

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

Matter of Arkadian S., Eden S., and Elysium S.

Matter of Arkadian S. · No. CAF 14-00273 · Decided July 2, 2015

SUMMARY

The Supreme Court of the State of New York, Appellate Division, Fourth Department, dismissed the father's appeal for lack of standing and affirmed an order denying the mother's motion to vacate prior Family Court orders. The court held that the mother did not make the evidentiary showing necessary to warrant a hearing and had not timely appealed the order suspending her parenting time. It also rejected relief based on newly discovered evidence, fraud, misrepresentation, or misconduct under CPLR 5015.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Scudder, P.J.; Carni, J.; Sconiers, J.; Valentino, J.; Whalen, J.
JURISDICTION	New York
DECIDED	July 2, 2015
DOCKET	CAF 14-00273
DISPOSITION	dismissed
PROCEDURAL POSTURE	Respondents appealed from an order of the Cayuga County Family Court denying Crystal S.'s motion under Family Court Act § 1061 and CPLR 5015(a)(2) and (3) to vacate prior orders concerning reunification, parenting time, permanency planning, temporary removal, and the father's abuse and derivative-neglect adjudication.
STANDARD OF REVIEW	Abuse of discretion as to the denial of the motion to vacate without a hearing; the court also applied statutory standing, preservation, timeliness, and CPLR 5015 standards.
PRECEDENTIAL VALUE	Published memorandum and order of the Appellate Division, Fourth Department; precedential status is not otherwise specified in the opinion.

PARTIES

Crystal S., Joshua S. v. Cayuga County Department of Health and Human Services

TOPICS

family law procedure

appellate procedure

due process

remedies

parental rights

PRACTICE AREAS

family law

appellate procedure

civil procedure

constitutional law

remedies

QUESTIONS PRESENTED

1. Whether Joshua S. had standing to appeal the denial of Crystal S.'s motion to vacate when he did not formally join in that motion.
2. Whether Family Court abused its discretion by denying Crystal S.'s motion to vacate without an evidentiary hearing.
3. Whether Crystal S. could obtain direct appellate review of the 2012 order suspending her parenting time despite failing to take a timely appeal.
4. Whether Crystal S. could assert the alleged due process violations of Joshua S. on his behalf.
5. Whether the September 2, 2011 progress note warranted relief under CPLR 5015(a)(2) as newly discovered evidence.
6. Whether Crystal S. established fraud, misrepresentation, or other misconduct sufficient for relief under CPLR 5015(a)(3).

HOLDINGS

1. Joshua S. lacked standing to appeal because he was not an aggrieved party and did not formally join in Crystal S.'s motion to vacate; his appeal was dismissed.
2. Family Court did not abuse its discretion by denying Crystal S.'s motion to vacate without a hearing because she failed to make an evidentiary showing sufficient to warrant a hearing on good cause to vacate the prior orders.
3. Crystal S.'s due process challenge to the 2012 order suspending her parenting time was not properly before the court because she failed to take a timely appeal from that order.
4. The court would not consider Crystal S.'s contention that Joshua S.'s due process rights were violated because third parties generally may not assert alleged violations of another person's constitutional rights.
5. Crystal S. was not entitled to vacatur under CPLR 5015(a)(2) because she failed to show that the progress note was not disclosed during discovery and therefore failed to establish that it was newly discovered; in addition, the note would not likely have produced a different result.
6. Crystal S. was not entitled to relief under CPLR 5015(a)(3) because she failed to establish fraud, misrepresentation, or other misconduct by an adverse party.

KEY QUOTATIONS

“‘evidentiary showing sufficient to warrant a hearing’” (698)

“‘[I]t is well established that third parties may not assert the alleged violations of another’s constitutional rights’” (698)

FACTUAL BACKGROUND

The underlying Family Court proceeding involved allegations that Joshua S. abused and derivatively neglected the subject children, and prior orders limited Crystal S.'s reunification and contact with them. Crystal S. relied principally on a September 2, 2011 progress note to seek vacatur of several prior orders, including an order suspending her parenting time and an order modifying the permanency-planning goal. She also argued that the progress note constituted newly discovered evidence and that the father's due process rights had been violated.

PROCEDURAL HISTORY

The Family Court, Cayuga County, denied the mother's motion to vacate various prior orders without conducting a hearing. Both respondents appealed. The Appellate Division dismissed Joshua S.'s appeal because he was not an aggrieved party and had not formally joined in the mother's motion, and affirmed the order as to Crystal S.

DISPOSITION

dismissed

CASES CITED

- Matter of Abraham S., 291 AD2d 452, 452
- Matter of George O., 115 Misc 2d 782, 783 n 2
- Matter of Cooper v Cooper, 74 AD3d 1868, 1868-1869
- Matter of Carrie F. v David PP., 34 AD3d 1108, 1109
- Matter of Melissa FF., 285 AD2d 682, 684
- Matter of Kole HH. [Thomas HH.], 84 AD3d 1518, 1519
- Matter of Cadejah AA., 34 AD3d 1141, 1142
- Matter of Harriet II. v Alex LL., 292 AD2d 92, 95
- Forward v Webster Cent. Sch. Dist., 136 AD2d 277, 280
- Matter of Emerald L.C. [David C.], 101 AD3d 1679, 1680
- Matter of York v Zullich, 89 AD3d 1447, 1448
- Matter of LiMandri, 171 AD2d 747, 747
- Matter of Mark D. v Marion M., 12 AD3d 1082, 1083
- Kerner v Kerner [appeal No. 5], 262 AD2d 1082, 1082
- Matter of Latasha M., 205 AD2d 457, 457
- Matter of Shere L. v Odell H., 303 AD2d 1023, 1024

- Rappold v Wagner [appeal No. 4], 244 AD2d 856, 856

OPINION

PER CURIAM.

SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department 698 CAF 14-00273 PRESENT: SCUDDER, P.J., CARNI, SCONIERS, VALENTINO, AND WHALEN, JJ. IN THE MATTER OF ARKADIAN S., EDEN S., AND ELYSIUM S. ----- MEMORANDUM AND ORDER CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT; CRYSTAL S. AND JOSHUA S., RESPONDENTS-APPELLANTS.

CYNTHIA B. BRENNAN, AUBURN, FOR RESPONDENT-APPELLANT CRYSTAL S. D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT JOSHUA S. FREDERICK R. WESTPHAL, COUNTY ATTORNEY, AUBURN (SAMUEL P. GIACONA OF COUNSEL), FOR PETITIONER-RESPONDENT. JAMES A. LEONE, ATTORNEY FOR THE CHILDREN, AUBURN. Appeals from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered January 9, 2014 in a proceeding pursuant to Family Court Act article 10.

The order denied the motion of respondent Crystal S. to vacate prior court orders. It is hereby ORDERED that said appeal by respondent Joshua S. is unanimously dismissed and the order is affirmed without costs. Memorandum: Respondents appeal from an order denying respondent mother's motion pursuant to Family Court Act § 1061 and CPLR 5015 (a) (2) and (3) to vacate various prior orders that limited her reunification and contact with the subject children, including a June 10, 2013 order modifying a permanency planning goal, a 2012 order suspending her parenting time with the subject children, and an October 27, 2010 order issued upon an application for temporary removal of the children.

She also sought to vacate an August 30, 2012 order finding that respondent father abused and derivatively neglected the subject children. We note at the outset that the father is not an aggrieved party and therefore lacks standing to appeal inasmuch as he did not formally join in the mother's motion to vacate (see Matter of Abraham S., 291 AD2d 452, 452; Matter of George O., 115 Misc 2d 782, 783 n 2).

Thus, his appeal must be dismissed (see CPLR 5511; Matter of Cooper v Cooper, 74 AD3d 1868, 1868-1869). Contrary to the mother's contention, we conclude that Family Court did not abuse its discretion in denying her motion without a -2- 698 CAF 14-00273 hearing (see Matter of Carrie F. v David PP., 34 AD3d 1108, 1109).

The mother failed to make an “ ‘evidentiary showing sufficient to warrant a hearing’ ” on the issue of good cause to vacate the prior orders (Matter of Melissa FF., 285 AD2d 682, 684; see Matter of

Kole HH. [Thomas HH.], 84 AD3d 1518, 1519; Matter of Cadejah AA., 34 AD3d 1141, 1142). Indeed, her motion is based on a single, misinterpreted phrase in the September 2, 2011 progress note.

To the extent that the mother purports to appeal directly from the 2012 order suspending her parenting time with the subject children, contending that her due process rights were violated by that order, we note that her contention is not properly before us inasmuch as she failed to take a timely appeal from that order (see Family Ct Act § 1113).

We do not consider the mother's contention that the father's due process rights were violated and thus that the court should have granted that part of her motion seeking to vacate the order finding that he abused and derivatively neglected the subject children. "[I]t is well established that third parties may not assert the alleged violations of another's constitutional rights" (Matter of Harriet II. v Alex LL., 292 AD2d 92, 95; see *Forward v Webster Cent.*

Sch. Dist., 136 AD2d 277, 280, appeal dismissed 72 NY2d 908, reconsideration denied 73 NY2d 740). We note in any event that the mother raises that contention for the first time on appeal and thus failed to preserve it for our review (see *Matter of Emerald L.C. [David C.]*, 101 AD3d 1679, 1680; *Matter of York v Zullich*, 89 AD3d 1447, 1448).

Finally, we reject the mother's contention that she is entitled to vacatur of the orders pursuant to CPLR 5015 (a) (2) and (3). Although the Attorney for the Children correctly notes that the mother failed to include those provisions as a ground for relief in her notice of motion, we disregard this technical deficiency inasmuch as she included those grounds for relief in her attorney's supporting affirmation (see CPLR 2001; *Matter of LiMandri*, 171 AD2d 747, 747).

In any event, the mother is not entitled to relief pursuant to CPLR 5015 (a) (2). She failed to show that the September 2, 2011 progress note was not disclosed during discovery in the underlying abuse and neglect proceeding against father, and thus the evidence was not newly discovered (see *Matter of Mark D. v Marion M.*, 12 AD3d 1082, 1083; *Kerner v Kerner* [appeal No. 5], 262 AD2d 1082, 1082, lv dismissed in part and denied in part 94 NY2d 873).

Additionally, the progress note "would not likely have produced a different result" in light of the evidence that the father sexually abused one of the subject children (*Matter of Latasha M.*, 205 AD2d 457, 457). The mother is not entitled to relief pursuant to CPLR 5015 (a) (3) because she "failed to meet [her] burden of establishing the existence of fraud, misrepresentation or other misconduct of an adverse party" (*Matter of Shere L. v Odell H.*, 303 AD2d 1023, 1024; see *Rappold v Wagner* [appeal No. 4], 244 AD2d 856, 856).

Entered: July 2, 2015 Frances E. Cafarell Clerk of the Court

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