

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PATRICIA LAFFERTY

Applicant

- and -

AUSTIN LAROCQUE

Respondent

MEMORANDUM OF JUDGMENT

[1] In this application, Mr. LaRocque seeks variation of an interim custody order.

[2] The parties are the parents of P., a little girl who will be 3 years old in April of this year. The parties have never cohabited. For the first year or so of her life, P. lived with Ms. Lafferty; the extent of Mr. LaRocque's involvement with her is a matter of dispute between the parties. By an interim consent order of September 23, 2011, Mr. LaRocque was granted specified access tailored to his two week work rotation at a minesite. On October 27, 2011, an interim order was made. That order provides that the parties have interim joint custody of P., with Ms. Lafferty being the primary caregiver. Mr. LaRocque was granted specified access, again tailored to his two week rotation at a minesite. Mr. LaRocque asks the Court to vary the October 27, 2011 order.

Preliminary issue

[3] Ms. Lafferty applied under Rules 373 and 375 of the *Rules of the Supreme Court of the Northwest Territories* to strike out certain affidavits, in whole or in part, that had been filed on behalf of Mr. LaRocque. At the hearing before me, counsel indicated that they had come to an agreement about which paragraphs and which

affidavits I should disregard. In accordance with their agreement, I have disregarded and have not taken into account the following: paragraphs 3, 11, 19, 20 and 23 of the affidavit of Austin LaRocque, sworn June 4, 2012; the entirety of the affidavit of Josh Angiers, sworn June 1, 2012; and the entirety of the affidavit of Eileen Hamilton, sworn June 1, 2012.

### Factual background

[4] The parties had a dating relationship. P. was born to them in 2010. Ms. Lafferty has two other children who reside with her, who are not the children of Mr. LaRocque. They are 7 and 10 years old.

[5] The parties' relationship has been marked by discord, and in their respective affidavits, each has made allegations against the other about alcohol and drug abuse. Ms. Lafferty alleges that Mr. LaRocque was very controlling of her during their relationship and that he assaulted her, on one occasion in the presence of P. He denies assaulting her and points out that although he was charged with assault, the charge was later stayed.

[6] P. has lived mainly with Ms. Lafferty. Mr. LaRocque has alleged in his affidavits that Ms. Lafferty has sometimes prevented him from seeing P., although that seems to have been largely resolved since specified access was ordered. Ms. Lafferty has denied that he spends as much time as he could with the child.

[7] As indicated above, an interim order was made on October 27, 2011. The terms of the order include that the parties have interim joint custody of P. and that Ms. Lafferty is her primary caregiver and makes health care and child care decisions about her. Mr. LaRocque has access when he is on his two weeks off rotation from the minesite, which means that he has P. in his care for several days at a time and for most of his two weeks off.

[8] At the time the interim order was made, Mr. LaRocque's concerns, as set out in his affidavit sworn October 21, 2011, were that Ms. Lafferty did not always permit him to see P. and that his efforts to make arrangements to see P. often resulted in arguments. At that time he did not raise concerns about drinking or drug abuse.

[9] In June 2012, Mr. LaRocque filed the present application, seeking an order that he have interim and permanent sole custody of P. and that Ms. Lafferty have

generous but supervised daytime access with P. In submissions, and in his brief, Mr. LaRocque indicates that he seeks interim primary care and control of the child, with Ms. Lafferty to have access.

[10] Mr. LaRocque's affidavit outlines his concerns about Ms. Lafferty's relationship with Garrett Jones, a man she began seeing in the summer of 2011. Mr. LaRocque states that in early 2012, Ms. Lafferty complained to him on occasion about Mr. Jones' drinking, and that he had taken her money and left her without money for the children. He also states that she complained about Mr. Jones being violent and using crack. Mr. LaRocque refers to both Mr. Jones and Ms. Lafferty having been charged with assault. He describes a specific incident on June 1, when he went to Ms. Lafferty's home at 11:30 at night and observed both her and Mr. Jones outside the home, being taken into police vehicles. P., who was there with a third party, was not dressed for bed and her diaper was soiled. Mr. LaRocque describes her as incredibly upset and screaming. He took her to his home for a few days and soon thereafter filed the variation application.

[11] Mr. LaRocque also expresses concern that when P. comes to him from Ms. Lafferty, her clothing is often too small and inappropriate for winter; she often has diaper rash and colds or flu and he believes her medical appointments are not being kept. P. has a rash that is treated with cream and which he says appears to be untreated when P. comes to him after being in Ms. Lafferty's care.

[12] Finally, Mr. LaRocque expresses concern about lack of cleanliness in Ms. Lafferty's home and that when he calls or comes to pick up P., Ms. Lafferty is frequently not there and instead her mother or grandmother are looking after P.

[13] Mr. LaRocque's application was adjourned a number of times from the June 28, 2012 date it was originally set down for. Some of the adjournments were granted to allow Ms. Lafferty to file affidavit material and one was granted so as to allow her to finish a residential alcohol and drug treatment program.

[14] In her affidavit sworn August 8, 2012, Ms. Lafferty says that her relationship with Mr. Jones lasted from approximately July 2011 to July 2012. She says she had no concerns about leaving the children in Mr. Jones' care while she was doing errands. She denies ever leaving the children at home alone without having arranged that someone keep an eye on them.

[15] Although Ms. Lafferty denies ever complaining to Mr. LaRocque about Mr. Jones being violent, she also describes her relationship with Mr. Jones as abusive and says that they are no longer together (as at the time she swore the affidavit, however as stated below, they have resumed their relationship). She admits that both she and Jones were charged with a number of assaults, but says that many of the charges were withdrawn. She admits that she was in police custody overnight following the incident on June 1. In her examination for discovery, she described that incident as a fight with Mr. Jones. She also admitted in her examination that on July 6, 2012, she was kept in remand for 6 days for a separate incident, however she says that when that happened, P. was in the care of Mr. LaRocque.

[16] Ms. Lafferty admits that Mr. Jones has been charged with assaulting her relating to an incident in July 2012; there is no information before me as to the outcome of that charge. She admits that she pled guilty to one charge of assault on Jones and two charges of breach of recognizance in July 2012 and was given a suspended sentence with probation, the terms of which require her to attend programs and treatment as recommended by her probation officer.

[17] Ms. Lafferty denies Mr. LaRocque's allegations about P. being improperly dressed and inadequately cared for. She says that she tries not to be present when Mr. LaRocque comes to the home, because their interaction usually results in an argument.

[18] In her affidavit sworn December 19, 2012, Ms. Lafferty states that she attended drug and alcohol counselling with a psychologist and a wellness worker from approximately late July 2012 until she entered a residential treatment program on November 21. She indicates that she successfully completed that program in mid-December and will attend follow up counselling commencing in January. She says that as at December 19, 2012, she has been sober since September 30 and intends to maintain a sober lifestyle without alcohol or drug abuse.

[19] She also indicates that she and Mr. Jones are working on their relationship, having attended one couple's counselling session in November and intending to continue with that in 2013. In submissions on this application, it was admitted by her counsel that she and Mr. Jones are still in a relationship. It is not clear when they got back together.

[20] Ms. Lafferty says that she was accepted into a Bachelor of Education program at the college in Fort Smith and was to start in September 2012. She now plans to start in September of 2013. The parties have had some discussions about this and Mr. LaRocque appears to be supportive of her plan to attend college, although he is concerned about the two hour drive between Fort Smith and Hay River and how that may impact his access.

[21] Mr. LaRocque earns a substantial salary at the minesite. He has an offer of work in Hay River, but at half the salary. He has expressed concern that he cannot decide whether to take the Hay River job without knowing whether his application for sole custody or primary care will be successful, lest he be penalized down the road for giving up a position that enables him to pay a healthy amount of child support.

### Applicable Law

[22] Since Mr. LaRocque is seeking a variation of an existing custody order, s. 22(1) of the *Children's Law Act*, S.N.W.T. 1997, c. 14, applies:

22.(1) A court shall not make an order under this Division that varies an order in respect of custody or access made by a court in the Territories unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child.

[23] Because the order that Mr. LaRocque seeks to vary is an interim one, it is helpful to look at the test to be applied on an application for interim custody:

The sole criterion to apply on an interim custody application, as on all custody issues, is the best interests of the children. The test on an application for interim custody is: What temporary living arrangements are the least disruptive, most supportive, and most protective for the children? The focus is on trying to maintain as much stability as possible for the children. That is why, generally speaking, the status quo will be maintained in the absence of compelling reasons indicative of the necessity of change. This is not a pre-determination of the eventual outcome of a custody trial but merely a short-term response.

*Cater v. Cater*, 2000 N.W.T.S.C. 34.

[24] In this case, an interim custody order is already in place, designed to govern P.'s living arrangements until trial. In *B.L. v. K.L.*, 2005 NUCJ 26, paragraphs 23

to 25, a case not cited by counsel, Johnson J. noted that judges are reluctant to vary interim custody orders and prefer that matters proceed to trial. The advantage of a trial is obviously that the matter can be decided after a full hearing on the merits and issues such as credibility, which can rarely be resolved on the basis of affidavits, can be addressed. Johnson J. cites Professor McLeod in *Child Custody Law and Practice* (Toronto, 1992) for the proposition that a Court may vary an interim order if there has been a 'sufficient' change in circumstances such that the best interests of the child require a change in the parenting regime which cannot wait until trial for correction. Justice Johnson concludes that the test for variation of interim custody orders is somewhat less rigorous than variation of permanent orders, made after a full hearing, because the Court is working with incomplete information and is focused on the short-term. Although the circumstances of the parties may change substantially in either case, with permanent orders the Court has to be mindful that the variation application is not a substitute for an appeal. With an interim order, there may be new information that indicates the short-term welfare of the children is threatened.

[25] As noted in *Cater v. Cater*, an interim order is meant to be a temporary solution until there can be a trial. The reality is that in many situations parties, for a variety of reasons including financial ones, do not always move matters along to trial. Instead they live with an interim order as if it were permanent and then seek variation when something unexpected happens.

[26] In this case, however, examinations for discovery have been completed. There is no reason why the matter cannot proceed to trial as soon as counsel and their clients and witnesses can be prepared and available (a period of perhaps two months, according to counsel) and the court schedule can accommodate them. That being the case, in my view the question is as follows: is there new information before the Court now, that was not before the Judge who made the interim order, and if so, does that information indicate that P.'s short-term welfare is threatened? Put another way, has there been a change in circumstances since the interim order was made and does that change indicate that P.'s short-term welfare is threatened?

### Positions of the parties

[27] Mr. LaRocque submits that under Ms. Lafferty's care, P.'s circumstances are unstable. He points specifically to the fact that when P. was present, Ms. Lafferty and Mr. Jones were arrested in June of 2012. He also points to the incident in July of 2012 when Ms. Lafferty was placed in remand for 6 days.

[28] Mr. LaRocque also relies on Ms. Lafferty's admission that she is in an abusive relationship with Mr. Jones. He submits that domestic violence is bound to have an effect on the child. He also submits that there may be danger to P. and refers to an incident he says Ms. Lafferty described to him where Mr. Jones is said to have "ripped" a dog from P.'s arms.

[29] When Ms. Lafferty attended the 28 day residential treatment program, P. was either with Mr. LaRocque or with babysitters. Therefore, one should not assume that P. would have difficulty adjusting to living in his home on a full time basis and not with her mother. Finally, Mr. LaRocque says that Ms. Lafferty's claim that she has been sober for some time now has not been tested. He asserts, however, that there has been testing of some of her evidence in the examinations for discovery. He points out that there are no allegations before the Court that his care of P. is inadequate.

[30] Ms. Lafferty, on the other hand, argues that Mr. LaRocque has not met the threshold requirement of a material change in circumstances affecting the best interests of P.; nor has he shown that variation on an interim basis is in P.'s best interests. She says that Mr. LaRocque has not presented any direct evidence that P. has been exposed to the violence in the relationship between Ms. Lafferty and Mr. Jones and says that virtually all the evidence about violence in her home is contested. She submits that her substance abuse is at the root of Mr. LaRocque's concerns and points out that she has taken steps to address that problem.

[31] Ms. Lafferty also submits that Mr. LaRocque's request for variation is based on his employment issues rather than P.'s best interests.

### Analysis

[32] Ms. Lafferty admits that her relationship with Mr. Jones was an abusive one. In my view, having admitted that, her assertion that Mr. LaRocque has presented no

direct evidence that P. has been exposed to violence or dysfunction in her home has little merit. She admits that in the middle of the night, when the police took her and Mr. Jones away separately, it was because of a fight between them and P. was home at that time. The fact that Ms. Lafferty has described the relationship as abusive suggests that more than one incident of abuse occurred over the time that they were together. She also admits to having developed a drinking problem starting in about March 2012.

[33] The drinking and domestic abuse are a material change in circumstance that are likely to affect the best interests of P. No child should be exposed to such behaviour and there can be no doubt that continuing exposure is likely to harm the child, if not physically, then psychologically.

[34] In this case there is no evidence that P. has been harmed physically. There is no evidence that harm or injury resulted to P. in the incident where Mr. Jones is said to have ripped a dog out of P.'s arms. Ms. Lafferty says she does not recall the incident and that she did not tell Mr. LaRocque about it. Even if the incident did take place, it is not entirely clear what happened; the term "ripped" may simply mean that Mr. Jones took the dog forcefully from the child's arms.

[35] It is significant that Ms. Lafferty has taken steps to address both the domestic abuse and her substance abuse. She and Mr. Jones are back together, however they have started, and intend to continue, counseling. She has also taken intensive treatment for alcohol abuse and says she has been sober since September. These steps are cause for a degree of optimism that her situation with Mr. Jones will improve, and that she will overcome her substance abuse issues, which on the evidence before me seem to have developed in 2011 or 2012 and so may not be longstanding. While the drinking and the abusive relationship are cause for concern and caution, she has been addressing those issues for several months now.

[36] Mr. LaRocque submits that because P. has adapted well to a regime whereby she spends time with both parents, there is no reason to think that she would not adapt well to being with him full-time. However, his proposed regime would still mean a significant change for her. Since Mr. LaRocque could only be her primary caregiver if he works in Hay River, he would actually spend much less time with her than he does now, given that he would no longer work a two week rotation and she would have to be cared for by a third party during the daytime when he is at work.



She would also be separated from her half-siblings. She would see much less of her mother than she is used to.

[37] I am not convinced that Mr. LaRocque's application is driven solely by his employment dilemma; there is some support in the evidence for his concerns about P.'s welfare, as I have described above. I accept that it is a difficult decision for him, faced on the one hand with a job at a remote site at which he earns a very good salary but is away from his daughter for two weeks a month; and on the other hand with an employment opportunity in Hay River at a much reduced salary, but that would permit him to be in a position to be P.'s primary caregiver.

[38] Mr. LaRocque's brief refers to wanting guidance from the Court on this issue and that he should not be forced to speculate about whether he should take the job in Hay River. However, even if the Court were to grant him interim custody or primary care contingent on his being in Hay River on a full time basis, that may not be a permanent solution. The outcome of a trial is always uncertain, and the result of a trial in this case could be joint custody with Ms. Lafferty having primary care of P. Or Mr. LaRocque could be granted primary care, or there could be a shared care regime. I acknowledge that this does present Mr. LaRocque with a dilemma as to whether he should give up his current employment, however that is the reality of the situation.

[39] The main incidents since the interim custody order that have caused concern to Mr. LaRocque and are admitted by Ms. Lafferty occurred several months ago within a period of about six months (in other words, during the first half of 2012). Ms. Lafferty has taken concrete steps since then to address these problems and although her recovery is still in its early stages, I am not persuaded that P.'s short term welfare is threatened at this time. Obviously it is important that Ms. Lafferty continue to remain sober and pursue treatment and counseling. It is also important that Ms. Lafferty not continue her relationship with Mr. Jones if that relationship becomes violent again.

[40] For the above reasons, I have decided to dismiss the application. I order that within 30 days of the date of this decision, counsel provide the registry with their estimate as to the number of days required for trial and their trial date availability over the next six months. They are to exchange witness summaries as required by the *Rules of Court*. If counsel are of the view that further directions are required, they may seek them from the trial judge after a trial date has been set.

V.A. Schuler  
J.S.C.

Dated at Yellowknife, NT, this  
7<sup>th</sup> day of February 2013

Counsel for Ms. Lafferty:                      Paul Parker

Counsel for Mr. LaRocque:              Andre Duchene

S-0001-FM-2011000088

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