

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

Rodriguez v. Feldman

126 A.D.3d 1557 (N.Y. App. Div. 4th Dep't 2015) · Decided March 27, 2015

SUMMARY

The Appellate Division, Fourth Department, unanimously affirmed a Family Court order awarding respondents primary physical custody of the subject child. The court rejected the grandmother's due process, expert-evaluation, temporary-custody, willful-violation, relocation, and preservation arguments, and held that changed circumstances and the child's best interests supported the custody award. The court also declined to remit the matter for a new best-interests hearing because ongoing Family Court proceedings addressed later factual developments.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Department
WRITING FOR THE COURT	Smith, J.P.; Peradotto, J.; Carni, J.; Valentino, J.; DeJoseph, J.
JURISDICTION	New York
DECIDED	March 27, 2015
DISPOSITION	affirmed
PROCEDURAL POSTURE	The grandmother appealed from a Family Court order awarding the child's maternal aunt and her husband primary physical custody after a custody hearing.
STANDARD OF REVIEW	A custody determination based on the hearing court's firsthand assessment of witness credibility is entitled to great weight and will not be disturbed absent a basis in the record.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Rodriguez, petitioner-respondent grandmother v. Feldman, respondents-petitioners, the child's maternal aunt and her husband

TOPICS

- child custody
- grandparent rights
- family law procedure
- appellate procedure
- due process

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether cumulative procedural errors, including the admission of telephonic expert testimony and medical evaluations of the child, deprived the grandmother of due process.
2. Whether the grandmother's challenge to the child's medical evaluations was preserved and whether she had standing to assert the child's due process rights.
3. Whether the challenge to the temporary mid-trial custody order was moot after entry of the final custody order.
4. Whether respondents willfully violated a prior court order when the alleged violation involved an oral court direction not reduced to writing.
5. Whether the matter should have been analyzed as a relocation case.
6. Whether respondents established a sufficient change in circumstances to warrant an inquiry into the child's best interests.
7. Whether Family Court properly conformed the petition to the evidence concerning post-petition conduct.
8. Whether awarding respondents primary physical custody was in the child's best interests.

HOLDINGS

1. Family Court properly exercised its discretion in permitting an expert witness residing in another state to testify by telephone.
2. The grandmother's challenge was unpreserved because she did not move to strike the expert's testimony on the grounds asserted on appeal, and she lacked standing to challenge evaluations implicating the child's rights rather than her own.
3. The challenge was moot because the temporary order was superseded by the final order of custody.
4. Family Court properly declined to find a willful violation because the alleged oral direction had not been reduced to a written order and the record did not establish that respondents knew of the oral direction.
5. The grandmother's contention that the case should have been analyzed as a relocation case was unpreserved because it was raised for the first time on appeal and, in any event, lacked merit.
6. Respondents established the requisite change in circumstances to warrant an inquiry into the child's best interests, and Family Court properly awarded them primary physical custody.
7. Family Court properly exercised its authority to sua sponte conform the petition to the evidence concerning post-petition conduct establishing a significant change in circumstances.

KEY QUOTATIONS

“a court’s determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight” (1559)

FACTUAL BACKGROUND

The grandmother and the child's maternal aunt and her husband shared joint legal custody under a 2007 stipulated order, while the grandmother had primary physical custody. In 2009, the respondents brought the child to Georgia and obtained a temporary custody order there. The record showed changes in the child's school schedule, an extraordinarily acrimonious relationship among the parties, and that the respondents were better able to meet the child's educational, therapeutic, nutritional, and health needs. Family Court awarded the respondents primary physical custody.

PROCEDURAL HISTORY

A 2007 stipulated custody order awarded the grandmother and the respondents joint legal custody, with the grandmother having primary physical custody. In 2009, the respondents took the child to Georgia and obtained a temporary custody order there. The grandmother and respondents then petitioned for sole custody under Family Court Act article 6, and after a hearing Family Court awarded the respondents primary physical custody. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Kelly v. Krupa, 63 A.D.3d 1395, 1396 (N.Y. App. Div. 2009)
- Matter of Awan v. Awan, 75 A.D.3d 597, 599 (N.Y. App. Div. 2010)
- Matter of Marvin Q., 45 A.D.3d 852, 853 (N.Y. App. Div. 2007), leave to appeal dismissed, 10 N.Y.3d 927 (2008)
- Campolongo v. Campolongo, 2 A.D.3d 476, 476-477 (N.Y. App. Div. 2003)
- Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 773 (1991)
- Matter of Fleischer v. New York State Liquor Auth., 103 A.D.3d 581, 583 (N.Y. App. Div. 2013), leave to appeal denied, 21 N.Y.3d 856 (2013)
- Matter of Ramirez v. Velez, 78 A.D.3d 1062, 1062-1063 (N.Y. App. Div. 2010)
- Matter of Kelly F. v. Gregory A.F., 34 A.D.3d 1277, 1277 (N.Y. App. Div. 2006)
- Matter of Dashaun G. [Diana B.], 117 A.D.3d 1526, 1527 (N.Y. App. Div. 2014), leave to appeal dismissed, 24 N.Y.3d 951 (2014)
- Matter of York v. Zullich, 89 A.D.3d 1447, 1448 (N.Y. App. Div. 2011)
- Matter of Tropea v. Tropea, 87 N.Y.2d 727, 740-741 (1996)
- Matter of Stilson v. Stilson, 93 A.D.3d 1222, 1223 (N.Y. App. Div. 2012)
- Matter of Claflin v. Giamporcaro, 75 A.D.3d 778, 779-780 (N.Y. App. Div. 2010), leave to appeal denied, 15 N.Y.3d 710 (2010)
- Matter of Orzech v. Nikiel, 91 A.D.3d 1305, 1305-1306 (N.Y. App. Div. 2012)
- Matter of Angel L.H. [Melissa H.], 85 A.D.3d 1637, 1637 (N.Y. App. Div. 2011), leave to appeal denied, 17 N.Y.3d 711 (2011)
- Matter of Taylor R., 290 A.D.2d 830, 832 (N.Y. App. Div. 2002)

- Matter of Marino v. Marino, 90 A.D.3d 1694, 1695-1696 (N.Y. App. Div. 2011)
- Matter of Kennedy v. Kennedy, 107 A.D.3d 1625, 1626 (N.Y. App. Div. 2013)

OPINION

PER CURIAM.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered March 30, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondents-petitioners primary physical custody of the subject child. It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Pursuant to a stipulated order of custody *1558entered in 2007, petitioner-respondent grandmother and respondents-petitioners (respondents), the subject child's maternal aunt and her husband, were awarded joint legal custody of the subject child with the grandmother having primary physical custody.

In 2009, respondents brought the child to their residence in Georgia and received an order of temporary custody in that state. Thereafter, the grandmother and respondents each petitioned for sole custody of the child pursuant to Family Court Act article 6 and, following a hearing, Family Court awarded respondents primary physical custody of the child.

We reject the grandmother's contention that she was denied due process based on cumulative errors by the court. Specifically, we conclude that the court properly exercised its discretion in permitting the telephonic testimony of an expert witness who resided in another state (see Domestic Relations Law § 75-j [2]; Matter of Kelly v Krupa, 63 AD3d 1395, 1396 [2009]).

We further conclude that the grandmother failed to preserve for our review her challenge to the medical evaluations of the child by the expert by moving to strike the expert's testimony on the grounds now asserted, and in any event, she lacks standing to object to those evaluations as violative of her own due process rights.

The allegedly unauthorized evaluations implicated the child's due process rights as opposed to the due process rights of the grandmother (see Matter of Awan v Awan, 75 AD3d 597, 599 [2010]; Matter of Marvin Q., 45 AD3d 852, 853 [2007], lv dismissed 10 NY3d 927 [2008]; Campolongo v Campolongo, 2 AD3d 476, 476-477 [2003]), and generally a litigant does not have standing to raise rights belonging to another (see generally Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 773 [1991]; Matter of Fleischer v New York State Liq.

Auth., 103 AD3d 581, 583 [2013], lv denied 21 NY3d 856 [2013]). We also conclude that the grandmother's challenge to the court's temporary order of physical custody issued mid-trial was rendered moot by entry of the final order of custody (see Matter of Ramirez v Velez, 78 AD3d 1062, 1062-1063 [2010]; see also Matter of Kelly F. v Gregory A.F., 34 AD3d 1277, 1277 [2006]).

The grandmother contends that the court erred in failing to find that respondents willfully violated a prior court order. We reject that contention inasmuch as, at the time of the alleged violation, the oral direction of the court had not been reduced to a written order and it is unclear on this record whether respondents were aware of the existence of the oral direction of the court at the time of the alleged violation (cf.

Matter of *1559Dashaun G. [Diana B.], 117 AD3d 1526, 1527 [2014], lv dismissed 24 NY3d 951 [2014]). The grandmother further contends for the first time on appeal that the court erred by not analyzing this matter as a relocation case, and thus that contention is unpreserved for our review (see Matter of York v Zullich, 89 AD3d 1447, 1448 [2011]).

In any event, we conclude that her contention is without merit (see Matter of Tropea v Tropea, 87 NY2d 727, 740-741 [1996]). Contrary to the grandmother's further contention, respondents established the requisite change in circumstances to warrant an inquiry into the best interests of the child given "the changes in the child's school schedule since the entry of the prior order" (Matter of Stilson v Stilson, 93 AD3d 1222, 1223 [2012]; Matter of Claflin v Giamporcaro, 75 AD3d 778, 779-780 [2010], lv denied 15 NY3d 710 [2010]), and the extraordinarily acrimonious nature of the parties' relationship (see Matter of Orzech v Nikiel, 91 AD3d 1305, 1305-1306 [2012]; York, 89 AD3d at 1448).

We conclude that the court properly "exercise[d] [its] power, in the interest of justice, to sua sponte conform the petition to the evidence" adduced at the fact-finding hearing with respect to post-petition conduct that established a significant change in circumstances (Matter of Angel L.H. [Melissa H.], 85 AD3d 1637, 1637 [2011], lv denied 17 NY3d 711 [2011]; see generally Matter of Taylor R., 290 AD2d 830, 832 [2002]).

We further conclude that the court properly determined that it was in the child's best interests to award primary physical custody to respondents (see generally Matter of Marino v Marino, 90 AD3d 1694, 1695-1696 [2011]).

The record establishes that respondents were able to provide for the child's educational and therapeutic needs, as well as her nutritional and health needs. The record further establishes that respondents are in excellent physical health and are better able to handle the stress involved in raising a child than is the grandmother. "[A] court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight" (id. at 1695 [internal quotation marks omitted]), and we perceive no basis upon which to disturb the court's order.

Finally, we note that, although it appears that several new factual developments have arisen since the entry of the order on appeal, there is no reason for us to remit the matter to Family Court for a new best interests hearing, in light of the ongoing proceedings in Family Court (cf. Matter of

Kennedy v Kennedy, 107 AD3d 1625, 1626 [2013]). Present — Smith, J.P., Peradotto, Carni, Valentino and DeJoseph, JJ.

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