

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

Conway v. Gartmond

108 A.D.3d 667, 969 N.Y.S.2d 525 (2d Dep't 2013) · Decided July 17, 2013

SUMMARY

The court affirmed the denial of the father's request to modify an existing custody arrangement and award him sole legal and physical custody, finding no sufficient change in circumstances. It modified the visitation schedule to provide alternate-weekend visitation from Friday evening through Monday evening and weekly visitation from Wednesday evening through Friday evening.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Balkin, J.P.; Leventhal, J.; Sgroi, J.; Miller, J.
JURISDICTION	New York
DECIDED	July 17, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	The father appealed from the portion of a Family Court order that denied his request for sole legal and physical custody and granted him expanded visitation on an alternative basis.
STANDARD OF REVIEW	A custody determination will not be disturbed when supported by a sound and substantial basis in the record. Modification of visitation is reviewed for an improvident exercise of discretion.
PRECEDENTIAL VALUE	published and precedential New York Appellate Division decision
PARTIES	Conway v. Gartmond

TOPICS

child custody visitation family law procedure appellate procedure standard of review

PRACTICE AREAS

family law child custody visitation appellate procedure

QUESTIONS PRESENTED

1. Whether the father established a subsequent change in circumstances sufficient to warrant modifying the existing custody arrangement and awarding him sole legal and physical custody.
2. Whether the Family Court properly exercised its discretion in setting the father's expanded visitation schedule.

HOLDINGS

1. The father failed to establish a change in circumstances sufficient to warrant changing custody, and the child should remain in the mother's sole physical custody.
2. The Family Court improvidently exercised its discretion by limiting the father's weekly overnight visitation to Thursday at 8:30 p.m.; the visitation order was modified to extend the weekly visitation through Friday at 6:00 p.m.

KEY QUOTATIONS

“In order to modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances so that modification is required to protect the best interests of the child” (668)

“Priority in custody disputes should usually be given to the parent who was first awarded custody . . . because this policy assures stability in the child's life” (668)

“When . . . there is no indication that a change of custody will result in significantly enhancing the child's welfare, it is generally considered in the child's best interests not to disrupt his [or her] life” (669)

FACTUAL BACKGROUND

A prior 2006 order awarded the mother sole physical custody of the parties' child and granted the father specified visitation. The father sought modification to obtain sole legal and physical custody, or alternatively expanded visitation. The mother had been the child's primary caregiver since birth, and the child was doing well in her care.

PROCEDURAL HISTORY

In related child custody and visitation proceedings under Family Court Act article 6, the Family Court, Westchester County, after a hearing, denied the father's request to modify a 2006 custody order to award him sole legal and physical custody. The court granted expanded visitation to a limited extent. The Appellate Division affirmed the custody determination but modified the visitation schedule to provide weekly overnight visitation from Wednesday at 6:00 p.m. until Friday at 6:00 p.m.

DISPOSITION

affirmed

CASES CITED

- Matter of Anwar v. Sani, 78 A.D.3d 827, 827 (2010)
- Matter of Fallarino v. Ayala, 41 A.D.3d 714, 714 (2007)
- Matter of Rosen v. Goldhaber, 73 A.D.3d 1184, 1185 (2010)
- Eschbach v. Eschbach, 56 N.Y.2d 167, 171 (1982)
- Matter of Wilson v. McGlinchey, 2 N.Y.3d 375, 381 (2004)
- Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 94-95 (1982)
- Matter of Nikolic v. Ingrassia, 47 A.D.3d 819, 821 (2008)
- Matter of Kozlowski v. Mangialino, 36 A.D.3d 916, 917 (2007)
- Matter of Ross v. Ross, 96 A.D.3d 856, 857-858 (2012)
- Matter of Salvati v. Salvati, 221 A.D.2d 541, 542-543 (1995)
- White v. Mazzella-White, 84 A.D.3d 1068, 1069 (2011)
- Matter of Russell v. Russell, 72 A.D.3d 973, 974 (2010)
- Matter of Chery v. Richardson, 88 A.D.3d 788, 789 (2011)
- Matter of Solovay v. Solovay, 94 A.D.3d 898, 900 (2012)
- Matter of Nell v. Nell, 87 A.D.3d 541, 542 (2011)
- Matter of Heuthe v. McLaren, 296 A.D.2d 500, 501 (2002)
- Daghir v. Daghir, 82 A.D.2d 191, 193 (1981), *aff'd*, 56 N.Y.2d 938 (1982)

OPINION

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PER CURIAM.

In related child custody and visitation proceedings pursuant to Family Court Act article 6, the father appeals, as limited by his brief, from so much of an order of the Family Court, Westchester County (Morales-Horowitz, J.), entered June 22, 2012, as, after a hearing, denied that branch of his petition which was to modify a prior order of the same court (Spitz, JH.O.) entered May 8, 2006, awarding sole physical custody of the parties' child to the mother with certain visitation to him, so as to award him sole legal and physical custody of the parties' child, and, in effect, granted that branch of his petition which was, in effect, in the alternative, to modify the order entered May 8, 2006, so as to award him certain expanded visitation, only to the extent of directing that he have visitation with the child on alternate weekends from Friday at 6:00 p.m. until Monday at 6:00 p.m. *668and weekly overnight visitation from Wednesday at 6:00 p.m. until Thursday at 8:30 p.m. Ordered that the order entered June 22, 2012, is modified, on the facts and in the exercise of discretion, by deleting the provision thereof granting that branch of the father's petition which was, in effect, in the alternative, to modify the order entered May 8, 2006, so as to award him certain expanded visitation, only to the extent of directing that he have visitation with the child on alternate weekends from Friday at 6:00 p.m. until Monday at 6:00 p.m. and weekly overnight visitation from Wednesday at 6:00 p.m. until Thursday at 8:30 p.m., and substituting therefor a provision granting that branch of the father's petition and directing that he have visitation with the

child on alternate weekends from Friday at 6:00 p.m. until Monday at 6:00 p.m. and weekly overnight visitation from Wednesday at 6:00 p.m. until Friday at 6:00 p.m.; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements. “ ‘In order to modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances so that modification is required to protect the best interests of the child’ ” (Matter of Anwar v Sani, 78 AD3d 827, 827 [2010], quoting Matter of Fallarino v Ayala, 41 AD3d 714, 714 [2007]; see Matter of Rosen v Goldhaber, 73 AD3d 1184, 1185 [2010]). The best interests of the child are determined by a review of the totality of the circumstances (see Eschbach v Eschbach, 56 NY2d 167, 171 [1982]). In this regard, the court should consider whether the alleged changed circumstances indicate that one of the parties is unfit, the nature and quality of the relationships between the child and the parties, and the existence of a prior agreement (see Matter of Wilson v McGlinchey, 2 NY3d 375, 381 [2004]; Friederwitzer v Friederwitzer, 55 NY2d 89, 94-95 [1982]). The recommendation of the court-appointed expert and the position of the attorney for the child are factors to be considered and are entitled to some weight, but such recommendations and position are not determinative and do not usurp the judgment of the trial judge (see Matter of Nikolic v Ingrassia, 47 AD3d 819, 821 [2008]; Matter of Kozlowski v Mangialino, 36 AD3d 916, 917 [2007]). “ ‘Priority in custody disputes should usually be given to the parent who was first awarded custody . . . because this policy assures stability in the child’s life’ ” (Matter of Ross v Ross, 96 AD3d 856, 857 [2012], quoting Matter of Salvati v Salvati, 221 AD2d 541, 542 [1995]; see Friederwitzer v Friederwitzer, 55 NY2d at 94; White v Mazzella-White, 84 AD3d 1068, 1069 [2011]; *669Matter of Russell v Russell, 72 AD3d 973, 974 [2010]). “Thus, ‘[w]hen . . . there is no indication that a change of custody will result in significantly enhancing the child’s welfare, it is generally considered in the child’s best interests not to disrupt his [or her] life’ ” (Matter of Ross v Ross, 96 AD3d at 857, quoting Matter of Salvati v Salvati, 221 AD2d at 543). Here, the Family Court’s determination that there had not been a change of circumstances sufficient to warrant a change in custody was supported by a sound and substantial basis in the record and will not be disturbed. The evidence indicates that it is in the best interests of the subject child to remain with the mother, who has been his primary caregiver since birth and in whose care the subject child is doing well (see Matter of Ross v Ross, 96 AD3d at 857-858; Matter of Chery v Richardson, 88 AD3d 788, 789 [2011]; Matter of Fallarino v Ayala, 41 AD3d at 714). However, the Family Court improvidently exercised its discretion to the extent that it granted that branch of the father’s petition which was, in effect, in the alternative, to award him certain expanded visitation, only to the extent of directing that he have visitation with the child on alternate weekends from Friday at 6:00 p.m. until Monday at 6:00 p.m. and weekly overnight visitation from Wednesday at 6:00 p.m. until Thursday at 8:30 p.m. (see Matter of Solovay v Solovay, 94 AD3d 898, 900 [2012]; Matter of Nell v Nell, 87 AD3d 541, 542 [2011]; Matter of Heuthe v McLaren, 296 AD2d 500, 501 [2002]; see also Daghir v Daghir, 82 AD2d 191, 193 [1981], affd 56 NY2d 938 [1982]). On this record, the best interests of the child would be served by awarding the father visitation with the child on

alternate weekends from Friday at 6:00 p.m. until Monday at 6:00 p.m., and weekly overnight visitation from Wednesday at 6:00 p.m. until Friday at 6:00 p.m. (see *Matter of Solovay v Solovay*, 94 AD3d at 900; *Matter of Nell v Nell*, 87 AD3d at 542; *Matter of Heuthe v McLaren*, 296 AD2d at 501; see also *Daghir v Daghir*, 82 AD2d at 193). Balkin, J.P., Leventhal, Sgroi and Miller, JJ., concur.

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