SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacLean v. Boylan, 2011 NSSC 314

Date: 20110504
Docket: SFHMCA-032826
Registry: Halifax

Between:

Lauchlin Hector MacLean

Applicant

v.

Michelle Leigh Boylan

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Counsel: Terrance G. Sheppard for Lauchlin MacLean
Julia E. Cornish, Q.C. for Michelle Boylan

By the Court:

Introduction

[1] Skylar Boylan is the daughter of Lauchlin MacLean and Michelle Boylan. Skylar's father brought a number of applications relating to her parenting which were the subject of a hearing and oral decision on May 4, 2011. This decision provides my reasons in a more organized fashion.

[2] Ms. Boylan and Mr. MacLean cohabited, not continuously, over ten years. Skylar was born in 2003, shortly before her parents' relationship ended in 2004. Mr. MacLean and Ms. Boylan negotiated a very detailed agreement about Skylar's parenting and this parenting plan was incorporated into a consent order in 2005.

[3] Mr. MacLean asks that Skylar be able to make her first communion at his church. She cannot do this without having first participated in the sacrament of reconciliation. Mr. MacLean also wants to modify the terms of Skylar's summer access and he wants a custody and access assessment ordered. The assessment would include psychological testing.

[4] The mass where children will make their first communion is this Sunday.

Participation in religious sacraments

[5] The consent order provided that Skylar would be in her parents' joint custody. The parenting plan described how decisions would be made in paragraph 1(c):

> Neither parent will make a major developmental decision regarding Skylar without the consent or acquiescence of the other except on an emergency basis. In the event that the parties are unable to reach an agreement the mother shall make the decision, pending further agreement of the parties, or order of the court.

How to determine this issue

[6] Paragraph 1(c) of the parties' parenting plan can be viewed in two ways. In one way, Mr. MacLean's application might be seen as a variation application, if he is asking that I vary this term so that Ms. Boylan may not make the final decision about Skylar's

religious upbringing where “the parties are unable to reach an agreement”. Alternately, Mr. MacLean’s application might be seen as one of the steps provided for in the parenting plan: the parties have been unable to reach an agreement, Ms. Boylan has made the decision about Skylar’s religious upbringing, there has been no further agreement by the parties and Mr. MacLean seeks an order of the court to resolve the disagreement about this major developmental decision.

[7] The parenting plan is very detailed. It makes explicit a procedure that is normally implicit: a parent who believes a decision has been made that isn’t in the child’s best interests may challenge the decision in court. Spelling out this procedure suggests that the parents were experiencing a level of conflict which exceeded that between most separating parents, where this much detail is not required in describing how decisions are to be made. Most agreements don’t anticipate this level of conflict.

[8] Mr. MacLean takes exception to various decisions that have been made. The current conflict about Skylar’s religious upbringing is one example of their disagreements. If this matter was proceeding as an application to vary paragraph 1(c) of the parenting plan, I would dismiss the application on the basis that there is no material change in circumstances on which to ground the application: the conflict that currently exists was anticipated and provided for in the consent order.

[9] Mr. MacLean says he is simply working his way through the process the parties agreed upon for making decisions about Skylar: the parents disagreed about a decision, Ms. Boylan made the decision, there has been no subsequent agreement by the parents and now, at the last step, I am asked to make an order. I accept Mr. MacLean’s characterization of the application before me. His larger application does seek to vary the terms of the consent order as they relate to decision-making and this assists in persuading me that this interim application is a matter of the parents working their way through the process outlined in the consent order.

Skylar’s religious upbringing

[10] Mr. MacLean is a member of the Roman Catholic Church. Ms. Boylan is a member of the United Church. Both parents agree that Skylar will choose her own faith, if any, once she’s older. They also agree that she may be exposed to each parent’s faith.

[11] Mr. MacLean agrees that Skylar may participate in her mother’s faith. Ms. Boylan says that a person doesn’t become a member of the United Church until reaching late adolescence. There is no particular rite or ceremony that a person must complete before receiving communion in the United Church and, according to Ms. Boylan, participating

in the United Church means that Skylar may take part in its communion ceremony now even though she isn't a member of the United Church.

[12] Ms. Boylan agrees that Skylar may participate in her father's faith: Skylar may attend his Church, attend catechism classes and take part in the Christmas pageant. Ms. Boylan objects to Skylar taking any steps, at this point, which bring her closer to becoming a member of the Roman Catholic Church. She believes that at her age, Skylar doesn't appreciate the faith she's being positioned to adopt. Skylar turns eight this weekend.

[13] Skylar's attended catechism classes in the Roman Catholic Church since she began attending school. This year, children in her catechism class were being prepared to receive the sacraments of reconciliation and first communion. Initially, Ms. Boylan was opposed to Skylar's participation in this class. Ultimately, she agreed that Skylar could take part in the class on the clear condition that Skylar would not ultimately receive these sacraments. I was provided with a letter from Father Cosgrove, the priest at Mr. MacLean's church, which says:

> Skylar's mother has had several conversations with myself and our religious education director at first requesting Skylar be removed from the class then allowing her to attend after receiving assurances that Skylar will not be invited to share in the right [*sic* - rite] of first communion without Ms. Boylan's expressed permission. We abide by these instructions.

[14] Parenthetically, I do wonder whether Skylar would be invited to share in the rite of first communion if I order it, in light of Father Cosgrove's statement that this will not happen "without Ms. Boylan's expressed permission". If the church is seeking Ms. Boylan's permission that Skylar will make her first communion, this requirement wouldn't be met by my decision. My decision would be made because Ms. Boylan will not give her permission.

[15] Mr. MacLean explains that Skylar's been preparing for her first communion and she will be disappointed if she cannot take part in it. He describes this as an event where Skylar will wear a special outfit, she will have a bow on her arm, there will be a celebration and there will be a party. Ms. Boylan points out that these are the "social" elements of the event and they don't relate to the fact that this is a religious rite. She suggests that Skylar doesn't understand the religious significance of the occasion (including why she can receive communion in one church and not the other): Skylar only understands the social elements of the occasion. Skylar's disappointment, as described by Mr. MacLean, would be focused on not being able to take part in the social aspects of

the first communion. Regardless, Mr. MacLean will not be satisfied if Skylar participates in the social aspects of the day, but not the actual first communion sacrament.

[16] Mr. MacLean argues that because Skylar participates in communion at the United Church, she should be able to do the same in the Roman Catholic Church. As Ms. Boylan explains it, anyone who attends the United Church may receive communion in that church while in the Roman Catholic Church, receiving communion is reserved for select individuals within the congregation who have already received the sacrament of reconciliation. Ms. Boylan argues that if Skylar makes her first confession and receives communion she is drawn into membership in the Roman Catholic faith and this is not consistent with the parents' view that Skylar will select her own faith when she is older.

[17] Mr. MacLean tells me that Skylar's natural progression through catechism classes is such that when she is in grade two in elementary school, she naturally proceeds through first confession (the sacrament of reconciliation) and first communion. I understand from this that the opportunity to receive these sacraments is available annually. There's no requirement that Skylar participate in these sacraments this year. She could take part any year.

[18] Mr. MacLean says that I must determine this application on the basis of Skylar's best interests. Since Skylar can receive these sacraments any year, is it in her best interest that she participate this year, rather than when she is older or when her parents agree it's the appropriate time?

[19] Mr. MacLean disagrees with Skylar having received communion in the United Church. However, Skylar's receipt of communion in the United Church is consistent with his view that Skylar can participate in the United Church: I'm told that anyone who attends that church may receive communion there. In that way, Ms. Boylan takes a consistent view of Skylar's participation in her parents' churches: Skylar may participate in each church in whatever ways any member of the congregation may, but she may not participate in anything which indicates a greater membership in that faith.

[20] Mr. MacLean has not identified any interest that is served by putting Skylar in a position where she participates in a religious ceremony that puts her at odds with the religious values of one of her parents or which detracts from the parents' agreement that Skylar may choose her faith "when she is older": Skylar is a few days short of her eighth birthday as this application is made.

[21] Ms. Boylan's approach is consistent with the goals both parents share: both parents may expose Skylar to their faith and Skylar will make a decision about her faith when she's older.

[22] Skylar's disappointment that she cannot dress up and be celebrated at a party for those who've made their first communion is not sufficient to make it in her best interests that her parents' agreement that she may choose her own religion when she is older should be set aside. Skylar is, at this age, too young to make that decision. This is demonstrated by her ignorance of the distinction between the communion ceremonies in each of her parent's faiths.

[23] I am concerned that Skylar continued to participate in catechism classes preparing her for the religious sacraments when her parents knew there was no agreement she would take part in the religious rites. Skylar was not told that there was no agreement about her participating in these rites or that she might not be able to do so. She was lead to believe that she could take part in all the social elements of this special day when that was anything but certain.

[24] Because Skylar has been lead to believe that she will participate in the first communion ceremony and she may be disappointed, I encourage her parents to work together to salvage this situation. Perhaps they can arrange for Skylar to meet with Father Cosgrove or the minister at her mother's church who can provide an explanation of the differences in how the churches view communion and the meaning of the reconciliation rite. Her parents can put this information in the context of their agreement that Skylar will be exposed to both faiths so she can determine which, if either, will be her faith in the future. This Sunday, when her catechism classmates make their first communion, she can participate as a special observer and her parents can acknowledge that she has completed the education that accompanies this rite.

Review of summer access

[25] The parents' agreement was incorporated in the 2005 consent order. The agreement provided that Skylar's vacations would be no longer than one week with either parent. They also agreed that following the summer of 2008, they would review "the issue of the one week vacation".

[26] Mr. MacLean and Ms. Boylan haven't reviewed this aspect of the agreement until this application. Since the agreement provided for a review, it isn't necessary that there be a material change in circumstances for my review. Of course, Mr. MacLean must still prove that the change he proposes is in Skylar's best interests.

[27] The schedule of Skylar's parenting time since 2005 has involved multiple instances of extended time with Mr. MacLean: eleven week-long vacations, one eight-day vacation and three nine-day vacations. The nine-day vacations happen during the first quarter of the year, while the week-long or eight-day vacations happen during the

summer months and there's no more than one in each of July and August. I'm told that while Skylar has had these extended periods of time with her father, she generally does not alternate between lengthy periods with each of her parents. She may have a week with each parent, but after this week, she returns to her usual routine of moving back and forth between her parents frequently and at brief intervals.

[28] Skylar tells her mother that she worries about having more time with her father than she currently has. Ms. Boylan's evidence is that Skylar is very concerned about this. The evidence I have is that Skylar does well with some periods of extended access with her father, where those extended periods are not continuous, but are separated by months of her regular access routine.

[29] In cross-examination there was a fair amount of questioning about "typical" relationships between mothers and children and "typical" eight year olds. My task is not to determine what might be best for a "typical" child, but to determine what is best for Skylar. This is particularly important because I'm told Skylar has an exceptionally close bond with her mother. She doesn't recall ever living with her father and expresses upset at being separated from her mother, according to Ms. Boylan. Mr. MacLean disagrees with this and says Skylar is fine when she is with him.

[30] Mr. MacLean's busy season at work is during the summer and he wants to be in Cape Breton as much as possible during the summer to participate in the work to be done. He also wants to be able to take Skylar on trips to New Brunswick and Prince Edward Island during this time. Mr. MacLean says that trips to see friends and family in Alberta and Ontario would be facilitated by longer periods of summer access, as would Skylar's participation in educational or recreational camps which run from Monday to Friday.

[31] I may modify Skylar's access if it's in her best interests to do so. In that regard, travel to New Brunswick and Prince Edward Island can be accomplished within the time presently provided for travel to Cape Breton. These trips are not prohibited by the current parenting arrangement. I'm told that the friends and family Mr. MacLean wants to visit in Alberta and Ontario typically visit Nova Scotia, so Skylar has the opportunity to see these people without varying her parenting schedule.

[32] The only goal that would be accomplished by extending Mr. MacLean's time with Skylar does not relate to Skylar's best interests, but to accommodating Mr. MacLean's work schedule (though he has not explained how his own travel to New Brunswick, Prince Edward Island, Ontario or Alberta during the summer is consistent with the busy work schedule he has there). The other purported benefits of his proposal can be accomplished within the current parenting schedule. Since it is not shown to be in Skylar's best interest that I modify her parenting schedule, I decline to do so.

[33] The current order provided that access would be reviewed. The review occurs without the requirement of a material change being shown to have occurred since the order was granted. Any subsequent application to modify the parenting schedule will bear this requirement.

Custody and access assessment

[34] Mr. MacLean has applied pursuant to section 32F of the *Judicature Act*, R.S.N.S. 1989, c. 240 for a custody and access assessment.

[35] Assessments may include a component of psychological testing and Mr. MacLean asks that psychological testing be included in the assessment he seeks. Typically, the testing involves a number of tests. I didn't review the nature of the testing in my oral decision. I do so now. The tests are usually:

- the Parent Child Relationship Inventory which was designed to assess parents' attitudes toward parenting and toward their children;
- the Parent Stress Indicator which identifies "parent-child systems" that are under stress and at risk for the development of dysfunctional parenting behaviours or behaviour problems in the child;
- the State Trait Anger Expression Inventory which attempts to determine if tested individuals experience or express anger to a degree that may interfere with their optimal functioning; and
- the Minnesota Multi-phasic Personality Inventory-2 which is comprised of a variety of scales which assess the psychopathology and personality characteristics of adults.

[36] Mr. MacLean has described the form of the assessment as one where the assessor would meet and talk with Skylar and observe her in each of her homes. As well, the psychological testing would be conducted.

[37] Skylar's time is shared on a relatively equal basis. If Mr. MacLean's application is successful, it would be clearer, he says, that the time-sharing is an equal time-sharing arrangement and decision-making would be changed. In applying to vary the parenting arrangement, Mr. MacLean also asks to vary the prescribed terms of decision-making.

[38] In *Farmakoulas v. McInnis,* 1996 CanLII 5447 (NS S.C.), Justice Edwards

helpfully summarized the law relating to applications for assessments. At paragraph 15, he said that the burden is on the party requesting the assessment to show that a professional opinion is required. Assessments should be ordered where there's a specific need for the type of information they generate and the information would not otherwise be available because it falls within the special knowledge of the expert. In *Farmakoulas v. McInnis*, 1996 CanLII 5447 (NS S.C.), Justice Edwards denied the request for an assessment, finding the assessment really was a fishing expedition.

[39] I accept Justice Edwards' criterion as the appropriate test for ordering an assessment. Based on these criterion (the need for a professional opinion, the need for the specific type of information the assessment will generate and the likelihood the assessment will provide information not otherwise available because it falls within the special knowledge of the assessor), this is not a case where an assessment is appropriate.

[40] Mr. MacLean's application doesn't seek to vary Skylar's parenting arrangement dramatically or to move from supervised parenting to unsupervised parenting, for example. In those circumstances, an assessment might provide useful information. The change to parenting time he seeks is fairly modest and the real qualitative change proposed has to do with decision-making. The information generated by the proposed assessment and testing wouldn't provide information about how decision-making is best structured, whether there should be parallel parenting or if one parent should have decision-making authority in some domains while the other makes decisions in others.

[41] Mr. MacLean hasn't discharged the burden of proving the need for an assessment as explained by Justice Edwards in *Farmakoulos v. McInnis*, 1996 CanLII 5447 (NS S.C.): that a professional opinion is needed; that there's a specific need for the type of information the assessment will generate; or that the assessment is likely to provide me with information otherwise unavailable because it falls within the assessor's specialized knowledge.

Costs

[42] I am dismissing all of Mr. MacLean's applications.

[43] Counsel agreed that they would discuss the matter of costs between themselves and return to me only if they were unable to resolve it. In the interest of ensuring the record is clear, I ask that an order be prepared stating that all Mr. MacLean's applications have been dismissed and describing the status of the costs claim.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia