

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

Matter of Lazaroff v. Acevedo

2021 NY Slip Op 02159 (App. Div. 2021) · No. 2020-05712 · Decided April 7, 2021

SUMMARY

The New York Appellate Division, Second Department, affirmed an order granting the mother's petition for sole legal and physical custody and permission to relocate with the child to Florida. The court independently reviewed the record and concluded that the relocation and custody arrangement were in the child's best interests, while rejecting or declining to review the father's recusal and ineffective-assistance claims.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Cheryl E. Chambers, J.P.; Robert J. Miller, J.; Betsy Barros, J.; Linda Christopher, J.
JURISDICTION	New York
DECIDED	April 7, 2021
DOCKET	2020-05712
DISPOSITION	affirmed
PROCEDURAL POSTURE	The father appealed from a Family Court order that, after a hearing, modified a prior consent custody and parental-access order, awarded the mother sole legal and physical custody, granted the father parental access, and permitted the mother to relocate with the child to Florida.
STANDARD OF REVIEW	The Appellate Division independently reviewed the record to determine the child's best interests. A trial court's recusal determination is reviewed for improvident exercise of discretion, and an ineffective-assistance claim in a Family Court proceeding is assessed by whether the record, viewed in totality, shows meaningful representation.
PRECEDENTIAL VALUE	Published New York appellate opinion
PARTIES	John L. Acevedo v. Grace Lazaroff

TOPICS

relocation

child custody

parental rights

preservation of error

appellate procedure

PRACTICE AREAS

family law

appellate procedure

QUESTIONS PRESENTED

1. Whether the mother established that relocation with the child to Florida and an award of sole legal and physical custody were in the child's best interests.
2. Whether the Family Court should have recused itself.
3. Whether the father's recusal claim was preserved for appellate review and could be considered when based on matter dehors the record.
4. Whether the father was deprived of the effective assistance of counsel.

HOLDINGS

1. A parent seeking to relocate with a child must establish by a preponderance of the evidence that the proposed relocation is in the child's best interests. After independently reviewing the record, the court concluded that awarding the mother sole legal and physical custody and permitting relocation to Florida served the child's best interests.
2. The father's recusal contention was unpreserved and, insofar as it relied on matter dehors the record, was not properly before the court. On the record presented, the Family Court did not improvidently exercise its discretion by declining to recuse itself.
3. The father received meaningful representation when the record was viewed in totality; therefore, his ineffective-assistance claim did not warrant reversal.

KEY QUOTATIONS

*"A parent seeking leave to relocate with a child bears the burden of establishing by a preponderance of the evidence that the proposed relocation would be in the child's best interests" (*1)*

*"In determining whether a proposed move is in the child's best interests, courts are 'free to consider and give appropriate weight to all of the factors that may be relevant to the determination'" (*1)*

*"Absent a legal disqualification under Judiciary Law § 14, a court is the sole arbiter of the need for recusal, and its decision is a matter of discretion and personal conscience" (*2)*

FACTUAL BACKGROUND

The parties are unmarried parents of one child who initially shared joint legal and physical custody and equal parental access. The mother sought sole custody and permission to move with the child to Florida. Although the Family Court made several factual findings unsupported by the record, the Appellate Division independently determined that sole custody for the mother and relocation to Florida were in the child's best interests.

PROCEDURAL HISTORY

The parties initially shared joint legal and physical custody and equal parental access under a 2013 consent order. In 2019, the mother petitioned to modify that order to obtain sole custody and permission to relocate to Florida. The Family Court, Orange County, granted the petition after a hearing, and the father appealed. The Appellate Division affirmed after independently reviewing the record.

DISPOSITION

affirmed

CASES CITED

- Matter of Tropea v Tropea, 87 NY2d 727, 740-741
- Matter of Ventura v Huggins, 141 AD3d 600, 600
- Louise E.S. v W. Stephen S., 64 NY2d 946, 947
- Matter of D'Angelo v Lopez, 94 AD3d 1261, 1262
- Matter of Jennings v Yillah-Chow, 84 AD3d 1376, 1377
- Matter of Caraballo v Colon, 9 AD3d 459, 459-460
- Matter of Francisca M.V.R. v Jose G.H.G., 154 AD3d 856, 857
- Burke v Carrion, 101 AD3d 920, 921
- Matter of Chamas v Carino, 119 AD3d 564, 565
- Matter of Saraguard v Saraguard, 125 AD3d 982, 983

OPINION

PER CURIAM.

Matter of Lazaroff v Acevedo (2021 NY Slip Op 02159) Matter of Lazaroff v Acevedo 2021 NY Slip Op 02159 Decided on April 7, 2021 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 April 7, 2021 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department CHERYL E. CHAMBERS, J.P.

ROBERT J. MILLER BETSY BARROS LINDA CHRISTOPHER, JJ. 2020-05712 (Docket No. V-5523-12/19B) [*1]In the Matter of Grace Lazaroff, respondent, vJohn L. Acevedo, appellant. Cooper Erving & Savage LLP, Albany, NY (Colin D. Dwyer of counsel), for appellant. James M. Hendry, Port Jervis, NY, for respondent. Gary E. Eisenberg, New City, NY, attorney for the child. DECISION & ORDER In a proceeding pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Orange County (Victoria B. Campbell, J.), dated April 20, 2020.

The order, after a hearing, granted the mother's petition to modify an order of custody and parental access of the same court (Debra J. Kiedaisch, J.) dated April 10, 2013, so as to award her sole legal and physical custody of the parties' child with parental access to the father, and to permit her to relocate with the child to Florida. ORDERED that the order dated April 20, 2020, is affirmed, without costs or disbursements.

The parties are the unmarried parents of one child. After they separated, the Family Court entered an order of custody and parental access on the parties' consent, awarding them joint legal and physical custody of the child and equal parental access.

In 2019, the mother filed a petition to modify the prior order of custody and parental access so as to award her sole legal and physical custody of the child with parental access to the father, and to permit her to relocate with the child to Florida.

In an order dated April 20, 2020, after a hearing, the court granted the mother's petition. The father appeals. A parent seeking leave to relocate with a child bears the burden of establishing by a preponderance of the evidence that the proposed relocation would be in the child's best interests (see *Matter of Tropea v Tropea*, 87 NY2d 727, 741; *Matter of Ventura v Huggins*, 141 AD3d 600, 600).

In determining whether a proposed move is in the child's best interests, courts are "free to consider and give appropriate weight to all of the factors that may be relevant to the determination" (*Matter of Tropea v Tropea*, 87 NY2d at 740). These factors include each parent's reasons for seeking or opposing the move, the quality of the child's relationship with the custodial parent and the noncustodial parent, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the child's life may be enhanced economically, emotionally, and educationally by the move, and the feasibility of [*2]preserving the relationship between the child and the noncustodial parent through alternate parental access arrangements (see *id.* at 740-741).

Here, as the father correctly contends, a number of the Family Court's factual findings were unsupported by the record. However, upon our own independent review of the record (see *Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947; *Matter of D'Angelo v Lopez*, 94 AD3d 1261, 1262), we conclude that it would be in the child's best interests to award the mother sole legal and physical custody and to permit the mother to relocate with the child to Florida (see generally *Matter of Jennings v Yillah-Chow*, 84 AD3d 1376, 1377).

Accordingly, we agree with the court's ultimate determination as to the child's best interests. The father's contention that the court should have recused itself is unpreserved for appellate review (see *Matter of Caraballo v Colon*, 9 AD3d 459, 459-460).

The contention also is not properly before this Court because it relies on matter dehors the record (see *Matter of Francisca M.V.R. v Jose G.H.G.*, 154 AD3d 856, 857). In any event, to the extent the father's contentions are not based on matter dehors the record, "[a]bsent a legal disqualification under Judiciary Law § 14, a court is the sole arbiter of the need for recusal, and its decision is a matter of discretion and personal conscience" (*Burke v Carrion*, 101 AD3d 920, 921).

Based on the record before us, the court did not improvidently exercise its discretion in failing to recuse itself. The father's remaining contention, that he was deprived of the effective assistance of counsel, rests partially on matter which is dehors the record and not properly before this Court (see *Matter of Chamas v Carino*, 119 AD3d 564, 565).

To the extent this claim can be reviewed, the record, viewed in totality, reveals that the father received meaningful representation (see *Matter of Saraguard v Saraguard*, 125 AD3d 982, 983). CHAMBERS, J.P., MILLER, BARROS and CHRISTOPHER, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court