

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)

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