

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Yates v. Boswell, 2010 NSSC 11

Date: 20100316

Docket: 1201-50455

Registry: Halifax

Between:

Shelley Alaine Yates

Applicant

v.

Clinton Walker Emmerson Boswell

Respondent

Judge: The Honourable Justice Deborah Gass

Heard: March 16, 2010, in Halifax, Nova Scotia

Written Decision: September 19, 2011

By the Court:

[1] In the matter as between Shelley Yates and Clinton Boswell. The parties were divorced and a Corollary Relief Judgment was granted in April of 1996, which made provision for a number of issues, and in particular the parenting issues with respect to the parties' child Emma, who is now almost 17 years of age.

[2] The order was varied and the varied order did put in to place some very specific provisions with respect to parenting. That order was issued on the 18th of November 1998, the matter having come for hearing initially in November of '97, an interim order – agreement reached on access in December of 1997 and then subsequently the parties further considered the issues and agreed to vary the Corollary Relief Judgment to put in some more specifics with regard to the access time that the father would have with the child, including provisions with respect to travel and consent to travel.

[3] So, in essence, the court is being asked to vary the provisions of that corollary relief. The initial Corollary Relief Judgment in April of 1996 did incorporate a separation agreement that the parties had reached and in that the provision was made for the parties to remain joint custodial parents of the child Emma Nicole Boswell, born July 21st, 1993, and it went on to speak about the intent of joint custody and some of the incidentals of joint custody. And then the specifics with respect to access were the subject of the variation.

[4] The governing legislation in this application to vary is the *Divorce Act* and that is the legislation that the court must consider. And in considering an application to vary the court has to first consider any change in circumstances relevant to the change that is being sought, and in this case the issue to be decided is whether there's been a change in circumstances to warrant a variation from joint custody to sole custody, and in so doing, what are the changes in circumstances that would be relevant to that. And the respondent, Mr. Boswell, has argued that there is no change in circumstances, although in his submission he did acknowledge some changes in circumstances.

[5] I'm satisfied that there have been changes in circumstances and, as it is in the case of parenting, custody and access arrangements, one of the changes in circumstances that often gives rise to the court re-examining custodial arrangements is the mere passage of time. Even though the passage of time is

something that is foreseeable when the parties enter into an agreement or the court makes an order with respect to parenting, the needs and circumstances of children change as children grow and develop and therefore because the legislation that the court operates under has as its hallmark the fact that the best interests of the child is the overall governing consideration. The court has to look at changes in circumstances in light of that as well, and it is normal for a child to go through changes in his or her life and therefore her needs and her interests change as the child goes through life. So the court can put into place some kind of a parenting arrangement that is perfectly acceptable for a particular point in a child's life and even though it's foreseeable that time is going to pass and circumstances may change, that does not mean that the court cannot then re-visit the parenting arrangements to ensure that they continue to be in the best interests of the child, and if they are not to vary those provisions so that they are. So when one considers what has changed since 1997 or actually 1996 when the initial joint custody order was put into place, and even what has changed since 1997/1998 we're talking about the passage of 12 or 13 years, anyway somewhere between 12 and 14 years, and that is a huge change when you consider that this child Emma was basically an infant or a toddler when the provisions were made and she is now 16 almost 17 years of age, almost finished high school. So there has been a significant change in circumstances just by the sheer passage of time and then the changes that would come to her incidental to the passage of time. It does appear as well that there have been changes in circumstances in that the nature of the relationship that was contemplated or hoped for by everyone did not seem to materialize and deteriorated for one reason or other. And the father argues that the deterioration is solely because the mother has alienated the child from the father and that that is the cause of this and that is why it's necessary for him to maintain, or why he's opposing the change away from joint custody because this has been manipulated by the parent who is seeking the change. His other reason for opposing the change is that he is concerned that the mother's involvement in spiritual activities, for lack of a better word, as a result of a near death experience that she had that has resulted in her having some spiritual awakenings and experiences that have influenced her life and the course that her life has taken since then, that that has rendered her incapable of providing proper and adequate parenting the child without his overseeing of that, and that it is not appropriate for the child to be influenced or involved in any way in those activities that her mother has engaged in.

[6] I've reviewed the affidavits, I've read them all and I've reviewed Mr. Whitzman's report, and it certainly appears from all of the evidence before me that

Emma has developed into a very mature, thoughtful, intelligent, highly functioning young woman and that in all aspects of her life she is thriving, she is doing exceptionally well, except in this one area of her life, and that is in regards to the relationship she has with her father and what has happened to it over time, that appears to be the one area in her life that is causing her some difficulty. One of the concerns that the father has said that has influenced her to have this negative sentiment about her relationship with her father is that she's been brought into family discussions and she's been involved in this issue from discussing the matter with her mother, with her mother's partner, with her mother's best friend who is like an aunt to her, and that this is inappropriate. There's also been some evidence as well that there was the tearing up of the agreement that provided for her to have specific access when she was upset by that when she was about 11 or 12. Again, in the context of all of the evidence and listening to the witnesses, I'm satisfied that her interaction with the adults in her life has been appropriate. She, as a child, is not one to decide for herself what should happen to her but over time, and she is now 17 years of age, her own experience has prompted her to express her views about what is going on in her relationship with her father and prompted her to urge her mother to bring an application to the court to deal with this matter.

[7] I'm satisfied in reviewing the evidence that it is her open communication with adults in her open communication with adults that are around her, adults that she loves and trusts, that she has communicated her angst about her relationship with her father, and apart from this anxiety and difficulty that she has she is, and there's absolutely no evidence to suggest otherwise, that she is, as I say, a mature, thoughtful, intelligent and highly functioning young woman. I also do not conclude on the evidence that I have heard that it is abnormal for her to have the kind of relationship with her mother and with her mother's partner and her mother's friend that she has; these are people who are close to her, these are people that she cares about and it is normal for them to be there for her, to hear her out when she has things that she wishes to say, and there's a fine line – there's quite a difference rather, between involving and dragging a child into discussions about another parent, there's a big difference between that and being there to hear a child when a child is expressing concerns to the parent and being there to support and listen to what the child has to say. I am also, and it does appear from the evidence, that the preponderance of the evidence would suggest that the mother has not been obstreperous and alienating in her behaviour with respect to the child and the child's father and that in fact the evidence would suggest the opposite to be true, that the mother has encouraged the relationship, and that in fact when Emma

expressed an interest in going to live with her father the mother supported that and enabled her to make that attempt and that as a result of whatever, and nobody really has a handle on that, but she changed her mind. But there is absolutely no evidence before me to suggest that it had anything to do with the mother poisoning the child's relationship with her father, in fact the preponderance of the evidence would suggest the contrary.

[8] The court has the benefit of the report of Martin Whitzman and Martin Whitzman is a highly skilled and experienced family counsellor and therapist and assessor, and the report of Mr. Whitzman is to determine what the child's wishes are, but also to determine as best he can the extent to which, if any, a child is being influenced in giving his or her views about the situation as between the parents. Mr. Whitzman is dealing with a 16 year old child, not a nine year old, not a six year old, not even a 12 year old, but a 16 year old who is very articulate and very able to speak for herself. In it he speaks about her frustrations with her relationship with her father. It is more than an issue of permission to travel. There is, in summarizing it, a feeling of an exercising of control over her life, but not having any other kind of meaningful relationship with her, only intervening to exert control over her, but not any kind of other attempt to develop and build a supportive and loving relationship and the situation has become one in which she has become uncomfortable. There is not a shred of evidence, as far as I'm concerned, that this has been precipitated by anybody else. She expresses even in her views to Mr. Whitzman that she loves her father, she misses her siblings, she'd like to have a relationship with his children; these are not the words of somebody who is alienated, they are the words of somebody who is not comfortable in the situation as it currently is but has not closed the door on it at all, but that right now it is more an interference in her life and it's upsetting her, but that does not mean that she doesn't love her father and she's expressed that very clearly. Those are not the words of a child who is being alienated.

[9] So I'm not satisfied that Mr. Boswell's reason for opposing the application because of alienation is founded in the facts that are before me. Nor do I find that his reasons for opposing joint custody because of the child's mother's involvement in a spiritual aspect of her life renders her incapable of providing adequate parenting and the suggestion that she may be mentally ill as a result of it; there's not a shred of evidence to that effect. While some may not agree with her, or may not understand it, that does not mean that she's not capable of parenting, and in fact the proof is evident in the fact that her daughter is an extraordinary young

woman and is doing extremely well in all aspects of her life and her schooling and it appears that she is a child who has been extremely well brought up and that she's living in a loving and supportive family environment. So I'm not satisfied that there are any weaknesses or frailties in Ms. Yates' parenting that would suggest that it is necessary in the best interests of Emma to have the overseeing of Mr. Boswell in the parenting.

[10] This is a situation where even if I felt that she was being influenced by the mother's spiritual views, those have not in my view from anything I have read, any evidence before me, had any kind of a negative impact on her health and well-being. In fact, if anything, it appears that the way of living and the values and morals of the household in which she is being brought up and the principals upon which they function are very positive and supportive ones, not only for people within the family but for generally living in the world and being a participant in the world. In fact, if anything, any negative impact on her health and well-being would appear to be this one issue with respect to dealing with her father. As I've indicated, I do not feel that this child is an alienated child on the evidence that I have heard; she expresses love for her father, but she needs space right now, and she has had difficulty in her father being involved in a more negative way than in a supportive and loving way and intervening at these times when she wants to go on a trip, for example, and it becomes an issue, or going to the school or whatever, finding out information about her and then conveying that he knows it about her.

[11] I have to be satisfied that the joint – so, in finding that there is a change in circumstances, that gives me then the cause to look at the overall circumstances and determine anew what is in the best interests of the child. And at this point in time I have to say that the evidence before me does not suggest that joint custody at this point is in the best interests of the child because it's not really grounded in reality. I do not have in the evidence before me any concrete examples of where joint custody has actually been beneficial to Emma. In fact, it suggests – the evidence suggests that the joint custodial arrangement as it currently is being lived out is more of a negative in her life. There is no relationship between the parent and the child, except the one where it involves some control over her activities and there's no evidence of circumstances where that joint custodial arrangement has actually served her best interests.

[12] Emma is a child, as I say, who has done well and in my view of the evidence it appears that the mother has done a more than adequate, in fact an admirable job

in raising this child virtually alone, and there were circumstances or examples given of where – when Dad was consulted or when there was some reference to Dad about some major issues, such as braces, operations or getting involved in counselling, he determined that it wasn't necessary and he didn't want to be involved and the child has gone through some – there was reference to the surgery that the child went through when the Dad wasn't involved, didn't contact the child to see how she was doing or anything of that nature.

[13] So it doesn't appear to me from what I have heard and read that over the last many, many years that there is any semblance of reality in the joint custodial order. It is more than just having parenting time with a child, it is being supportive and being there if the child requires it, or even being there when the child doesn't require it, but by communicating in a positive way. Even looking at the emails from Emma to her father, and again they satisfy me that Emma's not alienated from her father, she talks about different kinds of love and how she loves her father but she's just not comfortable with him at this point in time and that she doesn't feel a part of his family, she doesn't feel she knows him, she doesn't feel he knows her, and it does appear that there is a gap between the ideal of joint custody here and the reality of it. As I've said, I find that Mr. Whitzman's report is a balanced one, he is a skilled and experienced assessor; he found that the child wanted to have a relationship with her father, but in his reporting she described how the child wanted to have the relationship with her father but it didn't work out, that she even explored living with her father and that was encouraged by her mother and that didn't materialize, she acknowledged missing her siblings. Mr. Whitzman specifically talked to her about coaching and being influenced. He's interviewing, again, a 16 year old girl, not a small child. So I do accept the report of Mr. Whitzman, notwithstanding the comments that Mr. Boswell makes about its veracity. The problem with Mr. Boswell's assessment of the assessment is that he doesn't know his daughter that well and he doesn't know what she's capable of saying, so if he thinks that words like emancipation or other words that she's used in her discussion with Mr. Whitzman are not those of a typical 16 year old child, I'm not sure who's in a position to give that kind of opinion, but she is in Grade 11 so she – and she's bright and articulate so, and he doesn't really know her, so I can't place a great deal of weight on his own opinion that those are not the proper reflections of what a 16 year old girl would say.

[14] So, I am satisfied first that there's been a change in circumstances, the mere passage of time and the consequent increased age and maturity of the child which

results in changing needs and interests warrant a review of it and I have to be satisfied that to continue the order is in her best interests, and I'm not satisfied that it's in Emma's best interests to maintain the joint custodial arrangement and I will therefore vary the order to provide for the child to be in the custody and primary care of her mother with reasonable access at reasonable times upon reasonable notice bearing in mind the needs and interests of the child Emma.

[15] With regard to the question of maintenance, I'm going to leave the order as it currently stands. There was very little evidence with respect to that. The father had made a reference to undue hardship; the foundations for an undue hardship application have to be under very – only certain criteria, if there's an increased cost of access, if the parent is responsible for the – if there's a split custody or something of that nature, the parent is responsible for paying child support to another child or dependent adult, increased debts that were as a result of the breakdown of the marriage that are being carried by that parent, those sorts of things and the criteria is not there. There is some reference to an increase in the annual income of the respondent but I did not really hear much evidence on that and there was some reference – there was no reference at all to it although it has been pleaded, so I'm leaving that provision and the only thing – as it currently stands – and the only thing I'm changing is from joint to sole custody with reasonable access at reasonable times upon reasonable notice bearing in mind the needs and interests of a 17 year old – almost 17 year old. Thank you.

Gass, J.