

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

Matter of Andreija N. (Michael N.)

2019 NY Slip Op 53957 (N.Y. Ct. App. 2019) · No. 529271 · Decided November 27, 2019

SUMMARY

The New York Appellate Division, Third Department, reversed a Family Court order vacating a stay-away order of protection in an abuse and neglect proceeding. The court held that good cause had not been shown to permit unsupervised overnight visitation before the record was further developed, particularly in light of alleged sexual abuse and threatening conduct toward the mother and others.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Lynch, J.; Egan Jr., J.P.; Clark, J.; Devine, J.
JURISDICTION	New York
DECIDED	November 27, 2019
DOCKET	529271
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The Montgomery County Department of Social Services appealed from a Family Court order that vacated a stay-away order of protection and issued a new temporary order permitting the respondent unsupervised visitation.
STANDARD OF REVIEW	Whether Family Court abused its discretion in modifying or vacating an order of protection under Family Court Act § 1061; the modified order must be supported by a sound and substantial basis in the record and be consistent with the child's best interests.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Montgomery County Department of Social Services v. Michael N.

TOPICS

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domestic violence

child custody

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evidence

PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Family Court had good cause under Family Court Act § 1061 to vacate the stay-away order of protection before the evidentiary record was fully developed.
2. Whether the respondent's threatening conduct toward the mother and others associated with the custody case was relevant to determining the child's best interests and whether unsupervised overnight parenting time should be permitted.
3. Whether the Appellate Division could consider materials submitted on appeal concerning the respondent's messages and social-media postings when those materials were reflected in the forensic psychologist's reports.

HOLDINGS

1. Family Court abused its discretion by vacating the stay-away order of protection without good cause shown. The decision was premature because the fact-finding record had not been adequately developed, including the opportunity to subpoena and cross-examine the forensic psychologist and to hear from the child's therapist.
2. Family Court should not have diminished the respondent's threatening conduct as merely unconventional. Domestic violence is not limited to physical violence, and the respondent's threats and efforts to control or coerce the mother and others associated with the custody case were relevant to whether unsupervised parenting time was in the child's best interests.
3. The court considered the challenged text messages and Facebook postings because the respondent acknowledged that the submissions had been reviewed by the psychologist, whose reports identified and discussed those materials, and because the child's best interests were paramount.

KEY QUOTATIONS

“As with an initial order, the modified order must reflect a resolution consistent with the best interests of the child after consideration of all relevant facts and circumstances and must be supported by a sound and substantial basis in the record” ([*1])

“Our concern with these observations is that domestic violence is not limited to physical violence.” ([*1])

FACTUAL BACKGROUND

The respondent and the child's mother were unmarried parents who had litigated custody issues since shortly after the child's birth. After allegations of sexual abuse and threatening behavior toward the mother, Family Court entered and repeatedly extended a temporary stay-away order of protection against the respondent. Although two forensic psychologist reports found no credible evidence of sexual abuse and recommended implementing the existing custody order, the record also included evidence of threatening text messages and

social-media postings, and the psychologist had not been cross-examined or presented as a witness when Family Court vacated the protection order.

PROCEDURAL HISTORY

Family Court issued a temporary stay-away order of protection after the Department alleged that Michael N. sexually abused the child. During a combined fact-finding proceeding, Family Court admitted two forensic psychologist reports but, before testimony was taken, vacated the stay-away order without explanation and issued a replacement order allowing unsupervised visitation. The Appellate Division reversed and remitted for further proceedings, and reinstated the stay-away order pending those proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse the Family Court order, deny the motion to vacate the stay-away order of protection, and remit the matter to the Family Court of Montgomery County for further proceedings not inconsistent with the Appellate Division's decision. The stay-away order of protection is to remain in effect pending further proceedings.

CASES CITED

- Matter of Angel RR. [Gloria RR.—Pedro RR.], 152 AD3d 1010, 1010 (2017)
- Matter of Sutton S. [Abigail E.S.], 152 AD3d 608, 608-609 (2017)
- Matter of Yosepha K. [Chana D.], 165 AD3d 932, 933 (2018)
- Crawford v Merrill Lynch, Pierce, Fenner & Smith, 35 NY2d 291, 298-299 (1974)
- Callahan v Cortland Mem. Hosp., 127 AD2d 921, 922 (1987)

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