

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

Matter of Brandon HH. v. Megan GG.

184 N.Y.S.3d 462 (N.Y. App. Div. 2023) · No. 532809 · Decided March 2, 2023

SUMMARY

The New York Appellate Division, Third Department affirmed an order modifying the mother's visitation with her children to require supervision. The court held that objections to the admission of a Family Court Act § 1034 investigative report were unpreserved and, in any event, harmless, and that the Family Court's adverse inference concerning a missing witness was erroneous but harmless. The court concluded that a change in circumstances and the children's best interests supported supervised visitation.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Fisher, J.; Egan Jr., J.P.; Lynch, J.; Aarons, J.; Ceresia, J.
JURISDICTION	New York
DECIDED	March 2, 2023
DOCKET	532809
DISPOSITION	affirmed
PROCEDURAL POSTURE	The mother appealed from an order of the Family Court of Otsego County modifying a prior custody order and requiring that her visitation with the children be supervised.
STANDARD OF REVIEW	A custody or visitation modification must be supported by a change in circumstances and a determination that the modification serves the children's best interests. The Family Court's best-interests determination is accorded great deference when supported by a sound and substantial basis in the record, including deference to its credibility determinations.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Megan GG. v. Brandon HH.

TOPICS

visitation

child custody

family law procedure

hearsay

preservation of error

PRACTICE AREAS

family law

evidence

appellate procedure

QUESTIONS PRESENTED

1. Whether the mother's hearsay challenge to the admission of a Family Court Act § 1034 investigative report was preserved for appellate review.
2. If preserved, whether admission of the investigative report constituted reversible error.
3. Whether Family Court improperly drew an adverse inference against the mother for failing to call her boyfriend as a witness.
4. If the adverse inference was improper, whether the error was harmless.
5. Whether the record established a change in circumstances and a sound and substantial basis for modifying the mother's visitation to supervised visitation in the children's best interests.

HOLDINGS

1. The mother's hearsay objection to the investigative report was unpreserved because the objections below challenged relevance but did not raise hearsay.
2. Even assuming error in admitting the report, its admission was harmless because the report merely restated evidence already introduced, particularly the mother's testimony.
3. Family Court improperly drew an adverse inference because no party requested one and the mother was not given an opportunity to oppose the inference or attempt to procure the boyfriend's testimony.
4. The improper adverse inference was harmless because sufficient other evidence supported supervised visitation.
5. Family Court properly found a change in circumstances and determined that supervised visitation served the children's best interests; its order had a sound and substantial basis in the record.

KEY QUOTATIONS

“Nevertheless, this error was harmless as there was sufficient evidence adduced at the fact-finding hearing to support the need for supervised visitation” ([*2])

“Modifying an existing custody order requires a change in circumstances and that such change will serve the children's best interests” ([*2])

“Family Court has the discretion to impose supervised visitation if it determines that unsupervised visitation would be detrimental to the child[ren]'s safety because the parent is either unable or unwilling to discharge his or her parental responsibility properly” ([*2])

FACTUAL BACKGROUND

The parents had joint legal custody of their son and daughter, with the father having primary physical placement and the mother exercising regular parenting time. Evidence before Family Court included the mother's continued contact with a boyfriend after an alleged incident of sexual misconduct involving the daughter, concerns that the mother failed to administer the son's prescribed medication, and testimony about the children's hygiene and safety while in the mother's care. A Department of Social Services caseworker testified that safety concerns existed because of the boyfriend and the mother's ability to determine who was safe to be around the children.

PROCEDURAL HISTORY

The parties previously had joint legal custody, with the father having primary physical placement and the mother having regular parenting time. After the father filed an enforcement petition and sought restrictions based on missed visits, the mother's living situation, alleged safety concerns, hygiene issues, and concerns about the son's medication, Family Court ordered an investigation under Family Court Act § 1034. Following a fact-finding hearing and Lincoln hearings with the children, Family Court admitted the investigative report, drew an adverse inference from the mother's failure to call her boyfriend, found a change in circumstances, and ordered supervised parenting time. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of William O. v. John A., 151 A.D.3d 1203, 1205 (3d Dep't 2017), lv denied, 30 N.Y.3d 902 (2017)
- Matter of Thomas FF. v. Jennifer GG., 143 A.D.3d 1207, 1208 (3d Dep't 2016)
- Matter of Thomas v. Osborne, 51 A.D.3d 1064, 1069 (3d Dep't 2008)
- Matter of Kylene FF. v. Thomas EE., 137 A.D.3d 1488, 1492 (3d Dep't 2016)
- Matter of Timothy V. v. Sarah W., 144 A.D.3d 1423, 1425 (3d Dep't 2016)
- Matter of Liam M.J. [Cyril M.J.], 170 A.D.3d 1623, 1625 (4th Dep't 2019), lv denied, 33 N.Y.3d 911 (2019)
- Mereau v. Prentice, 139 A.D.3d 1209, 1211 (3d Dep't 2016)
- Matter of Kelly CC. v. Zaron BB., 191 A.D.3d 1101, 1107 (3d Dep't 2021)
- Matter of David VV. v. Alison YY., 203 A.D.3d 1534, 1535 (3d Dep't 2022), lv denied, 38 N.Y.3d 908 (2022)
- Matter of Michael U. v. Barbara U., 189 A.D.3d 1909, 1911 (3d Dep't 2020)
- Matter of Christopher WW. v. Avonna XX., 202 A.D.3d 1425, 1426-1427 (3d Dep't 2022)
- Matter of Michael NN. v. Robert OO., 210 A.D.3d 1326, 1327-1328 (3d Dep't 2022)
- Matter of Amanda YY. v. Faisal ZZ., 198 A.D.3d 1125, 1126-1127 (3d Dep't 2021), lv denied, 38 N.Y.3d 908 (2022)
- Matter of Jamie UU. v. Dametrius VV., 196 A.D.3d 759, 762 (3d Dep't 2021)

OPINION

PER CURIAM.

Matter of Brandon HH. v Megan GG. (2023 NY Slip Op 01115)

Matter of Brandon HH. v Megan GG.
2023 NY Slip Op 01115
Decided on March 2, 2023
Appellate Division, Third Department
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This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: March 2, 2023

532809

[*1]In the Matter of Brandon HH., Respondent,
v Megan GG., Appellant.

Calendar Date: January 18, 2023

Before: Egan Jr., J.P., Lynch, Aarons, Ceresia and Fisher, JJ.

Rural Law Center of New York, Inc., Castleton (Kelly L. Egan of counsel), for appellant.

Aaron A. Louridas, Delmar, for respondent.

Larisa Obolensky, Delhi, attorney for the child.

Veronica Reed, Schenectady, attorney for the child.

Fisher, J.

Appeal from an order of the Family Court of Otsego County (John F. Lambert, J.), entered December 18, 2020, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of a son (born in 2011) and a daughter (born in 2013).

Pursuant to a March 2019 order, the parties were awarded joint legal custody of the children with the father having primary physical placement and with parenting time to the mother on every weekend except the fifth weekend of the month.

In January 2020, the father filed an enforcement petition, alleging that the mother had failed to comply with the terms of the order because she had missed more than 10 scheduled visits with the children, had unstable living arrangements and that he suspected that the mother was not providing the son with his medication during her parenting time. Thereafter, the father moved, by order to show cause, to suspend or restrict the mother's parenting time to only daylight hours based upon, among other things, the mother's living situation, association with individuals who were alleged to have threatened the children and the mother's repeated return of the children in an unsanitary condition.

Based on several allegations of neglect, Family Court ordered an investigation pursuant to Family Ct Act § 1034.

Relevantly, the report stated that the mother allowed her boyfriend to continue to interact with the daughter after an alleged act of sexual misconduct between the boyfriend and the daughter. The report also provided that the mother had failed to provide the son with his prescribed medication. During a fact-finding hearing and a *Lincoln* hearing with each child, Family Court

admitted into evidence the report generated by the Family Ct Act § 1034 investigation and issued an adverse inference against the mother for her failure to call the boyfriend as a witness.

Ultimately, Family Court determined that supervision of the mother's parenting time was in the best interests of the children and issued an order to that effect. The mother appeals. </p> <p>We affirm. The mother's contention that Family Court improperly admitted the report completed pursuant to Family Court Act § 1034 is unpreserved.

Although the daughter's attorney for the child (hereinafter AFC) did object to the relevancy of the report during the hearings, and the mother joined such objection, neither advanced the hearsay argument that they do now for the first time on appeal (<i>see Matter of William O. v John A.</i>, 151 AD3d 1203, 1205 [3d Dept 2017], <i>lv denied </i>30 NY3d 902 [2017]; <i>see Matter of Thomas FF. v Jennifer GG.</i>, 143 AD3d 1207, 1208 [3d Dept 2016]).

In any event, given the other evidence introduced at the hearing, particularly the mother's testimony, the report simply restated what was already introduced and its admission was harmless (<i>see Matter of Thomas v Osborne</i>, 51 AD3d 1064, 1069[*2][3d Dept 2008]; <i>see also Matter of Kylene FF. v Thomas EE.</i>, 137 AD3d 1488, 1492 [3d Dept 2016]; <i>compare Matter of Timothy V. v Sarah W.</i>, 144 AD3d 1423, 1425 [3d Dept 2016]).</p> <p>Next, we agree with the mother that Family Court improperly drew an adverse inference against her for not calling the boyfriend as a witness.

Neither of the AFCs nor the father requested an adverse inference for a missing witness, and Family Court did not provide the mother an opportunity to be heard in opposition or to attempt to procure the boyfriend's testimony (<i>see Matter of Liam M.J. [Cyril M.J.]</i>, 170 AD3d 1623, 1625 [4th Dept 2019], <i>lv denied</i> 33 NY3d 911 [2019]; <i>Mereau v Prentice</i>, <a href="/opinion/3203076/mereau-v-prentice/#1211" aria-

description="Citation for case: Mereau v. Prentice">139 AD3d 1209, 1211 [3d Dept 2016]).

Nevertheless, this error was harmless as there was sufficient evidence adduced at the fact-finding hearing to support the need for supervised visitation (<i>see Matter of Kelly CC. v Zaron BB.</i>, 191 AD3d 1101, 1107 [3d Dept 2021]).</p> <p>To this end, and contrary to the mother's contentions, Family Court's determination did not lack a sound and substantial basis in the record (<i>see Matter of David VV. v Alison YY.</i>, 203 AD3d 1534, 1535 [3d Dept 2022], <i>lv denied</i> 38 NY3d 908 [2022]; <i>Matter of Michael U. v Barbara U.</i>, 189 AD3d 1909, 1911 [3d Dept 2020]).

Modifying an existing custody order requires a change in circumstances and that such change will serve the children's best interests (<i>see Matter of Christopher WW. v Avonna XX.</i>, 202 AD3d 1425, 1426 [3d Dept 2022]). "Family Court has the discretion to impose supervised visitation if it determines that unsupervised visitation would be detrimental to the child[ren]'s safety because the parent is either unable or unwilling to discharge his or her parental responsibility properly" (<i>see Matter of Michael NN. v Robert OO.</i>, 210 AD3d 1326, 1327 [3d Dept 2022] [internal quotations marks and citations omitted]; <i>see Matter of Amanda YY. v Faisal ZZ.</i>, 198 AD3d 1125, 1126-1127 [3d Dept 2021], <i>lv denied</i> 38 NY3d 908 [2022]).

"The court's ultimate assessment of the child[ren]'s best interests is to be accorded great deference so long as it is supported by a sound and substantial basis in the record" (<i>Matter of David VV. v Alison YY.</i>, 203 AD3d at 1535 [citation omitted]; <i>see Matter of Michael NN. v Robert OO.</i>, 210 AD3d at 1328).</p> <p>During the fact-finding hearing, the mother testified that the incident outlined in the report completed pursuant to Family Ct Act § 1034 was unfounded and that she has not heard anything further from child protective services.

When questioned about the incident, the mother further explained that she spoke to her daughter about it and, as a result, removed the boyfriend from her home. However, the mother admitted

that, after she was in an abusive relationship with another individual, she reconciled with the boyfriend and was at least partially financially dependent on him. She further confirmed that the children still had contact with the boyfriend, including the daughter, notwithstanding the incident that had [*3]initially prompted her to remove him from the children's presence.

Family Court further heard testimony from the father, who testified that he was concerned regarding the children's continued contact with the boyfriend and other individuals that the mother associated with.

He further testified that the children have returned from the mother's care covered in dirt, bug bites and in the same clothes that he had sent them in. He also articulated concerns as it relates to hygiene, notably with the son's teeth and the daughter developing a rash while visiting with the mother. A caseworker for the Department of Social Services also testified, explaining that she had safety concerns with the children visiting the mother because of the incident with the boyfriend and the mother's ability to make a determination as to who is safe to be around the children.

Based on the foregoing, and in considering the testimony from the Lincoln hearing, we agree with Family Court that there was a change in circumstances and that supervised visitation serves the children's best interests (see *Matter of Michael NN. v Robert OO.*, 210 AD3d at 1328; *Matter of David VV. v Alison YY.*, 203 AD3d at 1535; *Matter of Michael U. v Barbara U.*, 189 AD3d at 1911).

Although there was conflicting testimony relating to the incident involving the boyfriend, the children's hygiene while visiting with the mother and her administration of the son's medication, the mother's explanations were contradictory to other testimony or self-serving, and we accord deference to Family Court's credibility determinations (see *Matter of Jamie UU. v Dametrius VV.*, 196 AD3d 759, 762 [3d Dept 2021]).

We further recognize that supervised visitation affords the mother an opportunity to continue her relationship with the children while addressing credible safety concerns that the record demonstrates she has been unable or unwilling to properly discharge as part of her parental responsibilities (see *Matter of Michael NN. v Robert OO.*, 210 AD3d at 1327; *Matter of Amanda YY. v Faisal ZZ.*, 198 AD3d at 1126-1127).

As such, we find that a sound and substantial basis exists in the record to support Family Court's order modifying the mother's visitation to be supervised (*see* Matter of Christopher WW. v Avonna XX., 202 AD3d at 1427).

To the extent not expressly addressed herein, the mother's remaining contentions, including her claim of ineffective assistance of counsel, have been considered and found to be without merit.

Egan Jr., J.P., Lynch, Aarons and Ceresia, JJ., concur.

ORDERED that the order is affirmed, without costs.