

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

Matter of Edwin R. v. Maria G.

2019 NY Slip Op 06717 (N.Y. Ct. App. 2019) · No. 9880 · Decided September 24, 2019

SUMMARY

The Appellate Division, First Department unanimously affirmed a Family Court order awarding the father sole legal and physical custody of the children and continuing the mother's visitation by mutual agreement. The court held that the hearing evidence supported the custody award, that the visitation arrangement was permissible, and that the Family Court properly limited testimony from the mother's child life specialist.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Sweeny, J.P.; Richter, J.; Kapnick, J.; Kern, J.; Singh, J.
JURISDICTION	New York
DECIDED	September 24, 2019
DOCKET	9880
DISPOSITION	affirmed
PROCEDURAL POSTURE	Respondent mother appealed from a Family Court order granting petitioner father sole legal and physical custody of the children and continuing visitation as mutually agreed upon by the parties.
STANDARD OF REVIEW	A custody award will be upheld when the hearing evidence provides a sound and substantial basis for the determination.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Maria G. v. Edwin R.

TOPICS

- child custody
- visitation
- expert testimony
- family law procedure
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the hearing evidence provided a sound and substantial basis for awarding the father sole legal and physical custody.
2. Whether visitation may properly continue as mutually agreed upon by the parties despite the mother's contention that the parties could not work together.
3. Whether Family Court properly precluded a child life specialist from testifying in a professional capacity about the mother's changes and parental fitness.

HOLDINGS

1. The custody award to the father was supported by a sound and substantial basis in the hearing evidence and was properly affirmed.
2. The order continuing the mother's visitation as mutually agreed upon was not improper on the record presented.
3. Family Court properly declined to allow the child life specialist to testify in a professional capacity about the mother's changes because the witness was not an expert and could not opine on the mother's parental fitness.

KEY QUOTATIONS

*“Should the parties be unable to reach a mutual agreement on visitation, either may file a petition to enforce or modify the order” (at *1)*

*“The court properly declined to permit respondent's child life specialist to testify in her "professional capacity" about how respondent had changed while participating in a supportive housing program because the witness was not an expert and could not opine on respondent's parental fitness” (at *1)*

FACTUAL BACKGROUND

After a custody hearing, the father was awarded sole legal and physical custody of the subject children. The record showed that the father made the children available to the mother in person and by telephone and testified that he intended to continue ensuring their access to the mother and her family. The mother also sought to present testimony from a child life specialist concerning changes she had made while participating in a supportive housing program, but the witness was not qualified as an expert.

PROCEDURAL HISTORY

Family Court, Bronx County, granted the father's petition for sole legal and physical custody and directed that the mother's visitation continue as mutually agreed upon. The Appellate Division unanimously affirmed the order without costs.

DISPOSITION

affirmed

CASES CITED

- Matter of James Joseph M. v. Rosana R., 32 A.D.3d 725, 726 (1st Dep't 2006), lv. denied, 7 N.Y.3d 717 (2006)
- Matter of Samuel v. Sowers, 162 A.D.3d 674, 675 (2d Dep't 2018)
- Matter of Alleyne v. Cochran, 119 A.D.3d 1100, 1101-1102 (3d Dep't 2014)
- Matter of Sara B., 41 A.D.3d 170, 171 (1st Dep't 2007)
- Matter of Painter v. Painter, 211 A.D.2d 993, 995 (3d Dep't 1995)
- Matter of Thomson v. Battle, 99 A.D.3d 804, 806 (2d Dep't 2012)

OPINION

Matter of Edwin R. v. Maria G. 2019 NY Slip Op 6717

PER CURIAM.

Matter of Edwin R. v Maria G. (2019 NY Slip Op 06717) Matter of Edwin R. v Maria G. 2019 NY Slip Op 06717 Decided on September 24, 2019 Appellate Division, First 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 September 24, 2019 Sweeny, J.P., Richter, Kapnick, Kern, Singh, JJ. 9880 [*1]In re Edwin R., Petitioner-Respondent, vMaria G., Respondent-Appellant, Administration for Children's Services, Respondent. Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant. Steven P. Forbes, Jamaica, for respondent. Kenneth M. Tuccillo, Hastings on Hudson, attorney for the children. Order, Family Court, Bronx County (Lynn M. Leopold, J.), entered on or about November 15, 2018, which granted petitioner father's petition for sole legal and physical custody of the subject children, and directed that visitation by respondent mother continue as mutually agreed upon by the parties, unanimously affirmed, without costs. The hearing evidence presents a sound and substantial basis for the award of custody of the children to petitioner (see generally Matter of James Joseph M. v Rosana R., 32 AD3d 725, 726 [1st Dept 2006], lv denied 7 NY3d 717 [2006]). Respondent failed to present evidence to support her argument that the order continuing visitation based on the mutual agreement of the parties is improper because the parties cannot work together (see Matter of Samuel v Sowers, 162 AD3d 674, 675 [2d Dept 2018]; Matter of Alleyne v Cochran, 119 AD3d 1100, 1101-1102 [3d Dept 2014]). The hearing record demonstrates that petitioner has made the children available to respondent in person and by telephone, and petitioner testified that he intends to continue to ensure the children's access to their mother and her family. Should the parties be unable to reach a mutual agreement on visitation, either may file a petition to enforce or modify the order (see Samuel, 162 AD3d at 675). The court properly declined to permit respondent's child life specialist to testify in her "professional

capacity" about how respondent had changed while participating in a supportive housing program because the witness was not an expert and could not opine on respondent's parental fitness (see Matter of Sara B., 41 AD3d 170, 171 [1st Dept 2007]). Respondent had agreed that the witness would limit her testimony to her relationship with respondent and the services respondent received, and respondent was permitted to testify about her own progress while residing in supportive housing (cf. Matter of Painter v Painter, 211 AD2d 993, 995 [3d Dept 1995] [court improperly precluded proof of respondent's alleged interference with petitioner's visitation rights]; Matter of Thomson v Battle, 99 AD3d 804, 806 [2d Dept 2012] [mother's due process rights were violated when she was not permitted to present any evidence]).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 24, 2019

CLERK