament in 2002 and left residue of his estate to wife -- Husband and wife divorced in 2007 and executed separation agreement -- Section 20 of agreement provided that parties forever renounced and waived any claim in estate of other and any right to share in estate of other, whether such claim or right arose under statute or otherwise, including right to administer estate of other in event of death of that party -- Husband died without making new will -- Executrix of husband's estate applied for determination of whether wife, by virtue of s. 20 of agreement, had waived and released her right to inherit under will -- It was not clear from wording of s. 20 that wife waived her right to claim under will if her husband chose not to alter his will so as to eliminate her as beneficiary -- There was no reference to will in separation agreement -- Section 20 of

agreement did not affect right of wife to be sole beneficiary under will -- In absence of challenge to will, there would need to be compelling reasons to override testator's intentions -- Language of agreement did not permit this conclusion -- It would have been possible for agreement to include clear waiver of right of parties to inherit under each other's wills, if this was their intention -- Spouse's right to claim against estate or to share in estate appeared to be distinct from testator's right to confer benefit voluntarily -- Separation agreement did not revoke will, nor did it appear to have affected either party's ability to dispose of their estate as they saw fit -- Both ss. 22 and 23 of Wills Act were consistent with this interpretation.

Morrell Estate v. Robinson (2008), 2008 NSSC 295, 2008 CarswellNS 530, A.W.D. Pickup J. (N.S. S. C.) [Nova Scotia]

FAM.IX.2.a

Subject Title: Family law

Classification Number: IX.2.a

Custody and access -- Factors to be considered in custody award -- Best interests of child generally

23-year-old man and 19-year-old woman lived together in NB from October 2006 to December 2007 and had child in February 2007 -- In February 2008, woman took child to Ontario for three weeks, having given man letter promising to return child, but following month, woman served man with application in Ontario court for custody and child support -- Man obtained interim order requiring woman to return child and giving parties joint custody and primary residence to man -- Man was employed and worked 12-hour shifts, and man's parents, who had meaningful relationship with child, babysat while man was working -- Man would move to three-bedroom apartment if given custody -- Man alleged concern over woman's socializing and produced photographs from Facebook of woman drinking and partying -- Woman had not finished high school and did not work but planned to move to Ontario and return to school to take program not available in NB -- Woman planned to live with father but father admitted concerns about her lifestyle, ability to make it on own, and whether she would stay there -- Child's family other than maternal grandfather live in NB -- Parties each brought motions for sole custody of child or joint custody with primary care and control -- Man was awarded custody with access to woman -- Child's best interests would be served by keeping child in NB where there was support structure and familiar caregivers and surroundings -- From birth until removal to Ontario, child resided with both parents and it was important that child have meaningful relationship with both parents -- Woman's decision to move to Ontario was not, in and of itself, compelling enough reason on which to

decide custody -- Child had bonded with man and paternal grandparents while woman's father and step-mother were admittedly strangers to child -- As between parents, there were clear differences in maturity and only man could see to child's physical, emotional, social and economic needs, while it appeared woman was not ready to be full-time mother and might place own interests ahead of child's -- There were concerns, given woman's removal of child and application for custody from Ontario, that if child permanently moved to Ontario, contact between child and man would be frustrated, complicated and costly, while it was clear that man's family would ensure woman continued to have contact -- Woman's access, if moving to Ontario, would be on weekends, holidays and vacation at paternal grandfather's expense, and if woman remained in NB, child's time with parties was to continue as at present with woman's access supervised until further order and, in either case, ban on alcohol, tobacco and non-prescription drugs in child's presence or within 12 hours before access.

W. (J.W.A.) v. B. (A.) (2008), 2008 CarswellNB 435, 2008 NBQB 157, B.L. Baird J. (N.B. Q.B.) [New Brunswick]

FAM.IX.2.g.v

Subject Title: Family law

Classification Number: IX.2.g.v

**Custody and access -- Factors to be considered in custody award -- Conduct of parent --
Clandestine removal of child**

23-year-old man and 19-year-old woman lived together in NB from October 2006 to December 2007 and had child in February 2007 -- In February 2008, woman took child to Ontario for three weeks, having given man letter promising to return child, but following month, woman served man with application in Ontario court for custody and child support -- Man obtained interim order requiring woman to return child and giving parties joint custody and primary residence to man -- Man was employed and worked 12-hour shifts, and man's parents, who had meaningful relationship with child, babysat while man was working -- Man would move to three-bedroom apartment if given custody -- Man alleged concern over woman's socializing and produced photographs from Facebook of woman drinking and partying -- Woman had not finished high school and did not work but planned to move to Ontario and return to school to take program not available in NB -- Woman planned to live with father but father admitted concerns about her lifestyle, ability to make it on own, and whether she would stay there -- Child's family other than maternal grandfather live in NB -- Parties each brought motions for sole custody of child or joint custody with primary care and control -- Man was awarded custody with

access to woman -- Child's best interests would be served by keeping child in NB where there was support structure and familiar caregivers and surroundings -- From birth until removal to Ontario, child resided with both parents and it was important that child have meaningful relationship with both parents -- Woman's decision to move to Ontario was not, in and of itself, compelling enough reason on which to decide custody -- Child had bonded with man and paternal grandparents while woman's father and step-mother were admittedly strangers to child -- As between parents, there were clear differences in maturity and only man could see to child's physical, emotional, social and economic needs, while it appeared woman was not ready to be full-time mother and might place own interests ahead of child's -- There were concerns, given woman's removal of child and application for custody from Ontario, that if child permanently moved to Ontario, contact between child and man would be frustrated, complicated and costly, while it was clear that man's family would ensure woman continued to have contact -- Woman's access, if moving to Ontario, would be on weekends, holidays and vacation at paternal grandfather's expense, and if woman remained in NB, child's time with parties was to continue as at present with woman's access supervised until further order and, in either case, ban on alcohol, tobacco and non-prescription drugs in child's presence or within 12 hours before access.

W. (J.W.A.) v. B. (A.) (2008), 2008 CarswellNB 435, 2008 NBQB 157, B.L. Baird J. (N.B. Q.B.) [New Brunswick]

FAM.IX.2.i

Subject Title: Family law

Classification Number: IX.2.i

Custody and access -- Factors to be considered in custody award -- Miscellaneous factors

Religious practices of parent -- Parties married in 1996, had four children, and separated in 2006 -- Mother became immersed in religion that prohibited children from listening to music, wearing swimsuits or body suits, playing with dolls and toys, and limited socializing with others -- Interim order provided that wife had day to day care and control of children -- Mother home schooled children, and didn't teach history or science -- Application by father for sole custody of children -- Application granted -- Evidence favoured change in custody -- It was in children's best interests to be in father's custody -- Children's mental, emotional and physical health was questionable -- Father could provide children with type of environment that would allow them to be productive members of society -- Father was more prepared to broaden scope of children's lives with learning, association and challenges.

K. (A.S.) v. K. (M.A.B.) (2008), 2008 CarswellNB 432, 2008 NBQB 229, B.L. Baird J. (N.B. Q.B.) [New Brunswick]

FAM.XIV.2.b

Subject Title: Family law

Classification Number: XIV.2.b

Children born outside marriage -- Custody and access -- Custody

23-year-old man and 19-year-old woman lived together in NB from October 2006 to December 2007 and had child in February 2007 -- In February 2008, woman took child to Ontario for three weeks, having given man letter promising to return child, but following month, woman served man with application in Ontario court for custody and child support -- Man obtained interim order requiring woman to return child and giving parties joint custody and primary residence to man -- Man was employed and worked 12-hour shifts, and man's parents, who had meaningful relationship with child, babysat while man was working -- Man would move to three-bedroom apartment if given custody -- Man alleged concern over woman's socializing and produced photographs from Facebook of woman drinking and partying -- Woman had not finished high school and did not work but planned to move to Ontario and return to school to take program not available in NB -- Woman planned to live with father but father admitted concerns about her lifestyle, ability to make it on own, and whether she would stay there -- Child's family other than maternal grandfather live in NB -- Parties each brought motions for sole custody of child or joint custody with primary care and control -- Man was awarded custody with access to woman -- Child's best interests would be served by keeping child in NB where there was support structure and familiar caregivers and surroundings -- From birth until removal to Ontario, child resided with both parents and it was important that child have meaningful relationship with both parents -- Woman's decision to move to Ontario was not, in and of itself, compelling enough reason on which to decide custody -- Child had bonded with man and paternal grandparents while woman's father and step-mother were admittedly strangers to child -- As between parents, there were clear differences in maturity and only man could see to child's physical, emotional, social and economic needs, while it appeared woman was not ready to be full-time mother and might place own interests ahead of child's -- There were concerns, given woman's removal of child and application for custody from Ontario, that if child permanently moved to Ontario, contact between child and man would be frustrated, complicated and costly, while it was clear that man's family would ensure woman continued to have contact -- Woman's access, if moving to Ontario, would be on weekends, holidays and vacation at paternal grandfather's expense, and if woman remained in NB, child's time with parties was to continue as at present with woman's access supervised until further order and, in either case, ban on alcohol, tobacco and non-

prescription drugs in child's presence or within 12 hours before access.

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