

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

Matter of Yasin Tisdale v Judy Anderson

CAF 11-00654 · No. CAF 11-00654 · Decided November 16, 2012

SUMMARY

The New York Appellate Division, Fourth Department, affirmed an order awarding the father sole custody of the parties’ two children and permitting them to reside with him in Virginia. The court held that any error in temporarily changing the children’s residence without an evidentiary hearing was harmless because a full hearing was subsequently conducted, and it found a sound and substantial basis for the custody determination.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Per Curiam; Scudder, P.J.; Smith, J.; Fahey, J.; Carni, J.; Valentino, J.
JURISDICTION	New York
DECIDED	November 16, 2012
DOCKET	CAF 11-00654
DISPOSITION	affirmed
PROCEDURAL POSTURE	Judy Anderson appealed from Family Court orders concerning custody of the parties' children. The Appellate Division affirmed the order granting Yasin Tisdale sole custody and permitting the children to reside with him in Virginia.
STANDARD OF REVIEW	A custody determination following a hearing will not be disturbed when it has a sound and substantial basis in the record. Any assumed error in temporarily changing the children's physical residence without an evidentiary hearing is reviewed for harmlessness.
PRECEDENTIAL VALUE	precedential
PARTIES	Judy Anderson v. Yasin Tisdale

TOPICS

- child custody
- family law procedure
- harmless error
- preservation of error
- appellate procedure

PRACTICE AREAS

family law

appellate procedure

QUESTIONS PRESENTED

1. Whether Family Court committed reversible error by temporarily changing the children's physical residence without first conducting an evidentiary hearing.
2. Whether the mother's unpreserved argument that the father failed to establish a change in circumstances warranted appellate review.
3. Whether Family Court's determination that the children's best interests required awarding sole custody to the father had a sound and substantial basis in the record.

HOLDINGS

1. Even assuming Family Court erred by granting the father's request for a temporary change in the children's physical residence without conducting an evidentiary hearing, the error was harmless because Family Court subsequently conducted the requisite hearing.
2. The mother failed to preserve for appellate review her contention that the father did not establish a change in circumstances warranting review of the prior custody order.
3. There was a sound and substantial basis in the record for Family Court's determination that the children's best interests required awarding sole custody to the father, and the determination would not be disturbed.

KEY QUOTATIONS

“there is a sound and substantial basis in the record to support the court’s determination following the hearing that it was in the children’s best interests to award sole custody to the father” (1132)

FACTUAL BACKGROUND

The parties were the parents of two children who had been residing with the mother in New York. Family Court temporarily changed the children's residence to the father's home in Virginia and, after a full evidentiary hearing, determined that the children's best interests required awarding the father sole custody. The Appellate Division concluded that the custody determination had a sound and substantial basis in the record.

PROCEDURAL HISTORY

The father commenced a Family Court Act article 6 proceeding seeking modification of a prior custody order and sole custody of the parties' two children. The mother filed a competing petition seeking sole custody. Family Court temporarily changed the children's residence from the mother in New York to the father in Virginia, later conducted a full evidentiary hearing, awarded the father sole custody based on the children's best interests, and dismissed the mother's petition. The Appellate Division unanimously affirmed without costs.

DISPOSITION

affirmed

CASES CITED

- Matter of Owens v Garner, 63 AD3d 1585, 1585-1586
- Matter of Darryl B.W. v Sharon M.W., 49 AD3d 1246, 1247
- Matter of Canfield v McCree, 90 AD3d 1653, 1654
- Matter of Deegan v Deegan, 35 AD3d 736, 736-737
- Stilson v Stilson, 93 AD3d 1222, 1223
- Capodiferro v Capodiferro, 77 AD3d 1449, 1450
- Wideman v Wideman, 38 AD3d 1318, 1319

OPINION

PER CURIAM.

SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department 1132 CAF 11-00654 PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND VALENTINO, JJ. IN THE MATTER OF YASIN TISDALE, PETITIONER-RESPONDENT, V MEMORANDUM AND ORDER JUDY ANDERSON, RESPONDENT-APPELLANT. (APPEAL NO. 1.) MINDY L. MARRANCA, BUFFALO, FOR RESPONDENT-APPELLANT. CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR NASIR Y.T. AND NADIA S.-Y.T. Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered February 7, 2011 in a proceeding pursuant to Family Court Act article 6.

The order granted petitioner sole custody of the parties' children. It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs. Memorandum: Yasin Tisdale, the petitioner in appeal No. 1 and the respondent in appeal No. 2 (father), commenced the proceeding in appeal No. 1 pursuant to Family Court Act article 6 seeking to modify the custody provisions in a prior order by awarding him sole custody of the parties' two children.

Judy Anderson, the respondent in appeal No. 1 and the petitioner in appeal No. 2 (mother), filed the petition in appeal No. 2 seeking sole custody of the children. By the order in appeal No. 1, Family Court granted the father's request for a temporary change in the residence of the children with the mother in New York to the father in Virginia and determined, following a full evidentiary hearing, that it was in the children's best interests that the father have sole custody and that they reside with him in Virginia.

By the order in appeal No. 2, the court dismissed the mother's petition. Even assuming, arguendo, that the court erred in appeal No. 1 by granting the father's request for a temporary change in the

physical residence of the children without conducting an evidentiary hearing, we conclude that any such error is harmless because the court subsequently conducted the requisite hearing (see *Matter of Owens v Garner*, 63 AD3d 1585, 1585-1586; *Matter of Darryl B.W. v Sharon M.W.*, -2- 1132 CAF 11-00654 49 AD3d 1246, 1247).

With respect to the court's custody determination in appeal Nos. 1 and 2, we conclude that "[t]he mother... failed to preserve for our review her contention that the father failed to establish a change of circumstances warranting review of the prior order" (*Matter of Canfield v McCree*, 90 AD3d 1653, 1654; see *Matter of Deegan v Deegan*, 35 AD3d 736, 736-737).

We note in any event that, "in her petition, the mother alleged that there had been such a change of circumstances" (*Stilson v Stilson*, 93 AD3d 1222, 1223). Contrary to the mother's further contention, there is a sound and substantial basis in the record to support the court's determination following the hearing that it was in the children's best interests to award sole custody to the father, and thus that determination will not be disturbed (see *Capodiferro v Capodiferro*, 77 AD3d 1449, 1450; *Owens*, 63 AD3d at 1586; *Wideman v Wideman*, 38 AD3d 1318, 1319).

Entered: November 16, 2012 Frances E. Cafarell Clerk of the Court