

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

Matter of Ivory B. v. Shameccka D. B.

2014 N.Y. Slip Op. 06578 (Supreme Court of the State of New York Appellate Division Second Department
2014) · No. 2013-03448 · Decided October 1, 2014

SUMMARY

The Appellate Division, Second Department, affirmed an order granting the father sole custody of the child, with visitation to the mother. The court held that the Family Court's determination was supported by a sound and substantial basis in the record, including the father's provision of a stable and structured environment and the child's improved school performance while in his care.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Mark C. Dillon, J.P.; Thomas A. Dickerson, J.; Jeffrey A. Cohen, J.; Colleen D. Duffy, J.
JURISDICTION	New York
DECIDED	October 1, 2014
DOCKET	2013-03448
DISPOSITION	affirmed
PROCEDURAL POSTURE	The mother appealed from a Family Court order, entered after a hearing, granting the father's petition for sole custody of the child and awarding the mother visitation.
STANDARD OF REVIEW	A custody determination will not be disturbed if it is supported by a sound and substantial basis in the record, particularly because such determinations depend substantially on the trial court's assessment of witness credibility and the parents' character, temperament, and sincerity.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Shameccka D. B. v. Ivory B.

TOPICS

child custody

family law procedure

appellate procedure

standard of review

family law

PRACTICE AREAS

family law

child custody

appellate procedure

QUESTIONS PRESENTED

1. Whether the Family Court properly awarded the father sole custody based on the totality of the circumstances and the child's best interests.
2. Whether the Family Court's custody determination was supported by a sound and substantial basis in the record.

HOLDINGS

1. Custody and visitation determinations must be based on the child's best interests under the totality of the circumstances, including stability, the available home environments, each parent's past performance and relative fitness, the ability to foster the child's relationship with the noncustodial parent, and the child's desires.
2. An appellate court will not disturb a custody determination that has a sound and substantial basis in the record.
3. A child's expressed preference is not determinative, although it may provide some indication of the child's best interests when the child's maturity and ability to articulate preferences are demonstrated and the attorney for the child recommends that the wishes receive weight.

KEY QUOTATIONS

"The essential consideration in making an award of custody or visitation determination "is the best interests of the child, under the totality of the circumstances"" (121 A.D.3d at 674)

"[T]he existence or absence of any one factor cannot be determinative on appellate review since the court is to consider the totality of the circumstances"" (121 A.D.3d at 675)

"Inasmuch as a court's custody determination is dependent in large part upon its assessment of the witnesses' credibility and upon the character, temperament, and sincerity of the parents, the court's exercise of its discretion will not be disturbed if supported by a sound and substantial basis in the record"" (121 A.D.3d at 675)

FACTUAL BACKGROUND

The father had cared for the child for approximately three years while neglect proceedings against the mother were pending. During the period of the father's temporary custody, the child's schoolwork and grades dramatically improved. Although both parents loved the child and could provide for her well-being and relationship with the other parent, the father was better able to provide a stable and structured environment.

PROCEDURAL HISTORY

The Family Court, Kings County, granted the father's petition for sole custody after a hearing. The mother appealed, and the Appellate Division, Second Department, affirmed without costs or disbursements.

DISPOSITION

affirmed

CASES CITED

- Matter of Boggio v. Boggio, 96 A.D.3d 834, 835
- Eschbach v. Eschbach, 56 N.Y.2d 167, 171, 173-174
- Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 94
- Matter of Supangkat v. Torres, 101 A.D.3d 889, 890
- Matter of Awan v. Awan, 63 A.D.3d 733, 734
- Craig v. Williams-Craig, 61 A.D.3d 712, 712
- Matter of Berrouet v. Greaves, 35 A.D.3d 460, 461
- Matter of Hall v. Hall, 118 A.D.3d 879, 882-883
- Matter of Zubizarreta v. Hemminger, 107 A.D.3d 909, 909-910
- Matter of McVey v. Barnett, 107 A.D.3d 808, 809
- Matter of Reyes v. Polanco, 83 A.D.3d 849, 850
- Cervera v. Bressler, 90 A.D.3d 803, 805

OPINION

PER CURIAM.

Matter of Ivory B. v Shameccka D. B. (2014 NY Slip Op 06578) Matter of Ivory B. v Shameccka D. B. 2014 NY Slip Op 06578 Decided on October 1, 2014 Appellate Division, Second 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 on October 1, 2014 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department MARK C. DILLON, J.P. THOMAS A. DICKERSON JEFFREY A. COHEN COLLEEN D. DUFFY, JJ. 2013-03448 (Docket No. V-38286-09) [*1] In the Matter of Ivory B. (Anonymous), petitioner- respondent, v Shameccka D. B. (Anonymous), appellant, et al., respondent. Lisa Lewis, Brooklyn, N.Y., for appellant.

Sedrick G. Malcolm, Brooklyn, N.Y., for petitioner-respondent. Brad M. Nacht, Brooklyn, N.Y., attorney for the child. DECISION & ORDER In a child custody proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Kings County (Turbow, J.), dated November 20, 2012, which, after a hearing, granted the father's petition for sole custody of the subject child, with certain visitation to her.

ORDERED that the order is affirmed, without costs or disbursements. The essential consideration in making an award of custody or visitation determination "is the best interests of the child, under the totality of the circumstances" (Matter of Boggio v Boggio, 96 AD3d 834, 835; see Eschbach v Eschbach, 56 NY2d 167, 171; Friederwitzer v Friederwitzer, 55 NY2d 89, 94; Matter of Supangkat v Torres, 101 AD3d 889, 890; Matter of Awan v Awan, 63 AD3d 733, 734).

A court deciding an initial petition for child custody must consider "the totality of the circumstances, including, but not limited to, (1) which alternative will best promote stability; (2) the available home environments; (3) the past performance of each parent; (4) each parent's relative fitness, including his or her ability to guide the child, provide for the child's overall well being, and foster the child's relationship with the noncustodial parent; and (5) the child's desires" (Matter of Supangkat v Torres, 101 AD3d at 890; see Craig v Williams-Craig, 61 AD3d 712, 712; Matter of Berrouet v Greaves, 35 AD3d 460, 461). "[T]he existence or absence of any one factor cannot be determinative on appellate review since the court is to consider the totality of the circumstances" (Eschbach v Eschbach, 56 NY2d at 174).

While it is often in a child's best interests to live with siblings, this factor is "not an absolute" (id. at 173). A child's expressed preference in a custody proceeding is not determinative, but it is "some indication of what is in the child's best interests, particularly where the attorney for the child recommended that the child's wishes be given weight, and where the interview demonstrates the child's level of maturity and ability to articulate his [or her] preferences" (Matter of Hall v Hall, 118 AD3d 879, 882-883 [citations omitted]).

However, the child's wishes are not determinative (see Matter of Zubizarreta v Hemminger, 107 AD3d 909, 909-910; Matter of McVey v Barnett, 107 AD3d 808, 809). "Inasmuch as a court's [*2]custody determination is dependent in large part upon its assessment of the witnesses' credibility and upon the character, temperament, and sincerity of the parents, the court's exercise of its discretion will not be disturbed if supported by a sound and substantial basis in the record" (Matter of Supangkat v Torres, 101 AD3d at 890; see Matter of Reyes v Polanco, 83 AD3d 849, 850; Cervera v Bressler, 90 AD3d 803, 805).

We see no reason to disturb the Family Court's well-reasoned determination to award sole custody to the father. The record shows that both parents love the subject child and are able to provide for the child's well-being and promote her relationship with the other parent.

However, the record also shows that the father, who had been caring for the subject child for a period of three years during the pendency of neglect proceedings against the mother, is better able to provide a stable and structured environment. Further, during the period when the father had temporary custody of the child, her school work and grades dramatically improved.

Accordingly, the Family Court's determination is supported by a sound and substantial basis in the record. DILLON, J.P., DICKERSON, COHEN and DUFFY, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court

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