

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20050104
Docket: A890307
Registry: Vancouver

Between:

WAYNE GARETH HENDERSON

PLAINTIFF

And:

IRENE WENDY VAN NIEUWKERK

DEFENDANT

Before: The Honourable Madam Justice Smith

Oral Reasons for Judgment

In Chambers
January 4, 2005

Counsel for Plaintiff

F.G. Potts
J.G. McQueen

Counsel for Defendant

K.L. Anderson

Place of Hearing:

Vancouver, B.C.

[1] **THE COURT:** The parties have agreed to adjourn the various applications regarding retroactive child support. A form of order has been provided which deals with the financial matters. They are to be put over to the trial list. There

are to be examinations for discovery and full financial disclosure.

[2] I am prepared to approve the consent order that has been prepared, after it has been vetted by the registry.

[3] The two issues requiring decision both relate to Lauren Henderson, born January 14th, 1987. Lauren lived with the defendant, her mother, after the separation in 1990 and until September 2003.

[4] On March 5th, 1990, a consent order made by Madam Justice Prowse provided that the defendant have sole custody of Lauren and the other two infant children of the marriage, and that the plaintiff have reasonable and generous access.

[5] Madam Justice Prowse further ordered that the parties have joint guardianship of the children and that they communicate with each other with respect to all significant issues including health, education and discipline, relating to the children's upbringing.

[6] The plaintiff father now seeks an order for sole custody of Lauren. He is content to leave the order for joint guardianship in place. The change in circumstances on which he relies is the change in Lauren's residence. She moved to her father's home in September 2003.

[7] As well, Mr. Potts for the father relied on an affidavit sworn by Lauren Henderson on August 30th, 2004, in which she deposed that she had been having significant difficulties in getting along with her mother prior to the summer of 2003 and that she advised her mother in September 2003 that she wanted to stay at her father's house indefinitely. Lauren further deposed that she would prefer her father to have custody in order to reduce conflict between her parents.

[8] Mr. Potts argued that Lauren and her mother are estranged and that the appropriate order would be one that gives the plaintiff father the right to make the day-to-day decisions of a custodial parent.

[9] On the other hand, the defendant's position is that there is no reason to change the custody order given that the defendant agreed to Lauren's change of residence and that she and Lauren, in fact, have maintained a good relationship in her view.

[10] Ms. Anderson, for the defendant, relied on affidavit evidence from her client to the effect that Mr. Henderson, despite the fact that Ms. Van Nieuwkerk has sole custody, has failed to keep her informed as to significant aspects of Lauren's welfare and that he similarly failed to do so with respect to the oldest child, Ashley.

[11] Ms. Anderson submitted that a sole custody order in Mr. Henderson's favour would do nothing but encourage this kind of disregard for Ms. Van Nieuwkerk's need to be included in decision making regarding Lauren. She argued that there should either be no custody order or an order for joint custody.

[12] I have considered the arguments of counsel and have referred to the affidavit material to which they directed me and I have concluded that the custody order should be varied to provide that Mr. Henderson will have sole custody.

[13] I am satisfied that the change in Lauren's residence was a material change in circumstances. The plaintiff has had *de facto* custody for over two years. Lauren is still a minor and there should be a custody order in place even for the relatively limited period of the remaining year of her minority. Joint custody is not a workable situation when the parents are so evidently unable to communicate effectively.

[14] The order for joint guardianship will remain in effect. However, I will add provisions specifying that Mr. Henderson must keep Ms. Van Nieuwkerk informed as to Lauren's activities and whereabouts and that he must consult with her as to all major decisions affecting Lauren, such as her place of residence, choice of university and the like.

[15] The second issue concerns the defendant's wish to be able to satisfy some of her obligation for the payment of child support for Lauren by direct expenditures for Lauren's benefit.

[16] Ms. Van Nieuwkerk deposed that since Lauren has not been living with her she has continued to spend money, including up to \$750 per month on clothing, for Lauren's benefit.

[17] Ms. Anderson submitted that her client has a limited income and could not afford to keep up these expenditures without some reduction in child support.

[18] I am not persuaded to depart from the usual situation in which the parent responsible for the payment of child support of a minor discharges that responsibility through payment directly to the recipient parent.

[19] Accordingly, the defendant's application in this regard is dismissed.

(DISCUSSION BETWEEN THE COURT AND COUNSEL RE COSTS)

[20] THE COURT: Yes, I am not going to make an order for costs today. I think that the issue of costs should be determined by the judge who hears the applications regarding

the financial matters and who can consider all of these matters at the same time.

Lynn Smith J.