

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

Dolson v. Mitts

99 A.D.3d 1079 (N.Y. App. Div. 2012) · Decided October 18, 2012

SUMMARY

The court reversed a Family Court order granting the mother sole legal custody for the limited purpose of obtaining the parties’ child’s passport. It held that the father was denied due process when Family Court refused to adjourn the proceeding so he could obtain counsel, and remitted the matter for further proceedings. The court also held that the appeal was not moot because the parties’ rights concerning possession and use of the passport remained affected.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Mercure, J.P.; Malone Jr., J.; Garry, J.; Egan Jr., J.
JURISDICTION	New York
DECIDED	October 18, 2012
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The father appealed from a Family Court order granting the mother's petition to modify custody and awarding her sole legal custody for the purpose of obtaining a passport for the child.
STANDARD OF REVIEW	Review of the Family Court order for errors of law; deprivation of the fundamental right to counsel required reversal without regard to the merits.
PRECEDENTIAL VALUE	published
PARTIES	Mitts v. Dolson

TOPICS

- child custody
- family law procedure
- due process
- appellate procedure
- mootness

PRACTICE AREAS

- family law
- civil procedure
- appellate procedure
- constitutional law

QUESTIONS PRESENTED

1. Whether Family Court violated the father's right to counsel and due process by refusing to adjourn the custody proceeding after he requested an attorney and then granting the mother's petition without counsel.
2. Whether the appeal became moot after the child was issued a passport and used it for foreign travel.

HOLDINGS

1. Family Court violated the father's fundamental right to counsel by refusing to adjourn the custody proceeding after he requested an attorney and then granting the mother's petition without affording him counsel.
2. The appeal was not moot because the parties' rights remained affected by the appellate determination concerning possession and control of the child's passport.

KEY QUOTATIONS

“The deprivation of a party’s fundamental right to counsel is a denial of due process and requires reversal, without regard to the merits of the unrepresented party’s position” (1080)

FACTUAL BACKGROUND

The parties shared joint legal custody of their child, while the mother had primary physical custody. The mother sought authority to obtain the child's passport after the father refused to sign the application or consent form. Although Family Court advised the father of his right to counsel, his right to an adjournment to consult counsel, and his potential right to assigned counsel, the court refused to adjourn after he expressed confusion and requested an attorney. The child was later issued a passport and used it for a family vacation with the mother, but the parties continued to dispute control and possession of the passport.

PROCEDURAL HISTORY

The parties' judgment of divorce incorporated a custody order providing for joint legal custody and the mother's primary physical custody. After the father refused to consent to the child's passport application, the mother sought a custody modification. Family Court granted the petition without an evidentiary hearing and without adjourning so the father could obtain counsel. The Appellate Division reversed and remitted for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The matter was remitted to the Family Court of Albany County for further proceedings not inconsistent with the Appellate Division's decision.

CASES CITED

- Matter of Wilson v. Bennett, 282 A.D.2d 933, 934 (2001)
- Matter of Deon M. [Vernon B.], 68 A.D.3d 1740, 1741 (2009)
- Matter of Scala v. Tefft, 42 A.D.3d 689, 691-692 (2007)
- Matter of Williams v. Bentley, 26 A.D.3d 441, 442 (2006)
- Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 (1980)
- Matter of Awan v. Awan, 75 A.D.3d 597, 598 (2010)

OPINION

MERCURE, J.

Mercure, J.E Pursuant to a custody order that was incorporated into the parties' judgment of divorce, the parties share joint legal custody of their child (born in 1999), with petitioner (hereinafter the mother) having primary physical custody.

The mother commenced this proceeding for modification of the prior order of custody, seeking an order allowing her to obtain a passport for the child after respondent (hereinafter the father) refused to sign an application or form consenting to the issuance of a passport for the child. Family Court granted the petition without an evidentiary hearing, and issued an order awarding the mother sole legal custody for the purpose of obtaining a passport for the child.

The father appeals, and we now reverse.* *1080As Family Court acknowledged during the parties' appearance before it, the father — a respondent in a custody proceeding — has the right to counsel, the right to seek an adjournment to confer with counsel, and the right to assigned counsel if qualified financially (see Family Ct Act § 262 [a] [iii]; Matter of Wilson v Bennett, 282 AD2d 933, 934 [2001]).

Although the court properly advised the father of these rights, it refused to adjourn the proceeding when the father expressed his confusion and requested an attorney. "The deprivation of a party's fundamental right to counsel is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position" (Matter of Deon M. [Vernon B.], 68 AD3d 1740, 1741 [2009] [internal quotation marks and citation omitted]; see Wilson v Bennett, 282 AD2d at 934).

Inasmuch as Family Court granted the petition without affording the father the assistance of counsel, we now reverse and remit (see Matter of Scala v Tefft, 42 AD3d 689, 691-692 [2007]; Matter of Williams v Bentley, 26 AD3d 441, 442 [2006]). Malone Jr., Garry and Egan Jr., JJ, concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Albany County for further proceedings not inconsistent with this Court's decision.

Asserting that the mother may take the child out of the country without his knowledge, the father requests that the mother either return the passport to the federal government or relinquish it to a

neutral third party; the mother *1080 seeks to retain the child's passport for future foreign travel.

Thus, although the child was issued a passport and has since used it to take a family vacation with the mother, the rights of the parties will be affected by our determination and this appeal is not moot (see *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; see generally *Matter of Awan v Awan*, 75 AD3d 597, 598 [2010]).