

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

White v. Mazzella-White

84 A.D.3d 1068 (N.Y. App. Div. 2011) · Decided May 17, 2011

SUMMARY

The Appellate Division affirmed an order modifying the parties' joint custody arrangement to award the father sole custody of their children. The court held that the record established a change in circumstances and supported the determination that sole custody with the father was in the children's best interests.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Angiolillo, J.E.; Florio, J.; Lott, J.; Austin, J.
JURISDICTION	New York
DECIDED	May 17, 2011
DISPOSITION	affirmed
PROCEDURAL POSTURE	The mother appealed from an order entered after a hearing that modified the custody provisions of the parties' judgment of divorce and awarded the father sole custody of the children.
STANDARD OF REVIEW	A custody determination after a hearing should not be disturbed unless it lacks a sound and substantial basis in the record. Modification of an existing custody arrangement requires a showing of changed circumstances such that modification is necessary to protect the children's best interests.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Mother v. Father

TOPICS

- child custody
- family law procedure
- appellate procedure
- standard of review
- dissolution of marriage

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the father established changed circumstances requiring modification of the existing joint-custody arrangement to protect the children's best interests.
2. Whether the Supreme Court's award of sole custody to the father lacked a sound and substantial basis in the record.

HOLDINGS

1. An existing custody arrangement may be modified upon a showing of changed circumstances such that modification is required to protect the best interests of the children.
2. The Supreme Court's determination awarding the father sole custody was supported by a sound and substantial basis in the record and therefore would not be disturbed.

FACTUAL BACKGROUND

The mother failed to promote a positive relationship between the children and their father, did not participate in their schooling or extracurricular activities, and did not provide the same household stability as the father. Although the parties' stipulation contemplated alternating physical custody weekly, both children had primarily lived with the father since 2007. While living with the father, the children thrived with consistent academic assistance, extracurricular support, and parental supervision, and the attorney for the children supported awarding the father sole custody.

PROCEDURAL HISTORY

The parties were divorced by judgment dated July 16, 2007. Pursuant to a September 13, 2005 stipulation, they had joint custody with alternating physical custody each week. After a hearing on the father's motion to modify custody, the Supreme Court, Westchester County, awarded the father sole custody; the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- *Matter of Chabotte v. Faella*, 77 A.D.3d 749, 749 (N.Y. App. Div. 2010)
- *Trinagel v. Boyar*, 70 A.D.3d 816, 816 (N.Y. App. Div. 2010)
- *Matter of Zeis v. Slater*, 57 A.D.3d 793, 793-94 (N.Y. App. Div. 2008)
- *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171 (1982)
- *Robert C.R. v. Victoria R.*, 143 A.D.2d 262, 264 (N.Y. App. Div. 1988)
- *Richman v. Richman*, 104 A.D.2d 934, 935 (N.Y. App. Div. 1984)

- *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 94 (1982)
- *Matter of Russell v. Russell*, 72 A.D.3d 973, 975 (N.Y. App. Div. 2010)
- *Matter of Tercjak v. Tercjak*, 49 A.D.3d 772 (N.Y. App. Div. 2008)

OPINION

PER CURIAM.

In a matrimonial action in which the parties were divorced by judgment dated July 16, 2007, the mother appeals from an order of the Supreme Court, Westchester County (Tolbert, J.), entered August 21, 2009, which, after a hearing, granted the father's motion to modify the custody provisions of the judgment of divorce to award him sole custody of the subject children. *1069Ordered that the order is affirmed, without costs or disbursements.

To modify an existing custody arrangement, there must be a showing of a change in circumstances such that modification is required to protect the best interests of the children (see *Matter of Chabotte v Faella*, 77 AD3d 749, 749 [2010]; *Trinagel v Boyar*, 70 AD3d 816, 816 [2010]; *Matter of Zeis v Slater*, 57 AD3d 793, 793 [2008]).

The best interests of the children are determined by a review of the totality of the circumstances (see *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Priority in custody disputes should usually be given to the parent who was first awarded custody by the court or to the parent who obtained custody by voluntary agreement (see *Robert C.R. v Victoria R.*, 143 AD2d 262, 264 [1988]; *Richman v Richman*, 104 AD2d 934, 935 [1984]; see also *Friederwitzer v Friederwitzer*, 55 NY2d 89, 94 [1982]).

Moreover, a hearing court's custody determination should not be set aside unless it lacks a sound and substantial basis in the record (see *Trinagel v Boyar*, 70 AD3d at 816; *Matter of Zeis v Slater*, 57 AD3d at 794). Here, the Supreme Court's determination that a change from joint custody to sole custody of the subject children to the father is supported by a sound and substantial basis in the record.

The record established that the mother failed to promote a positive relationship between the children and the father, failed to participate in the children's schooling or extracurricular activities, and did not provide the same stability in the home as the father provided.

In addition, the mother conceded that both children have primarily resided in the father's home since 2007 despite the parties' stipulation entered on September 13, 2005, pursuant to which they were to enjoy joint custody by alternating physical custody week to week. Since that time, the children have thrived, receiving consistent assistance with their school assignments, support and encouragement for extracurricular activities, and appropriate parental supervision.

In addition, the attorney for the children supports the award of sole custody of the children to the father (see e.g. *Matter of Russell v Russell*, 72 AD3d 973, 975 [2010]). The mother's remaining contentions are without merit.

Accordingly, we decline to disturb the Supreme Court's determination (see *Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of Tercjak v Tercjak*, 49 AD3d 772 [2008]). Angiolillo, J.E, Florio, Lott and Austin, JJ., concur.