

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

Matter of Kendra E. v. Jared T.

2022 NY Slip Op 06063 (App. Div. 2022) · No. V23579/18, V26864/18; Appeal No. 16547; Case No. 2020-03424 · Decided October 27, 2022

SUMMARY

The New York Appellate Division, First Department affirmed a Family Court order awarding the mother sole physical and legal custody and granting the father limited visitation. The court held that sole custody was supported by the mother's credibility, caregiving history, and the parties' inability to communicate productively, and that the visitation restrictions were in the child's best interests. The court also rejected the father's request for a schedule that would gradually expand parenting time based solely on the passage of time.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Kapnick, J.P.; Mazzarelli, J.; Friedman, J.; Shulman, J.; Rodriguez, J.
JURISDICTION	New York
DECIDED	October 27, 2022
DOCKET	V23579/18, V26864/18; Appeal No. 16547; Case No. 2020-03424
DISPOSITION	affirmed
PROCEDURAL POSTURE	Father appealed from a Family Court order entered after trial that awarded sole physical and legal custody of the child to the mother and awarded visitation to the father.
STANDARD OF REVIEW	Custody and visitation determinations are reviewed for whether they constitute a provident exercise of the Family Court's discretion and are supported by the child's best interests; credibility findings are entitled to deference.
PRECEDENTIAL VALUE	Published intermediate appellate decision
PARTIES	Jared T. v. Kendra E.

TOPICS

child custody

visitation

family law

standard of review

appellate procedure

PRACTICE AREAS

family law

child custody

visitation

appellate procedure

QUESTIONS PRESENTED

1. Whether Family Court providently exercised its discretion by awarding the mother sole physical and legal custody.
2. Whether Family Court properly determined that joint custody was not in the child's best interests because of the parties' inability to communicate and cooperate.
3. Whether the visitation schedule and stringent limitations on the father's access were in the child's best interests.
4. Whether Family Court was required to order a gradual expansion of the father's parenting time.

HOLDINGS

1. Family Court providently exercised its discretion by awarding sole physical and legal custody of the child to the mother.
2. Family Court properly declined to award joint custody because joint custody was not in the child's best interests given the parties' relationship and inability to communicate or cooperate.
3. The visitation schedule and stringent limitations on the father's access were a provident exercise of Family Court's discretion and were in the child's best interests.
4. Family Court was not required to order a gradual expansion of the father's parenting time because that order would improperly modify visitation based solely on the passage of time rather than on a requisite change in circumstances, and the father failed to show that expansion would serve the child's best interests.

KEY QUOTATIONS

*“The award of sole custody to the mother was a provident exercise of the court's discretion.” (*1)*

*“We reject the father's arguments that Family Court should have issued an order gradually expanding his parenting time, as such an order would effectuate a modification of visitation based on the mere passage of time, rather than on the requisite change of circumstances” (*2)*

FACTUAL BACKGROUND

The mother had cared for the child throughout his life and had capably made decisions concerning him, while the father had been largely uninvolved and did not seek judicial relief until 2018. The parents were unable to communicate or share information productively, and the father became aggressive when he disagreed with the mother. The record also included the child's fear of the father, the father's physical altercations with the mother, and the child's consistent preference to spend less time with the father.

PROCEDURAL HISTORY

Family Court, Bronx County, entered an order on or about July 13, 2020, awarding the mother sole physical and legal custody and granting the father limited visitation. The Appellate Division, First Department, unanimously affirmed the order insofar as appealed from, without costs.

DISPOSITION

affirmed

CASES CITED

- Deanna V. v. Michael C., 179 A.D.3d 445, 446-447 (1st Dep't 2020)
- Matter of Adriano D. v. Yolanda A., 94 A.D.3d 448, 449 (1st Dep't 2012)
- Matter of Charmaine L. v. Kenneth D., 76 A.D.3d 910, 910 (1st Dep't 2010), lv denied, 16 N.Y.3d 702 (2011)
- Braiman v. Braiman, 44 N.Y.2d 584, 590 (1978)
- Lubit v. Lubit, 65 A.D.3d 954, 955 (1st Dep't 2009), lv denied, 13 N.Y.3d 716 (2010), cert denied, 560 U.S. 940 (2010)
- Christopher H. v. Taiesha R., 166 A.D.3d 548, 548 (1st Dep't 2018)
- Eschbach v. Eschbach, 56 N.Y.2d 167, 171 (1982)
- Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 94 (1982)
- Melissa C.D. v. Rene I.D., 117 A.D.3d 407, 408-409 (1st Dep't 2014)

OPINION

PER CURIAM.

Matter of Kendra E. v Jared T. (2022 NY Slip Op 06063) Matter of Kendra E. v Jared T. 2022 NY Slip Op 06063 Decided on October 27, 2022 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: October 27, 2022 Before: Kapnick, J.P., Mazzairelli, Friedman, Shulman, Rodriguez, JJ. Docket No. V23579/18, V26864/18 Appeal No. 16547 Case No. 2020-03424 [*1]In the Matter Kendra E., Petitioner-Respondent, vJared T., Respondent-Appellant.

The Law Offices of Salihah R. Denman, PLLC, New York (Salihah R. Denman of counsel), for appellant. Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for respondent. The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child. Order, Family Court, Bronx County (Jennifer S. Burt, Ref.), entered on or about July 13, 2020, which, after a trial, insofar as appealed from as limited by the briefs, awarded sole physical and legal custody of the subject child to petitioner mother and awarded visitation to respondent father, unanimously affirmed, without costs.

The award of sole custody to the mother was a provident exercise of the court's discretion. Initially, the court found the mother's testimony credible and the father's far less credible, and those findings are entitled to deference (see *Deanna V. v Michael C.*, 179 AD3d 445, 446 [1st Dept 2020]).

The record also shows that the mother, who has cared for the child his entire life, has capably made all decisions concerning him, and that he has thrived under her care. In contrast, the record shows that the father has been uninvolved in the child's life (see *Matter of Adriano D. v Yolanda A.*, 94 AD3d 448, 449 [1st Dept 2012]).

The father does not adequately address that, notwithstanding his alleged concerns about exclusion from the child's life, he did not seek judicial relief until 2018 (see *Matter of Charmaine L. v Kenneth D.*, 76 AD3d 910, 910 [1st Dept 2010], lv denied 16 NY3d 702 [2011]).

In any event, the court addressed the issue by, among other things, ordering the mother to notify him of major decisions regarding the child's education, medical care and treatment, need for therapy or counseling, and religious training. Similarly, the court properly found an award of joint custody was not in the best interests of the child, given the nature of the parties' relationship (see *Braiman v Braiman*, 44 NY2d 584, 590 [1978]; *Lubit v Lubit*, 65 AD3d 954, 955 [1st Dept 2009], lv denied 13 NY3d 716 [2010]; cert denied, 560 US 940 [2010]).

The record shows that the parents cannot agree on issues concerning the child, as they cannot communicate or share information about the child in a productive way, and the father becomes aggressive when he disagrees with the mother (see *Deanna V.*, 179 AD3d at 446-447).

The visitation schedule was also a provident exercise of the court's discretion (see *Christopher H. v Taiesha R.*, 166 AD3d 548, 548 [1st Dept 2018]). More parenting time with the father would not be in the child's best interests (see *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 94 [1982]), nor do the father's arguments adequately confront the sound bases for the court's imposition of stringent limitations on his access, including the child's fear of the father and the father's physical altercations with the mother.

We reject the father's arguments that Family Court should have issued an order gradually expanding his parenting time, as such an order would effectuate a modification of visitation based on the mere passage of time, rather than on the requisite change of circumstances (*Christopher H.*, 166 AD3d at 548). Nor does the father show that such an order would be in the best interests [*2]of the child, especially given that the child consistently stated that he wished to spend less time with the father — a preference that the court properly took into account (see *id.*; *Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408-409 [1st Dept 2014]).

We have considered the father's remaining arguments and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE

DIVISION, FIRST DEPARTMENT. ENTERED: October 27, 2022

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