

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)