

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

Washington v. Marquis

97 A.D.3d 930 (N.Y. App. Div. 2012) · Decided July 12, 2012

SUMMARY

The court affirmed Family Court’s minor modifications to a prior visitation order, including limiting persons who could attend the mother’s visitations and prohibiting derogatory comments or questioning during telephone conversations. It held that the mother waived objection to the child’s in-camera Lincoln hearing by failing to object below and that Family Court did not abuse its discretion in conducting the hearing in camera.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Egan Jr., J.; Mercure, J.P.; Kavanagh, J.; Stein, J.; McCarthy, J.
JURISDICTION	New York
DECIDED	July 12, 2012
DISPOSITION	affirmed
PROCEDURAL POSTURE	The mother appealed from a Family Court order modifying an earlier custody and visitation order.
STANDARD OF REVIEW	Whether Family Court abused its sound discretion in conducting an in camera Lincoln hearing and whether its visitation modification had a sound and substantial basis in the record.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Mother v. Father

TOPICS

child custody visitation appellate procedure preservation of error standard of review

PRACTICE AREAS

family law child custody visitation appellate procedure

QUESTIONS PRESENTED

1. Whether Family Court abused its discretion by conducting a Lincoln hearing in camera rather than compelling the child to testify in open court.
2. Whether the mother's failure to object to the in camera procedure preserved her challenge for appellate review.
3. Whether Family Court had a sound and substantial basis to modify the prior visitation arrangement in the child's best interests.

HOLDINGS

1. The mother's challenge was unpreserved because she did not object when the child's attorney requested permission for the child to testify in camera.
2. Family Court did not abuse its sound discretion in determining that the child's interests would best be served by testifying in camera.
3. The mother's contention that the father failed to demonstrate a sufficient change in circumstances to justify modifying visitation lacked merit, and the minor modifications were affirmed.

KEY QUOTATIONS

“Having voiced no opposition to this procedure, the mother cannot now be heard to complain” (97 A.D.3d at 930)

“we cannot say that Family Court abused its sound discretion in concluding that the child's interests would best be served by testifying in camera” (97 A.D.3d at 930)

FACTUAL BACKGROUND

The father and mother are the biological parents of a daughter born in 1998. In 2009, the father was awarded custody and the mother was granted one weekend of visitation per month without overnights, plus additional visitation by agreement; the child's sister could attend, but the maternal grandmother could not. In 2011, the father sought to restrict the mother's contact to supervised visitation and telephone access. After a hearing, Family Court permitted only the child's sister to attend the mother's visits and prohibited the mother from making derogatory comments or questioning the child by telephone about where she wished to live.

PROCEDURAL HISTORY

The father had previously been awarded custody, while the mother received limited visitation. The father commenced a modification proceeding seeking supervised visitation and telephone access. After a hearing, Family Court made minor modifications governing who could attend the mother's visits and restricting derogatory comments and questioning during telephone calls. The mother appealed, and the Appellate Division affirmed.

DISPOSITION

CASES CITED

- Matter of Lopez v Robinson, 25 A.D.3d 1034, 1037 (2006)
- Matter of Lincoln v Lincoln, 24 N.Y.2d 270, 272 (1969)
- Matter of DeRuzzio v Ruggles, 88 A.D.3d 1091, 1091-1092 (2011)
- Matter of McGovern v McGovern, 58 A.D.3d 911, 913 n. 2 (2009)

OPINION

EGAN, J.

Egan Jr., J. Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the biological parents of a daughter (born in 1998). By order entered June 12, 2009, the father was awarded custody of the child, and the mother was granted visitation one *931weekend per month (no overnights) and such further visitation as the parties could agree.

Although the child's sister was permitted to participate in these visitations, the child's maternal grandmother was not allowed to attend. In March 2011, the father commenced this modification proceeding seeking to limit the mother's contact with the child to supervised visitation/telephone access. Following a hearing, Family Court made what it appropriately characterized as "minor modifications" to the prior order by directing that only the child's sister is permitted to be present for the mother's visitations with the child and, further, ordering the mother to refrain from making derogatory comments and/or quizzing the child during their telephone conversations regarding where she wishes to live.

The mother now appeals, contending that Family Court's determination lacks a sound and substantial basis in the record. We affirm. The crux of the mother's argument on appeal is that Family Court abused its discretion in conducting a Lincoln hearing in this matter — asserting instead that the child should have been compelled to testify in open court. Initially, a review of the hearing transcript reveals that the mother raised no objection when the attorney for the child requested that her client be permitted to testify in camera.

Having voiced no opposition to this procedure, the mother cannot now be heard to complain (cf. Matter of Lopez v Robinson, 25 AD3d 1034, 1037 [2006]). Moreover, given the underlying circumstances, we cannot say that Family Court abused its sound discretion in concluding that the child's interests would best be served by testifying in camera (see generally Matter of Lincoln v Lincoln, 24 NY2d 270, 272 [1969]; Matter of DeRuzzio v Ruggles, 88 AD3d 1091, 1091-1092 [2011]; Matter of McGovern v McGovern, 58 AD3d 911, 913 n 2 [2009]).

The mother's remaining contentions, including her assertion that the father failed to demonstrate a sufficient change in circumstances to warrant modification of the prior visitation arrangement to ensure the continued best interests of the child, have been examined and found to be lacking in merit. Mercure, J.E, Kavanagh, Stein and McCarthy, JJ., concur. Ordered that the order is affirmed, without costs.

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