

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

Sinnott-Turner v. Kolba

60 A.D.3d 774, 875 N.Y.S.2d 512 (N.Y. App. Div. 2d Dep't 2009) · Decided March 10, 2009

SUMMARY

The Appellate Division, Second Department, reviewed orders concerning modification of child visitation, custody, alleged violation of a visitation order, forensic evaluation, and therapeutic supervision. The court affirmed the orders in substance but held that the Family Court improperly delegated future visitation decisions to a therapist, modified one order accordingly, and remitted the matter for further proceedings on visitation.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Fisher, J.P.; Dillon, J.; Belen, J.; Chambers, J.
JURISDICTION	New York
DECIDED	March 10, 2009
DISPOSITION	remanded
PROCEDURAL POSTURE	The father appealed from Family Court orders modifying visitation, denying his petition for a change of custody and violation finding, and designating a therapist to supervise therapeutic visitation.
STANDARD OF REVIEW	Custody and visitation determinations are reviewed for whether they have a sound and substantial basis in the record and generally will not be disturbed absent an abuse of discretion. Modification requires a subsequent change in circumstances and a determination that modification is in the child's best interests.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Father v. Mother

TOPICS

- visitation
- child custody
- family law procedure
- harmless error
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the father established a change in circumstances and the child's best interests sufficient to transfer custody from the mother to him.
2. Whether the mother violated the prior visitation order by failing to provide the father's visitation.
3. Whether the evidence established a sufficient change in circumstances to modify the visitation order and require therapist-supervised visitation.
4. Whether the Family Court properly appointed and qualified a forensic evaluator and whether any inaccuracies in the evaluator's report or testimony required reversal.
5. Whether the Family Court improperly delegated its authority over future visitation issues to a therapist.

HOLDINGS

1. The father failed to establish a change in circumstances warranting transfer of custody from the mother to him.
2. The father failed to establish that the mother violated the prior visitation order.
3. The evidence established a change in circumstances sufficient to modify visitation and require that the father's visitation be supervised by a therapist.
4. The Family Court properly appointed a neutral expert to conduct forensic evaluations and properly qualified the forensic evaluator as an expert.
5. Any error introduced by the forensic evaluator's report or testimony was harmless and did not require reversal.
6. The Family Court improperly delegated authority to determine future visitation issues to the therapist.

KEY QUOTATIONS

“A noncustodial parent is entitled to meaningful visitation, and denial of that right must be based on substantial evidence that visitation would be detrimental to the welfare of the child” (776)

“However, the Family Court improperly delegated the authority to determine future issues involving visitation to a therapist” (777)

FACTUAL BACKGROUND

The mother and father were never married, and a 1998 Family Court order awarded the mother custody and the father weekly visitation. In 2006, after the child refused to visit the father and the mother alleged that the father was abusing the child, the mother sought to modify visitation; the father separately sought custody and claimed that the mother was violating the visitation order. The Family Court heard evidence that the child feared the father, refused visitation, and that the father had hit the child more than once. The court ordered therapist-supervised visitation, and the Appellate Division upheld that determination while rejecting delegation of future visitation decisions to the therapist.

PROCEDURAL HISTORY

The Family Court, Dutchess County, modified a 1998 custody and visitation order after a hearing, awarded the mother continued sole custody, terminated the father's unsupervised visitation, and ordered therapist-supervised visitation. It denied the father's petition seeking transfer of custody and a finding that the mother violated the prior visitation order. In a separate order entered without a hearing, the court designated a therapist to conduct supervised and therapeutic visitation. The Appellate Division affirmed the orders subject to deleting language that improperly allowed the therapist to determine when therapeutic supervision would commence, and remitted for further visitation proceedings.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The matter was remitted to the Family Court, Dutchess County, for further proceedings on the issue of visitation after deleting the provision allowing the therapist to select the timetable for commencement of therapeutic supervision. The December 4, 2007 order was affirmed, and one bill of costs was awarded to the mother.

CASES CITED

- Matter of Abranko v. Vargas, 26 A.D.3d 490, 491 (2006)
- Matter of Morash v. Minucci, 299 A.D.2d 486, 486-487 (2002)
- Cashel v. Cashel, 46 A.D.3d 501 (2007)
- Matter of Cornell v. Cornell, 8 A.D.3d 718, 719 (2004)
- Matter of Eric L. v. Dorothy L., 130 A.D.2d 660, 661 (1987)
- Neuman v. Neuman, 19 A.D.3d 383, 384 (2005)
- Matter of Perez v. Sepulveda, 54 A.D.3d 347 (2008)
- Ekstra v. Ekstra, 49 A.D.3d 594, 595 (2008)
- Matter of Tercjak v. Tercjak, 49 A.D.3d 772, 773 (2008)
- Matter of Vanjak v. Pesa, 26 A.D.3d 512 (2006)
- Matter of Thompson v. Yu-Thompson, 41 A.D.3d 487, 488 (2007)
- Matter of Powell v. Blumenthal, 35 A.D.3d 615, 617 (2006)
- Matter of Held v. Gomez, 35 A.D.3d 608 (2006)

OPINION

PER CURIAM.

In related child custody and visitation proceedings pursuant to Family Court Act article 6, the father appeals from (1) an order of the Family Court, Dutchess County (Sammarco, J.), dated October 24, 2007, which, after a hearing, granted the mother's petition to modify an order of the

same court dated June 23, 1998, inter alia, awarding her sole custody of the child and granting him unsupervised visitation with the child, to the extent of terminating his unsupervised visitation with the child and directing that visitation between him and the child be supervised by a therapist, and denied his petition alleging violation of an order of visitation and for a change of custody of the child from the mother to him, and (2) an order of the same court dated December 4, 2007, which, without a hearing, inter alia, designated a therapist to conduct the supervised and therapeutic visitation.

Ordered that the order dated October 24, 2007 is modified, on *775the law, by deleting the provision thereof stating “the therapeutic supervision shall commence upon the timetable selected by the therapist conducting the therapeutic visits after intake appointments with the child and the father and the mother, if required”; as so modified, the order dated October 24, 2007, is affirmed, and the matter is remitted to the Family Court, Dutchess County, for further proceedings on the issue of visitation; and it is farther, Ordered that the order dated December 4, 2007, is affirmed; and it is further, Ordered that one bill of costs is awarded to the mother.

An order entered June 23, 1998, in Family Court, awarded the mother, who was never married to the father, custody of the subject child, and weekly visitation to the father. In 2006, after the child refused to visit the father, the mother commenced a proceeding to modify the prior order, contending, inter alia, that the father was abusing the child.

The father, contending that the mother was not providing visitation pursuant to the prior order, commenced a separate proceeding to transfer custody of the child from the mother to him and to find the mother in violation of the prior order.

The Family Court suspended visitation, entered a temporary order of protection on behalf of the mother and child against the father, conducted a forensic evaluation, and held a hearing. After the hearing, the Family Court granted the mother’s petition and denied the father’s petition, directing that visitation between the father and child be supervised by a therapist.

A court may modify an order awarding custody and visitation upon a showing that there has been a subsequent change of circumstances and that modification is in the best interests of the child (see Family Ct Act § 652; *Matter of Abranko v Vargas*, 26 AD3d 490, 491 [2006]). A noncustodial parent is entitled to meaningful visitation, and denial of that right must be based on substantial evidence that visitation would be detrimental to the welfare of the child (see *Matter of Morash v Minucci*, 299 AD2d 486, 486-487 [2002]).

However, the determination of visitation is within the sound discretion of the trial court based upon the best interests of the child, and its determination will not be set aside unless it lacks a sound and substantial basis in the record (see *Cashel v Cashel*, 46 AD 3d 501 [2007]).

Although a child's wishes are not determinative, his or her wishes, age, and maturity should be given considerable weight (see *Matter of Cornell v Cornell*, 8 AD3d 718, 719 [2004]; *Matter of Eric L. v Dorothy L.*, 130 AD2d 660, 661 [1987]).

Here, the Family Court properly determined that the father *776 failed to establish that a change in circumstances warranted a transfer of custody from the mother to him (see *Neuman v Neuman*, 19 AD3d 383, 384 [2005]). Further, as the parties testified that they frequently cooperated in arranging visitation schedules based on their schedules, the Family Court properly determined that the father failed to establish that the mother violated the prior order of visitation (see *Matter of Perez v Sepulveda*, 54 AD3d 347 [2008]).

Moreover, in light of the evidence that the child feared the father and refused to visit him, and that the father had hit the child on more than one occasion, the Family Court properly determined that the mother had demonstrated a change in circumstances sufficient to warrant modification of the visitation order (see Family Ct Act § 652; *Matter of Abranko v Vargas*, 26 AD3d 490, 491 [2006]).

In custody disputes, the value of forensic evaluations of the parents and children has long been recognized (see 22 NYCRR 202.18; *Ekstra v Ekstra*, 49 AD3d 594, 595 [2008]). Thus, the Family Court properly appointed a neutral expert to conduct forensic evaluations of the parties and their child (see *Ekstra v Ekstra*, 49 AD3d at 595). Contrary to the father's contention, the Family Court did not err in qualifying the forensic evaluator as an expert (see 22 NYCRR 202.18; *Ekstra v Ekstra*, 49 AD3d at 595; *Neuman v Neuman*, 19 AD3d at 384).

Although the evidence suggests that the forensic evaluator's report may have contained inaccuracies, any error introduced by the forensic evaluator's report or testimony was harmless, as there was a sound and substantial basis in the record for the Family Court's determination without consideration of the forensic evaluator's report or testimony (see *Matter of Tercjak v Tercjak*, 49 AD3d 772, 773 [2008]; *Matter of Vanjak v Pesa*, 26 AD3d 512 [2006]; *Matter of Morash v Minucci*, 299 AD2d at 486-487).

Moreover, a court has the authority to order a party to submit to counseling as a component of visitation (see *Matter of Thompson v Yu-Thompson*, 41 AD3d 487, 488 [2007]; *Matter of Powell v Blumenthal*, 35 AD3d 615, 617 [2006]).

The Family Court's determination that visitation supervised by a therapist was in the best interests of the child has a sound and substantial basis in the record and should not be disturbed (see *Matter of Thompson v Yu-Thompson*, 41 AD3d at 488).

However, the Family Court improperly delegated the authority to determine future issues involving visitation to a therapist (see *Matter of Held v Gomez*, 35 AD3d 608 [2006]). The parties' remaining contentions are either academic or *777 without merit. Fisher, J.P., Dillon, Belen and Chambers, JJ., concur.

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