Date: 19990702
Docket: 07907
Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LINDA ANN MCLELLAND

PLAINTIFF

AND:

DAVID JOHN MCLELLAND

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE CHAMBERLIST

Counsel for the Plaintiff:	K. Klear
Counsel for the Defendant:	R. F. Johnston
Place and Date of Hearing:	Nanaimo, B.C. May 28, 1999

INTRODUCTION

[1] These proceedings come before the court as a result of notices of motion filed by the parties on April 7, 1998 and May 15, 1998 respectively. The first motion was that of the plaintiff seeking, in part, a variation of the order of divorce pronounced January 8, 1991 and further varied by order pronounced October 13, 1992, *inter alia*, summer access.

[2] The motion of May 15, 1998, was the motion of the defendant seeking, *inter alia*, that the order of Mr. Justice Cashman, pronounced October 13, 1992, be varied to increase the access for the defendant to the children of the marriage and for an order that there be an assessment with respect to Parental Alienation Syndrome, to be done by Dr. Larry W. Waterman.

[3] Both motions sought costs of the applications. The motions came before Mr. Justice Lander of this court on Monday the 15th day of June 1998. At that time Justice Lander ordered that Dr. Larry Waterman interview the infant children of the marriage for the purposes of determining and providing a report as to whether, in his opinion, Parent Alienation Syndrome exists in respect of the children and if so, to provide the court with recommendations as to how to resolve the syndrome.

[4] The order also provided, *inter alia*, that the plaintiff's application to fix the defendant's access for summer to the infant children of the marriage for future years and costs,

together with the defendant's application for an order increasing his access and costs, were adjourned generally until the completion of Dr. Waterman's report.

[5] Subsequently, Dr. Waterman completed his psychological assessment report on December 23, 1998, and the matters which had been adjourned in June of 1998 came back before the court. In addition to Dr. Waterman's report, consisting of some 64 pages, was a supplemental letter of January 13, 1999, relating to a meeting he had with the children of the marriage on January 12, 1999.

BACKGROUND

[6] The plaintiff, Linda Ann Smith (formerly McLelland) and the defendant, David John McLelland, were married on May 2, 1981 at Nanaimo, British Columbia. There were two children of their union, Derek Castell McLelland, born June 26, 1984; and, Shannon Alsye McLelland, born March 10, 1988. The parties were divorced by order granted January 8, 1991. Pursuant to that order the plaintiff was granted sole custody of the infant children with reasonable access to Mr. McLelland.

[7] Subsequently, that order was varied by the order of Mr. Justice Cashman pronounced Tuesday the 13th day of October 1992. That order dealt with specific access for the month of October 1992, regular weekend access comprised of the second weekend of each month commencing November 1992, Christmas

access, spring/March break access and summer access. Relative to summer access, the order provided that summer access after the 1993 summer would be determined by a review prior to the summer of 1994 with either party at liberty to apply for such a review.

[8] The weekend access per month commenced on Friday and ended on Sunday. The summer access was for two non-consecutive weeks and the spring break was alternating. As a result, Mr. McLelland's access pursuant to the order of Mr. Justice Cashman was therefore either 42 days or 52 days if Mr. McLelland had access on the spring break.

[9] At the time the variation order was made by Mr. Justice Cashman, Mr. McLelland was residing on the mainland and the order provided for pick up and delivery at the Nanaimo ferry terminal.

[10] Thereafter, on June 14, 1996, the defendant, acting on his own behalf, filed a motion seeking variation of Mr. Justice Cashman's order to provide, *inter alia*, for joint custody of the two children. That matter came before Mr. Justice L.T. Edwards on July 15, 1996.

[11] At that time Mr. McLelland also referred to Parental Alienation Syndrome. The application for joint custody was dismissed by the court.

[12] Thereafter, the defendant, again represented by counsel, filed his motion of May 15, 1998, seeking a further variation of Mr. Justice Cashman's order of October 13, 1992 and the order for the assessment by Dr. Waterman.

[13] Since the break up of their marriage, both the plaintiff and the defendant have remarried and Mr. McLelland and his present wife have a child of their union, William.

THE WATERMAN REPORT AND ALLEGATIONS OF PARENT ALIENATION SYNDROME (PAS)

[14] Dr. Waterman, at p. 57 of his report, discusses Parental Alienation Syndrome. He states at p. 57 and following:

> Dr. Richard Gardner first identified Parent Alienation Syndrome in 1985. He described it as a situation in which children are programmed by an allegedly "loved" parent to start a campaign of denigration against an allegedly "hated" parent. Gardner reported that PAS results from an attempt by one parent to alienate the child or children from the other parent. The mother typically instigates it since the mother usually has custody of the children. He stated that the alienating parent uses conscious programming techniques as well as subconscious and unconscious techniques to turn the children against the other parent. The resulting situation was one in which the children were non-ambivalent in their love for one parent and their hatred for the other parent.
>
> There are eight aspects of PAS that have to be met in order for this situation to be identified. They are as follows:
>
> 1. The child/children continually profess hatred of the absent parent and willingly tell anyone who will listen what he or she thinks of the "hated" parent.
>
> 2. When asked about the reasons for their strong feelings, the child/children offers

weak, frivolous or absurd reasons for the conclusions they have reached.

3. The child/children shows no ambivalence about the parents. One parent is only bad while the other parent is only good. The child/children's description of the "hated" parent is consistent with the "loved" parent's account of the other parent.

4. The "good" or "loved" parent steadfastly states that it is the child/children who must make the decision to see or reject the "hated" parent and the child/children's decision must be honored.

5. The child/children offers "reflexive" and complete support for the "good" parent.

6. There is no guilt that can be observed from the child/children for their strong feelings and behaviours toward the "hated" parent.

7. The child/children's description of the "hated" parent sounds rehearsed, coached, or borrowed and is consistent over time. Often the same words will be used to describe the "hated" parent which do not change form on description to another.

8. The child/children's dislike for the "hated" parent spreads to anyone associated with that person including grandparents and other relatives, friends of that person or anyone else associated in the child/children's mind with the "hated" parent.

[15] At p. 59, Dr. Waterman concluded on his analysis of his interviews with the two children, their mother, their stepfather, their father and their stepmother, that there was no evidence to support the possibility of PAS.

[16] With all due respect to Dr. Waterman, that should have been the end of his involvement as far as the court order of Justice Lander pronounced the 15th day of June 1998 was concerned. That order was quite specific that Dr. Waterman was to interview the children solely for the purposes of determining and providing a report as to whether or not, in his opinion, PAS existed. It was only if it was found to exist that Dr. Waterman was to provide the court with recommendations as to how to resolve the syndrome.

[17] Dr. Waterman did however proceed further and provided recommendations for the court's consideration. These recommendations are set out at p. 62 of the report and consist of seven recommendations which I will set out *verbatim*:

> Based on the results of this assessment, the following recommendations are presented for the Court's consideration:
>
> i) Shannon and Derek appear to be thriving in their home environment as it currently exists. They are doing well at school, are verbal and enjoyable children, and report that they have a number of interests and activities that they are involved in which they enjoy. For these reasons, there does not seem to be any basis for recommending a change in custody at this time. Therefore, it is recommended that day to day care of the children remain with Linda and Eric.
>
> ii) The current access schedule is extremely limited. At the present time, it involves one weekend per month, two weeks in the summer, and some other minimal access at various times such as Christmas. While this may have being (sic) appropriate in the past for a variety of reasons, it does not seem to be reasonable at this time. Given that the two households are in reasonable proximity of each other, there does not seem to be any reason why an increased in access could not take place from

a time or expense perspective. Similarly, the children seem to be becoming increasingly comfortable at the home of David and Julie and both state that they enjoy their younger stepbrother Willie. While Shannon may be somewhat reluctant to see a change in access, it is anticipated that she will adjust to it and benefit from increased contact with her father and stepmother. As a result, it is recommended that access increase to every second weekend. The weekend access can continue based on the current times which are generally from Friday afternoon until Sunday evening. If the access weekend happens to fall on a long weekend, it should be extended to include the extra day.

iii) It is recommended that holidays be divided in a more equable manner taking into account that the children have more friends and activities associated with their custodial home than they do with their father and stepmother's home. It is recommended that the children spend at least five days over the Christmas holidays with their father and stepmother. The alternating at Christmas seems to be working well and can continue unless the parents wish to change it by agreement. It (sic) David and Julie plan special events which the children want to participate in, the five days can be increased up to half of the holiday vacation to be spent in each household.

Similarly, it is recommended that the March break/Easter holiday be divided in a similar fashion. When Easter does not fall at the same time as March break, perhaps it could be alternated between households each year. The March break itself could be divided approximately evenly between the two households.

It is recommended that the summer holidays be divided in a more equable fashion than they have been to date. It is recommended that one month be spent with Linda and Eric while the other month be spent with David and Julie. If the children wish, the time could be divided into two week periods rather than for two separate months. It is recommended that these decisions be made at least three months prior to the end of school which falls at the end of June.

iv) It is recommended that information be made available to David and Julie about the children's progress in school, regarding their health and dental history, and any other scheduled events or sports in which the children are involved. It is the responsibility of David and Julie to ensure that any

costs incurred are paid to the necessary individuals or organizations (stamped self-addressed envelopes for extra school records, photocopy charges, etc.)

v) It is recommended that the children either spend the day or at least have dinner with their mother on Mother's Day and their father on Father's Day. Similar arrangements should be made on alternating years for the children's birthdays so that these occasions can be shared equally.

vi) It is recommended that David have access to any medical or other professional information about the children. For example, David should have access to medical information, dental information, or any other profession information which is pertinent to the children's well being. It is suggested that David be responsible for any cost associated for obtaining this information. It is Linda's responsibility to ensure that releases of information are made available to ensure that David can obtain whatever reasonable information is available about the children.

vii) It is recommended that a neutral professional third party be decided upon to talk with Shannon and Derek about the separation of their parents. It will be important for this person to emphasize that the children were in no way responsible for their parent's separation and that it was completely a decision by the adults involved.

[18] Subsequent to the preparation of his report, the two children attended at Dr. Waterman's office on January 12th. The appointment was made at the request of Derek McLelland and his sister Shannon was in attendance with him at Dr. Waterman's office. At that time, Dr. Waterman reports, in his supplementary report of January 13th, 1999, that Derek stated that he was aware of the access recommendations but advised Dr. Waterman at that time that he had not been honest during Dr. Waterman's assessment of him.

[19] In particular, Derek stated that he had not been honest in his last interview and advised that he did not want to hurt his father's feelings, and had therefore agreed to something he didn't want to do. It would appear from the supplementary report that Dr. Waterman asked Derek what his objections were to having access with his father and stepmother every second weekend and that Derek stated he would miss his friends, cousins and other family members if he went for access that often. He also indicated that it upset him when his father talked about access so much during the access visits that they had. He also reported that it upsets him when his father said bad things about his mother and Eric.

[20] Dr. Waterman then discussed various options with Derek and he reported that Derek agreed that he would be willing to have access every third weekend instead of every second weekend and that that access regime would allow him sufficient time to spend with his peers.

[21] Shannon was also interviewed by Dr. Waterman on that occasion and she apparently agreed with Derek that she did not want to go on access visits every second weekend. When the possibility of going every third weekend was raised, she was willing to agree to that and thought that "would work alright for her". He also indicated that both children would like to keep the summer access at two weeks rather than increase it but Dr. Waterman reported that he was not able to explore other

options with the two children about the summer, and he suggested "it may be that a two week period for one month and a one week period for the other month might be a reasonable compromise for them".

[22] In his closing comments of his supplementary letter, Dr. Waterman stated:

> I think it is important if at all possible to avoid any further Court action in this matter. It is hoped that both parents will be able to agree to a compromise situation in order to reduce the conflict to which the children are exposed. . . .

[23] The problem I see with Dr. Waterman's report, and his supplemental report, is that after his finding of no evidence of PAS, that should have been the end of the exercise. Dr. Waterman is obviously a proponent of greater access than that which the court has seen fit to order relative to these two children. That is not to say that he is not right in taking that view. The concern I have is that both children seem content with the access provisions that are presently in place and which have been in place for some seven years

[24] Dr. Waterman has, after completing his assessment relative to PAS, moved on to an area of advocacy where he is advocating his view of reasonable access between the children of the marriage and their access parents. He is attempting a compromise in his conclusions that would, in his view, meet the best interests of these children. I do not disagree with that

concept either, but, in court proceedings such as this to vary an existing court order there is the concept of correctness of previous orders that must stand the test of time and indirect attacks. I must therefore proceed on the basis that the access regime ordered by Justice Cashman in his 1992 order was correct.

[25] Further, the Supreme Court of Canada in ***Gordon v. Goertz*** (1996), 19 R.F.L. (4th) 177 (S.C.C.) has summarized, per McLachlin J. speaking for the majority, at pp. 201-2, the law relating to variation of access orders as follows:

> (1) The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
>
> (2) If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
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> (3) This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
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> (4) The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
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> (5) Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> (6) The focus is on the best interests of the child, not the interests and rights of the parents.
>
> (7) More particularly the judge should consider, *inter alia*:

> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;
>
> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent's reason for moving, *only* in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[26] While it is true that the order of Justice Cashman was made at a time when Mr. McLelland was residing on the mainland, and when the children some seven years younger than they are now, it should not be forgotten that a variation of Justice Cashman's order was sought by Mr. McLelland in 1996 at which time he was resident on the island and had at that time remarried. Although he was unrepresented at that time, I am of the view that that date is the commencement of the time frame that should be looked at to determine whether or not he has demonstrated a material change in the circumstances affecting his two children.

[27] About all that can be said with respect to change is that the children are now older. But that, in my view, without more, is not a sufficient ground amounting to a material change

in the circumstances affecting the children. By that I mean it is a change but it is not material as that is a change that all human beings endure with the passage of time.

[28] If I were to hold that the mere passage of time was sufficient in itself to allow a variation of child access then a custodial parent could conceivably look forward to variation applications by the access parent coinciding with birthday parties.

[29] The requirement for materiality was also addressed by McLachlin J. in ***Gordon v. Goertz***, at p. 189:

> Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made. Section 17(5) provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no farther: *Wilson v. Grassick* (1994), 2 R.F.L. (4th) 291 (Sask. C.A.).
>
> The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the *change* in circumstances since the order was issued: *Baynes v. Baynes* (1987), 8 R.F.L. (3d) 139 (B.C.C.A.); *Cicherty v. Beckett* (1989), 21 R.F.L. (3d) 92 (Ont. C.A.); *Wesson v. Wesson* (1973), 10 R.F.L. 193 (S.S.T.D.), at p. 194.
>
> What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those

> needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I. S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J.G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

[30] Applying this rationale to the facts before me I have concluded that there has not been the establishment of material change in the conditions, means, needs or other circumstances of the children that would warrant the inquiry going any farther. All there is is the added dimension of Dr. Waterman's recommendations which were diluted somewhat after his further meeting with the children on January 12, 1999.

[31] I am of the view that given the ages of Derek and Shannon the desirability of maximizing contact between the children and both parents must be somewhat tempered by the views of the children. There is no evidence to substantiate Mr. McLelland's submissions that the children must have been influenced by their mother to go and see Dr. Waterman some three weeks after his report and recommendations were released.

[32] The existing access regime has been in place for some six to seven years. The allegation of PAS, which was first raised by Mr. McLelland in 1996, has been answered after a full and

searching inquiry conducted by Dr. Waterman. While I am mindful that the existing order of Mr. Justice Cashman was made at a time when Mr. McLelland was resident on the mainland, the fact remains that the matter of extended access was before the court in 1996 and I find that there has been no material change affecting the condition, means, needs or other circumstances of Shannon and Derek other than the mere passage of time since that date.

[33] As a result, the defendant's application is dismissed with costs to the plaintiff.

[34] The plaintiff's application seeks an order that Mr. McLelland's access to the infant children be fixed for the first two weeks of July in one year, and in the following year, for the last two weeks of August, with Mr. McLelland to effect pickup and drop-off. In the alternative, Ms. Smith seeks an order that she be notified in writing by January 31st in each year as to which two week period Mr. McLelland desires his summer access to be fixed at. The reason for the request is that Ms. Smith, because of her seniority at her place of employment, is given first choice of her summer holidays. She generally works when Mr. McLelland exercises his summer access to the children and she wants to co-ordinate her summer holidays early in the year.

[35] She states that the order of Justice Cashman, as it relates to summer access, is unworkable. She says that she has had to "chase" Mr. McLelland in order to obtain his preference for summer access. She says she has tried to obtain his preference before January 31st in each year, however he has delayed and has not co-operated in her plans to work her holidays around the children's activities and that this creates a stressful situation.

[36] In all of the circumstances, the proposal by Ms. Smith that Mr. McLelland provide her with written notice of his two week summer access request would work to the benefit of both the parties and would alleviate any stress that is occasioned by late notification. This will bring certainty to the issue of summer access and will permit both parties to arrange their summer activities with the children far in advance.

[37] I would therefore make an order varying the order of Justice Cashman, pronounced the 13th day of October 1992, to provide that Mr. McLelland shall have summer access to the children of the marriage, namely Derek Castell McLelland, and Shannon Alsye McLelland, for two consecutive weeks with Mr. McLelland to notify the plaintiff in writing of his choice of the two weeks access no later than January 31st of each year.

[38] Relative to the plaintiff's motion that I have dealt with in this order, there will merely be an order that each party bear their own costs of the application.

[39] Finally, I note Mr. McLelland's complaints of not being informed relative to the children and being unable to contact teachers or medical providers. I have not adjudicated on this issue because I feel it is not properly before me, but, I note the existence of a joint guardianship order relating to the two children. I would urge the parties to consider the joint guardianship order suggested by Master Horn in the 1996 CBA publication of Section Talk.

"Chamberlist, J."