

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

Boggio v. Boggio

96 A.D.3d 834 (N.Y. App. Div. 2012) · Decided June 13, 2012

SUMMARY

The Appellate Division affirmed an order modifying the father’s visitation rights after finding a change in circumstances and determining that the modified arrangement served the child’s best interests. The court upheld incremental visitation, consideration of the child’s wishes without making visitation solely dependent on her consent, and the requirement that the father participate in counseling.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Dillon, J.P.; Eng, J.; Austin, J.; Sgroi, J.
JURISDICTION	New York
DECIDED	June 13, 2012
DISPOSITION	affirmed
PROCEDURAL POSTURE	The father appealed from an order of the Family Court, Kings County, entered after a hearing, that denied his petition to modify visitation, granted the mother's petition to modify visitation, limited his visitation, and directed him to participate in counseling.
STANDARD OF REVIEW	A Family Court visitation determination is reviewed for whether it has a sound and substantial basis in the record and will not be disturbed absent such a basis. The determination is otherwise entrusted to the Family Court's sound discretion.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Father v. Mother

TOPICS

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

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the Family Court properly modified the existing visitation arrangement after a change in circumstances.
2. Whether the modified visitation schedule served the child's best interests and improperly made visitation dependent upon the child's consent.
3. Whether the Family Court properly considered the child's wishes without basing its determination solely on those wishes.
4. Whether the Family Court could direct the father to participate in counseling as a component of the visitation determination.

HOLDINGS

1. An existing visitation arrangement may be modified only upon a showing of a subsequent change of circumstances and a determination that modification is required; the breakdown in the father's relationship with his daughter and the temporary suspension of visitation satisfied that requirement.
2. The Family Court properly modified visitation because the incremental schedule was in the child's best interests and had a sound and substantial basis in the record.
3. The Family Court properly considered the child's wishes but did not base its visitation determination solely on them, and the schedule did not improperly make visitation entirely dependent upon the child's consent.
4. The Family Court properly directed the father to participate in counseling as a component of the visitation determination.

KEY QUOTATIONS

“An existing visitation arrangement may be modified only “upon a showing that there has been a subsequent change of circumstances and modification is required”” (835)

“The paramount concern in any custody or visitation determination is the best interests of the child, under the totality of the circumstances” (835)

FACTUAL BACKGROUND

The father and mother had visitation provisions in a 2001 stipulation incorporated into their judgment of divorce. The relationship between the father and his then 11-year-old daughter broke down, and visitation was temporarily suspended, constituting a change of circumstances. Following an in camera interview with the child, the Family Court ordered visitation to resume incrementally, permitted telephone contact three times per week and weekly unsupervised Saturday visitation, allowed expansion to overnight visits upon the child's consent, and directed the father to participate in counseling.

PROCEDURAL HISTORY

The parties' 2001 stipulation of settlement contained visitation provisions and was incorporated but not merged into their judgment of divorce. In related Family Court Act article 6 proceedings, the father sought expanded or modified visitation, while the mother sought restrictions. After a hearing, the Family Court denied the father's petition, granted the mother's petition in part, and ordered an incremental visitation schedule and counseling. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Wilson v. McGlinchey, 2 N.Y.3d 375, 380-381 (2004)
- Galanti v. Kraus, 85 A.D.3d 723, 724 (2011)
- Eschbach v. Eschbach, 56 N.Y.2d 167, 172 (1982)
- Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 96 (1982)
- Matter of Crowder v. Austin, 90 A.D.3d 753, 754 (2011)
- Matter of Mohabir v. Singh, 78 A.D.3d 1056, 1057 (2010)
- Matter of Mera v. Rodriguez, 73 A.D.3d 1069 (2010)
- Matter of Jennifer WW., 274 A.D.2d 778, 779 (2000)
- Matter of Lozada v. Lozada, 270 A.D.2d 422 (2000)
- William-Torand v. Torand, 73 A.D.3d 605, 606 (2010)
- Matter of Eric L. v. Dorothy L., 130 A.D.2d 660, 661 (1987)
- Matter of Kristine Z. v. Anthony C., 21 A.D.3d 1319, 1321 (2005)
- Matter of Sinnott-Turner v. Kolba, 60 A.D.3d 774, 776 (2009)
- Matter of Thompson v. Yu-Thompson, 41 A.D.3d 487, 488 (2007)
- Matter of Williams v. O'Toole, 4 A.D.3d 371, 372 (2004)

OPINION

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PER CURIAM.

In related visitation proceedings pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Kings County (Gruebel, J.), dated May 13, 2011, which, *835after a hearing, denied his petition to modify the visitation provisions set forth in a stipulation of settlement dated February 13, 2001, which was incorporated but not merged into the parties' judgment of divorce dated August 20, 2001, and granted the mother's petition to modify the visitation provisions to the extent of limiting his visitation and directing him to participate in counseling. Ordered that the order is affirmed, with costs. An existing visitation arrangement may be modified only "upon a showing that there has been a subsequent change of circumstances and modification is required" (Family Ct Act § 467 [b] [ii]; see Matter of Wilson v McGlinchey, 2

NY3d 375, 380-381 [2004]; *Galanti v Kraus*, 85 AD3d 723, 724 [2011]). The paramount concern in any custody or visitation determination is the best interests of the child, under the totality of the circumstances (see *Matter of Wilson v McGlinchey*, 2 NY3d at 380-381; *Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 96 [1982]; *Galanti v Kraus*, 85 AD3d at 724). The determination of visitation issues is entrusted to the sound discretion of the Family Court and will not be disturbed unless it lacks a sound and substantial basis in the record (see *Matter of Crowder v Austin*, 90 AD3d 753, 754 [2011]; *Matter of Mohabir v Singh*, 78 AD3d 1056 [2010]). Here, the Family Court's visitation determination is supported by a sound and substantial basis in the record. The father does not dispute that the breakdown in his relationship with his then 11-year-old daughter and the temporary suspension of visitation constituted a change of circumstances warranting modification of the visitation provisions set forth in the parties' 2001 stipulation of settlement. Further, the record supports the Family Court's determination that it would be in the best interests of the child for visitation to resume incrementally by permitting the father telephone contact three times per week, and weekly unsupervised visitation on Saturdays, which could expand to overnight visits without further court order upon the child's consent. The Family Court gave appropriate weight to the wishes expressed by the child during her in camera interview (see *Matter of Mohabir v Singh*, 78 AD3d at 1057; *Matter of Mera v Rodriguez*, 73 AD3d 1069 [2010]; *Matter of Jennifer WW.*, 274 AD2d 778, 779 [2000]; *Matter of Lozada v Lozada*, 270 AD2d 422 [2000]), without improperly basing its visitation determination solely upon her wishes (cf. *William-Torand v Torand*, 73 AD3d 605, 606 [2010]; *Matter of Eric L. v Dorothy L.*, 130 AD2d 660, 661 [1987]). Contrary to the father's contention, the modified visitation schedule does not tend to *836unnecessarily defeat his right to visitation because it does not make visitation entirely dependent upon his daughter's consent (cf. *William-Torand v Torand*, 73 AD3d at 606; *Matter of Kristine Z. v Anthony C.*, 21 AD3d 1319, 1321 [2005]). Under the circumstances of this case, the Family Court also properly directed the father to participate in counseling as a component of the visitation determination (see *Matter of Sinnott-Turner v Kolba*, 60 AD3d 774, 776 [2009]; *Matter of Thompson v Yu-Thompson*, 41 AD3d 487, 488 [2007]; *Matter of Williams v O'Toole*, 4 AD3d 371, 372 [2004]). Dillon, J.P., Eng, Austin and Sgroi, JJ., concur.