

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Patterson v Publicover, 2005NSSC128

Date: 20050531

Docket: SFHD-10470 1201-55640

Registry: Halifax

Between:

Gregory Hugh Patterson

Applicant

v.

Taura Irene Publicover

Respondent

Judge:

The Honourable Justice Kevin Coady

Heard:

April 28 and May 16, 2005, in Halifax, Nova Scotia

Counsel:

Mr. Kenzie MacKinnon, for the Applicant

Ms. Julia Cornish, for the Respondent

Coady, J.:

[1] This is an application by Mr. Patterson to vary the terms of this couple's 2001 Corollary Relief Judgment respecting parenting arrangements. The parties separated in 1999 after six years of marriage. They have two children: Maclean, now aged 11, and Kaylee, now aged 9. The parties entered into a Separation Agreement dated August 23, 2000 which was incorporated into a Corollary Relief Judgment on May 16, 2001.

[2] The following three paragraphs of the Corollary Relief Judgment are most relevant to this application:

CUSTODY AND ACCESS

7. (a) The Husband and the Wife shall have shared, joint custody, care and control of the Children of the Marriage. Each of the Husband and the Wife shall have the day-to-day care and control of each of the Children of the Marriage while each of the Children of the Marriage is in his or her care.
- (b) The Children of the Marriage shall spend equal amounts of time with the Husband and the Wife. The Husband and the Wife shall be flexible in attempting to determine the specific equal residency arrangements which are in the best interests of the Children of the Marriage. The Husband and the Wife initially shall implement residency arrangements which have the Children of the Marriage

either alternating full weeks between the residences of the Husband and the Wife or alternating between four day and three day portions of each week at the residences of the Husband and the Wife. However, the Husband and the Wife may mutually agree upon alternative equal residency arrangements for the Children of the Marriage.

- (c) On or about the first anniversary of the execution of this agreement, either the Husband or the Wife may retain a child psychiatrist, psychologist or therapist to study the success of the adjustment of the Children of the Marriage to the custody arrangements set out herein. The other party shall have the right to approve of the child psychiatrist, psychologist or therapist to be so retained, which approval shall not be unreasonably withheld.

[3] The evidence disclosed that this is a high conflict couple and it is doubtful their parenting arrangements had any real chance of success. Nonetheless, the parties shared parenting arrangement has existed since 2000, albeit with much disagreement and discord.

[4] On October 8, 2003 Mr. Patterson made an application to vary seeking sole custody of the children. In support of his application, he alleged ongoing conflict which adversely impacted on the children. In February, 2004 the parties agreed to an assessment and also to the assessors. The report was completed on January 14, 2005. There were thirteen recommendations and the most fundamental was the first which stated:

Kaylee and Maclean Patterson be placed in the primary care and custody of their father, Greg Patterson.

[5] A bi-weekly access schedule was recommended and there was a significant emphasis on therapy for all members of this family.

[6] Mr. Peterson alleged Ms. Publicover refused to implement the recommendations and as a result the children were suffering. He relied on the assessment to support his concerns. Ms. Publicover did not accept the assessment and its recommendations. She essentially found it flawed for various reasons set out in her evidence.

[7] The position of Ms. Publicover is she wishes to continue with the shared parenting arrangement. She prefers a week on-week off arrangement to the three days on-four days off, and vice versa, that is presently the practice. She feels that this change, as well as surrendering decisions on school, activities, etc., would result in less parental conflict.

[8] The position of Mr. Patterson is that the assessment recommendations be implemented forthwith. He argues the children's problems are "deep seated" and "profound". It is his position that dramatic steps must be taken and that there is some urgency.

[9] The assessment was completed by Lise Godbout and Marg de la Salle, both psychologists. I found both to be very senior and experienced professionals. The assessment was put into evidence and the authors were cross-examined on their conclusions. The assessment included psychological testing of the parties. I find that the assessment was conducted appropriately and represents a very in-depth, comprehensive analysis of this families situation.

[10] The reason for referral was stated as follows:

Greg Patterson and Taura Publicover have been unable to develop a workable co-parenting arrangement and understanding that takes into account their distinctive perspectives and parenting styles as they respond to the needs of their children. The problems encountered to date have created stress and anxiety for the children and have contributed to ongoing difficulties and disputes.

[11] I accept the following conclusions that arose from the Assessors' examination:

- Both parents are capable parents. This case is not about parental deficiencies but rather a question as to what the children need at this time.
Both parents are capable of providing basic needs.
- The conflict between the parents is extreme and needs to end. This conflict is negatively impacting on both children.
- The children must be placed in the most stable environment with follow-up counselling and treatment.
- The assessment recommendations should be immediately implemented as the children's stress represents a developmental impediment.
- Both parents contribute to the stress and conflicts.
- There is a lot of conflict between these children and Ms. Publicover's stepson, Thabo.

- Maclean internalizes his feelings and worries about hurting his Mom and her new family. That is a basis for depression and there is a history of depression on the paternal side of the family.

- The children perceive that many issues (sports, school, activities) are not resolved by Ms. Publicover and as a result they feel caught in the middle of the conflict.

- The children are presently stressed out and suffering as a result of the uncertainty surrounding the future of their family.

- The children are close to both parents but are more relaxed in the home of their father.

- The children find that Mr. Patterson tends to listen to them and to discuss issues with candour.

- The children do not feel any competition in Mr. Patterson's home but feel competition in Ms. Publicover's home given the presence of her immediate new family.
- Mr. Patterson provides a more stable environment for the children and he is very involved in their activities. Stability is the most important factor needed by these children.
- The recommendations have gone unimplemented for too long. These children cannot proceed until they are in place.
- Ms. Publicover's concessions concerning surrendering decisions in areas that have driven conflict is too late and would represent a band-aid solution. The children require greater stability.
- Shared parenting will not work until all family members get treatment.
- The children's present stress would be greater than the stress they would experience from scaling back the time they spend with their mother.

[12] The assessment report concluded at p. 7:

...Although Mr. Patterson's home environment and approach to problems may lack refinement (at times he responds too quickly to matters and won't back down), there is a greater level of openness to the children's individual needs and experiences that takes priority. The defensive anxiety frequently noted during the course of the Assessment has not been in evidence when the children are in his presence. There is a relaxed, casual nature to the children's intimacy with their father that allows for greater clarity of disclosure and discussion of needs, as well as sharing of day-to-day events. These clinical observations are consistent with the results of the parenting stress index.

[13] The assessment report reflected somewhat differently on Ms. Publicover.

The following appears at p. 7:

Within the emotional realm, Taura struggles somewhat in her ability to be flexible in hearing, understanding, and integrating the individual emotional needs of the children. This component is further complicated by the current custody/access dispute. Had these parents maintained a working relationship, each of these parents would have been complimentary to each other's parenting style, and this would not have been a concern. At this time, Taura's struggles in this area of parenting can partially account for her experience of parenting stress with Maclean and Kaylee. She has been unable to relax into the children's individual emotional needs and fully adjust her principles accordingly.

[14] I had the benefit of a report and the evidence of Dr. Nina Woulff,

Psychologist. Dr. Woulff was retained by Ms. Publicover to critique the court

ordered assessment. While she interviewed Ms. Publicover, she did not meet with

Mr. Patterson or the children. While I appreciated and considered this evidence, it in no way impacted on the credibility of the assessment or the assessors.

[15] There was a great deal of affidavit evidence tendered by the parties and by their family and friends. For the most part, these affidavits extolled the virtue of both parties as caring, loving and committed parents. As well, the parties affidavits focussed on several incidents of high conflict since separation. While this evidence has its place, it did not lessen the concerns for the children disclosed by the court ordered assessment. After all, both parents are capable parents, they just can't do it together.

[16] Section 17(5) of the *Divorce Act* requires a material change in circumstances before I revisit custody on its merits. I must find such a material change "since the making of the custody order or the last variation order made in respect of that order". I find the serious concerns raised by the assessment satisfies this threshold requirement. The urgency of these concerns require immediate action.

[17] Furthermore, I must decide this variation application on the best interests of these children as determined by reference to the change in circumstances. I cannot consider what is in the best interests of these parties. Individually they could be good parents. Together they have failed to act in the best interests of their children. They refuse to put aside their personal hurt and anger so as to benefit these distressed children. I see nothing that will change this in the foreseeable future. The obvious solution, disclosed by the evidence, is to terminate the shared parenting arrangement set forth in their Corollary Relief Judgment. It is time to assist these children by creating stability in their lives. The only way this can be accomplished is by awarding primary care to one parent.

[18] This is an interim application to vary a *Divorce Act* order. There is no authority in the *Divorce Act* to make an interim variation order. Nonetheless, this practice of “Interim Variation” has become a local practice. The parties have insisted this was an interim hearing and they anticipate a final hearing. The only way I can effect the parties’ wishes is to consider this as the first part of the application to vary. Any future proceedings would amount to a completion of this application. Obviously I would be seized with this application until it is

completed. If there are no future proceedings on this application, my decision would become final upon motion of one of the parties.

[19] I conclude it is in these children's best interests to forthwith implement all recommendations of the Court ordered assessment. Kaylee and Maclean Patterson shall forthwith be placed in the primary care and custody of their father, Greg Patterson. All other recommendations are to be implemented at the very earliest opportunity.

[20] A request was made to seal this file. This will require a formal application.

I direct counsel's attention to *Civil Procedure Rule 70:32* and the case of *The Edmonton Journal v. A.G. for Alberta et al.*, [1989] 2 S.C.R. 1326.