

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

Hirtz v. Hirtz

108 A.D.3d 712, 969 N.Y.S.2d 553 (2d Dep't 2013) · Decided July 24, 2013

SUMMARY

The Appellate Division reviewed a Family Court order denying the father’s petition to relocate with the parties’ children from New York to North Carolina. The court upheld the denial of relocation based on the children’s best interests but held that the Family Court improperly modified joint legal custody to sole legal custody for the mother without notice that legal custody was at issue. The court also struck a prospective custodial plan addressing a possible future move by the parties to the same state.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Eng, P.J.; Rivera, J.; Hall, J.; Lott, J.
JURISDICTION	New York
DECIDED	July 24, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	The father appealed from a Family Court order denying his petition to relocate with the parties' two children to North Carolina and modifying a prior consent custody order.
STANDARD OF REVIEW	The Appellate Division's authority in relocation determinations is as broad as that of the hearing court; the determination will not stand unless supported by a sound and substantial basis in the record.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Father v. Mother

TOPICS

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

PRACTICE AREAS

- Family law
- Child custody
- Relocation
- Appellate procedure

QUESTIONS PRESENTED

1. Whether the father demonstrated by a preponderance of the evidence that relocating with the children to North Carolina was in their best interests.
2. Whether the Family Court could modify the parties' joint legal-custody arrangement to award the mother sole legal custody when the mother had not requested that relief and the father had no notice that legal custody was at issue.
3. Whether the Family Court could establish a prospective custodial plan for a future circumstance in which the parties might reside in the same state when that issue had not been raised or litigated.

HOLDINGS

1. The father failed to demonstrate by a preponderance of the evidence that relocating the children to North Carolina was in their best interests, so denial of the relocation petition was proper.
2. The Family Court improperly modified the prior consent order to award the mother sole legal custody because the mother did not request modification of legal custody and the father had no notice that legal custody was at issue.
3. The Family Court improperly established a custodial plan that would apply if the parties later decided to reside in the same state because that future issue had not been raised or litigated.

KEY QUOTATIONS

“When reviewing a custodial parent’s request to relocate, the court’s primary focus must be on the best interests of the child” (108 A.D.3d at 713)

“Relocation may be allowed if the custodial parent demonstrates, by a preponderance of the evidence, that the proposed move is in the child’s best interests” (108 A.D.3d at 713)

“the impact of the move on the relationship between the child and the noncustodial parent will remain a central concern” (108 A.D.3d at 713)

FACTUAL BACKGROUND

The parties entered into a 2009 consent order providing for joint legal custody of their two children, with primary physical custody to the father. In 2012, the father, a pediatrician employed by the United States military, received orders reassigning him from West Point, New York, to Fort Bragg, North Carolina, and sought permission to relocate with the children. The mother had been intimately involved in the children's lives and had been their exclusive caregiver during the father's overseas deployments; the record also showed that relocation would impair the children's relationship with the mother, while continued residence in New York would preserve their relationships with friends, health-care providers, therapists, and their church community.

PROCEDURAL HISTORY

The parties' 2009 consent order awarded joint legal custody and primary physical custody to the father. After the father received military reassignment orders from New York to North Carolina, he petitioned to relocate with the children. Following a hearing, the Family Court denied relocation, awarded the mother sole legal and physical

custody, and established a future custodial plan. The Appellate Division affirmed the denial of relocation but modified the order by vacating the sole-legal-custody modification and the prospective custodial plan.

DISPOSITION

affirmed

CASES CITED

- Matter of Giraldo v Gomez, 49 A.D.3d 645, 645 (2008)
- Matter of Tropea v Tropea, 87 N.Y.2d 727, 739-741 (1996)
- Matter of Hamed v Hamed, 88 A.D.3d 791, 791-792 (2011)
- Matter of Said v Said, 61 A.D.3d 879, 881 (2009)
- Matter of Steadman v Roumer, 81 A.D.3d 653, 654 (2011)
- Piccinini v Piccinini, 103 A.D.3d 868, 869 (2013)
- Matter of Retamozzo v Moyer, 91 A.D.3d 957, 957-958 (2012)
- Matter of Martino v Ramos, 64 A.D.3d 657, 657-658 (2009)
- Matter of Jennings v Yillah-Chow, 84 A.D.3d 1376, 1377 (2011)
- Matter of Clarke v Boertlein, 82 A.D.3d 976, 977 (2011)
- Matter of Joseph A. v Jaimy B., 81 A.D.3d 1219, 1220 (2011)
- Matter of Terry I. v Barbara H., 69 A.D.3d 1146, 1149 (2010)
- Matter of Adams v Bracci, 61 A.D.3d 1065, 1067 (2009)
- Matter of Grant v Terry, 104 A.D.3d 854, 854 (2013)
- Matter of Alexis AA. [Angela YY. — Bradley AA.], 93 A.D.3d 1090, 1091 (2012)
- Matter of Mahoney v Regan, 100 A.D.3d 1237, 1237-1238 (2012)
- Matter of Kowatch v Johnson, 68 A.D.3d 1493, 1495 (2009)
- Friederwitzer v Friederwitzer, 55 N.Y.2d 89 (1982)

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