

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

Shawn J. v. Dainee A.

100 A.D.3d 572 (N.Y. App. Div. 1st Dep't 2012) · Decided November 29, 2012

SUMMARY

The court unanimously affirmed an order granting the father's petition to modify a prior custody order and agreement, awarding him sole legal and physical custody of the children. The court held that a change in circumstances and the children's best interests supported the modification and that supervised visitation for the mother was appropriate based on evidence of neglect and continuing destructive behavior.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Appellate Division of the Supreme Court of the State of New York, First Department                                                                                                                                                                                             |
| WRITING FOR THE COURT | Andrias, J.E.; Friedman, J.; DeGrasse, J.; Román, J.; Gische, J.                                                                                                                                                                                                               |
| JURISDICTION          | New York                                                                                                                                                                                                                                                                       |
| DECIDED               | November 29, 2012                                                                                                                                                                                                                                                              |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                       |
| PROCEDURAL POSTURE    | The mother appealed, as limited by the briefs, from a Family Court order granting the father's petition to modify a prior custody order and the parents' 2008 agreement, awarding the father sole legal and physical custody and limiting the mother to supervised visitation. |
| STANDARD OF REVIEW    | The custody modification determination must have a sound and substantial basis in the record.                                                                                                                                                                                  |
| PRECEDENTIAL VALUE    | Published appellate decision                                                                                                                                                                                                                                                   |
| PARTIES               | Dainee A. v. Shawn J.                                                                                                                                                                                                                                                          |

TOPICS

- child custody
- visitation
- family law procedure
- appellate procedure
- standard of review

PRACTICE AREAS

- Family law
- Child custody
- Visitation

## QUESTIONS PRESENTED

1. Whether a change in circumstances warranted modification of the prior custody order and the parents' 2008 custody agreement.
2. Whether awarding the father sole legal and physical custody was in the children's best interests.
3. Whether supervised visitation for the mother was in the children's best interests.

## HOLDINGS

1. The Family Court properly determined that a change in circumstances had occurred warranting modification of the prior custody order.
2. Awarding the father sole legal and physical custody was in the children's best interests.
3. The Family Court properly ordered supervised visitation for the mother.

## KEY QUOTATIONS

*“The court’s determination that a “change of circumstances” had occurred warranting modification of the prior custody order, and that it would be in the children’s best interests to award sole legal and physical custody to the father, has a sound and substantial basis in the record” (100 A.D.3d at 572)*

## FACTUAL BACKGROUND

After entry of the prior custody order, the mother was found neglectful for failing to protect the children from excessive corporal punishment inflicted by her former boyfriend. Although she completed a parenting-skills program and participated in therapy, the record showed that she had not improved her relationship with the children, lacked empathy for them, and continued to claim that they had lied about the abuse. The children were comfortable and happy living with the father and were making progress under his care, while the mother's destructive behavior continued even during supervised visits.

## PROCEDURAL HISTORY

Family Court, Bronx County, entered an order on or about January 3, 2012, granting the father's modification petition. The Appellate Division unanimously affirmed the portion of the order appealed from, without costs.

## DISPOSITION

affirmed

## CASES CITED

- Matter of Wilson v. McGlinchey, 2 N.Y.3d 375, 380-381 (2004)
- Matter of Carl T. v. Yajaira A.C., 95 A.D.3d 640, 641-642 (1st Dep't 2012)
- Matter of Arelis Carmen S. v. Daniel H., 78 A.D.3d 504 (1st Dep't 2010), leave to appeal denied, 16 N.Y.3d 707 (2011)

## OPINION

PER CURIAM.

Order of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about January 3, 2012, which, to the extent appealed from as limited by the briefs, granted the father's petition to modify a prior order of custody and the parents' 2008 agreement, and awarded the father sole legal and physical custody of the subject children, with supervised visitation to appellant mother, unanimously affirmed, without costs.

The court's determination that a "change of circumstances" had occurred warranting modification of the prior custody order, and that it would be in the children's best interests to award sole legal and physical custody to the father, has a sound and substantial basis in the record (*Matter of Wilson v McGlinchey*, 2 NY3d 375, 380-381 [2004]; see *Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 641-642 [1st Dept 2012]).

Indeed, since the entry of the prior custody order, there has been a finding of neglect against the mother based on her failure to protect the children from the excessive corporal punishment inflicted on them by her former boyfriend. Despite this finding, the mother continued to assert that the children had lied about the abuse.

Although the mother had completed a parenting skills program and participated in therapy, the record shows that she failed to improve her relationship with the children and did not have empathy for them. By contrast, the records shows that the children were comfortable with the father, were happy living with him, and were making progress under his care.

The court properly determined that supervision of the mother's visits is in the children's best interests (see *Matter of Arelis Carmen S. v Daniel H.*, 78 AD3d 504 [1st Dept 2010], lv denied 16 NY3d 707 [2011]), particularly given the evidence of her consistent pattern of destructive behavior toward the children, which continued even during supervised visits (see *Matter of Carl T.*, 95 AD3d at 642).

Concur — Andrias, J.E, Friedman, DeGrasse, Román and Gische, JJ.