

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

William O. v. Michele A.

119 A.D.3d 990, 988 N.Y.S.2d 299 (3d Dep't 2014) · Decided July 3, 2014

SUMMARY

The New York Supreme Court, Appellate Division, reversed a Family Court order that denied a father's custody application and conditioned future custody petitions on completion of sex-offender treatment without a fact-finding hearing. The court held that the father received less than meaningful assistance of counsel because counsel failed to object to the improper role of the attorney for the children or request a hearing on treatment and the children's best interests.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	McCarthy, J.; Lahtinen, J.E.; Rose, J.; Lynch, J.; Devine, J.
JURISDICTION	New York
DECIDED	July 3, 2014
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The father appealed from a Family Court order that modified supervised visitation, denied his custody application without a fact-finding hearing, and conditioned future custody-modification petitions on completion of sex-offender treatment.
PRECEDENTIAL VALUE	published
PARTIES	William O. v. Michele A., John A., Wanda A.

TOPICS

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

PRACTICE AREAS

- family law
- appellate procedure
- civil procedure

QUESTIONS PRESENTED

1. Whether the father received meaningful or effective assistance of counsel in the custody and visitation proceeding.
2. Whether Family Court could deny the father's custody application and condition future custody-modification petitions on sex-offender treatment without a fact-finding hearing and based on challenged information outside the record.
3. Whether the attorney for the children was improperly used as an investigative arm and advisor of the court.

HOLDINGS

1. The father was denied effective assistance of counsel because his counsel failed to object to Family Court's improper reliance on the attorney for the children and failed to request a fact-finding hearing concerning sex-offender treatment and the children's best interests.
2. Family Court improperly relied on the attorney for the children as both an investigative arm of the court and an advisor in reaching its custody and visitation determinations.
3. Family Court could not deny the father's custody application and continue or condition visitation based on the untreated-sex-offender determination without a fact-finding hearing and evidence addressing the alleged risk to the children.

KEY QUOTATIONS

“The record demonstrates that Family Court improperly relied upon the attorney for the children as both an investigative arm of the court and as an advisor, referring to her as the court’s “quarterback” and regularly deferring to her recommendations in reaching its determinations.” (991)

“The failure of the father’s counsel to object to this improper use of the attorney for the children or to request a fact-finding hearing regarding the issues of sex offender treatment and the best interests of the children renders the representation less than meaningful.” (992)

FACTUAL BACKGROUND

The father and Michele A. were the unmarried parents of three children. While the father was incarcerated, custody of the children was awarded to their maternal grandparents; after the father commenced a proceeding seeking custody of the youngest child, Family Court continued custody with the grandparents and allowed supervised visitation. Family Court later relied on information outside the record to determine that the father was an untreated sex offender, without receiving evidence concerning whether his lack of treatment was detrimental to the children or holding a fact-finding hearing.

PROCEDURAL HISTORY

The Family Court of Chemung County continued custody of the children with their maternal grandparents and awarded the father supervised visitation. After a July 2012 appearance, Family Court determined without a fact-finding hearing that the father was an untreated sex offender, modified his supervised-visitations schedule, and imposed a treatment condition on future custody petitions. The father appealed, arguing that he was denied effective assistance of counsel.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse the Family Court's order and remit the matter to the Family Court of Chemung County for further proceedings not inconsistent with the appellate court's decision.

CASES CITED

- Matter of Carl v McEver, 88 A.D.3d 1089, 1090-1091 (2011)
- Weiglhofer v Weiglhofer, 1 A.D.3d 786, 788 n. (2003)
- Matter of Mitchell v Childs, 26 A.D.3d 685, 686-687 (2006)
- Matter of Jaikob O. [William O.], 88 A.D.3d 1075, 1077-1078 (2011)
- Matter of Valmas-Mann v Loewenguth, 114 A.D.3d 1091, 1091-1092 (2014)
- Matter of Melissa WW. v Conley XX., 88 A.D.3d 1199, 1201 (2011), lv denied 18 N.Y.3d 803 (2012)

OPINION

MCCARTHY, J.

McCarthy, J. Appeal from an order of the Family Court of Chemung County (Buckley, J.), entered July 12, 2012, which, among other things, partially granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody and visitation. Petitioner (hereinafter the father) and respondent Michele A. are the unmarried parents of three children (born in 2006, 2007 and 2009).

In October 2009, while the father was incarcerated, custody of the two older children was awarded to the children's maternal grandparents, respondents John A. and Wanda A. *991(hereinafter collectively referred to as the grandparents).

In September 2011, the grandparents were awarded custody of the youngest child as well. Later that month, in anticipation of his release from prison, the father commenced this proceeding seeking custody of the youngest child. During subsequent appearances before Family Court, the court continued custody with the grandparents, but awarded the father supervised visitation with all three children.

Finally, after an appearance before Family Court in July 2012, the court determined, without holding a fact-finding hearing, that the father was an untreated sex offender and entered an order that modified the supervised visitation schedule, but conditioned any consideration of future custody modification petitions filed by the father on his completing sex offender treatment.

The father appeals.¹ The father contends that he was denied the effective assistance of counsel. We agree. Family Court continued supervised visitation and denied the father's custody application, without holding a fact-finding hearing, based upon its belief that he was an untreated sex offender.² This belief came from information provided to Family Court by the attorney for the children that was based on evidence outside of the record, the accuracy of which was challenged by the father, and with no evidence presented as to whether a lack of treatment would be detrimental to the children (see generally *Matter of Carl v McEver*, 88 AD3d 1089, 1090-1091 [2011]).

The record demonstrates that Family Court improperly relied upon the attorney for the children as both an investigative arm of the court and as an advisor, referring to her as the court's "quarterback" and regularly deferring to her recommendations in reaching its determinations (see *Weiglhofer v Weiglhofer*, 1 AD3d 786, 788 n [2003]).

The failure of the father's counsel to object to this improper use of the attorney for the children or to request a fact-finding hearing regarding the issues of sex offender treatment and the best interests of the children renders the representation less than meaningful (see *Matter of Mitchell v Childs*, 26 AD3d 685, 686-*992687 [2006]; see also *Matter of Jaikob O. [William O.]*, 88 AD3d 1075, 1077-1078 [2011]).³ Accordingly, Family Court's order must be reversed.

Lahtinen, J.E, Rose, Lynch and Devine, JJ, concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Chemung County for further proceedings not inconsistent with this Court's decision..

Although the attorney for the children also seeks review of Family Court's order, her arguments regarding an issue not raised by the father are not properly before us inasmuch as only the father appealed (see *Matter of Valmas-Mann v Loewenguth*, 114 AD3d 1091, 1091-1092 [2014]; *Matter of Melissa WW. v Conley XX.*, 88 AD3d 1199, 1201 [2011], lv denied 18 NY3d 803 [2012])..

The father admitted to being convicted of endangering the welfare of a child in New Jersey in 1994, after engaging in sexual intercourse with two teenage girls when he was 20 years old. At the time he commenced the instant proceeding, the father was incarcerated in New York for failing to register as a sex offender..

We note that, although the father was represented by one institutional provider, five different attorneys appeared on his behalf at the nine court appearances. The individual attorneys were not always familiar with his case or prepared to represent him. At several appearances, the father spoke extensively while his counsel largely remained silent.