--- N.Y.S.3d ----, 174 A.D.3d 625, 2019 WL 3045177
(N.Y.A.D. 2 Dept.), 2019 N.Y. Slip Op. 05546

**1 In the Matter of Alena Raymond, Respondent,
v
Kednel Raymond, Appellant. (Proceeding No. 1.)
In the Matter of Kednel Raymond, Appellant,
v
Alena Raymond, Respondent. (Proceeding No. 2.)

Supreme Court, Appellate Division,
Second Department, New York
2018-02820, V-24719-11, V-24719-11A,
V-24719-14B, V-24719-16C
July 10, 2019

CITE TITLE AS: Matter of Raymond v Raymond

HEADNOTE

Parent, Child and Family
Custody
Increased Parental Access

David Laniado, Cedarhurst, NY, for appellant.
Melissa C. R. Chernosky, Jamaica, NY, for respondent.
Janet Neustaetter, Brooklyn, NY (Rachel J. Stanton and Diana Aragundi of counsel), attorney for the child.

In related proceedings pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Kings County (Maria Arias, J.), dated February 14, 2018. The order, after a hearing, granted the mother's petition for sole custody of the parties' child and denied the father's petition for increased parental access with the child.

Ordered that the order is affirmed, without costs or disbursements.

In 2011, after the parties separated, the mother filed a petition seeking sole custody of the parties' only child, who resided with her. The father initially was awarded parental access every weekend. He subsequently filed a petition seeking increased parental access. After a hearing, the Family Court granted the mother's petition and denied the father's petition. The father appeals, contending that the Family Court should have granted his request for a copy of a forensic report prepared by a court-appointed forensic evaluator, and that the court erred in admitting the forensic report into evidence.

The Family Court did not improvidently exercise its discretion in denying the request of the father, who proceeded pro se, for a copy of the forensic report prepared by the court-appointed forensic evaluator. The court provided the father with liberal access to the report over an extended period of time during which he could review the report upon request and take notes with regard to its contents (*see Matter of Isidro A.-M. v Mirta A.*, 74 AD3d 673 [2010]; *Matter of Morrissey v Morrissey*, 225 AD2d 779 [1996]; *Matter of Scuderi-Forzano v Forzano*, 213 AD2d 652 [1995]). The father has failed to show that his ability to prepare for the hearing was prejudiced by his not having his own physical copy of the report.

We also agree with the Family Court's determination to ***626** admit the forensic report into evidence. The parties received access to the report well in advance of the scheduled hearing, the forensic evaluator testified and was cross-examined by the parties at the hearing, the parties had the opportunity to rebut the forensic evaluator's findings, and the conclusions in the report were based primarily on the forensic evaluator's firsthand interviews rather than on hearsay statements made by nontestifying declarants (*see Straus v Strauss*, 136 AD3d 419 [2016]). Moreover, the court's determination to grant the mother sole custody and to deny the father's request for additional access was supported by ample evidence apart from the forensic report, which was one, but not the only or the controlling, factor in the court's decision. Mastro, J.P., Maltese, Connolly and Iannacci, JJ., concur.

172 A.D.3d 489, 100 N.Y.S.3d
241, 2019 N.Y. Slip Op. 03680

**1 In the Matter of Giovanni H.B., an Infant. Henry B., Appellant; Administration for Children's Services, Respondent; Orissa B., Respondent.

Supreme Court, Appellate Division,
First Department, New York
9273
May 9, 2019

CITE TITLE AS: Matter of Giovanni H.B. (Henry B.—Orissa B.)

HEADNOTE

Parent, Child and Family
Visitation
Visitation at Correctional Facility Where Father Incarcerated —Best Interests of Child

Andrew J. Baer, New York, for appellant.
Zachary W. Carter, Corporation Counsel, New York (Rebecca L. Visgaitis of counsel), for Administration for Children's Services, respondent.
Steven P. Forbes, Jamaica, for Orissa B., respondent.
John R. Eyerman, New York, attorney for the child.
Order, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about April 10, 2018, which, to the extent appealed from as limited by the brief, after a hearing, upon respondent father's request for visitation with the subject child (Giovanni), denied visitation at the correctional facility in which respondent is incarcerated and granted visitation via letters to be kept by petitioner agency, unanimously affirmed, without costs.

Respondent is incarcerated at the Coxsackie Correctional *490 Facility for the first-degree rape of his stepdaughter, Kayla, Giovanni's half-sister, in March 2014. Kayla was six years old at the time of the rape, and Giovanni, then approximately 18 months old, was in the home when the rape occurred. Respondent was sentenced to 12 years in prison, followed by 12 years of postrelease supervision, and a full stay-away order of protection through May 2034 was issued on Kayla's behalf.

Giovanni, who has not seen or spoken to his father since he was about two years old, has been diagnosed with autism spectrum disorder, and has cognitive and social deficits. Among other things, Giovanni becomes aggressive and defiant when there are changes to his routine. He has tantrums, tries to run away when taken out in public or on public transportation, is hyperactive, and suffers from anxiety.

Contrary to respondent's argument, the presumption that parental visitation is in the best interests of a child was overcome by the hearing evidence showing that visitation with respondent would not be in Giovanni's best interests (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]). The evidence demonstrates that, in view of respondent's heinous crime, the impact that visitation would have on Kayla and, in turn, on the close sibling relationship Giovanni enjoys with her could cause harm to Giovanni (*see e.g. Matter of Enrique T. v Annamarie M.*, 15 AD3d 310 [1st Dept 2005]; *Matter of Davis v Davis*, 265 AD2d 552 [2d Dept 1999]; *Matter of Rogowski v Rogowski*, 251 AD2d 827 [3d Dept 1998]).

We reject respondent's efforts to cast as irrelevant the likely effect that his visitation with Giovanni would have on Kayla. Even respondent argues that visitation determinations are based on the totality of the circumstances. Given the apparent significance of Giovanni's relationship with Kayla, the court properly considered the inevitably adverse effect on that relationship that would result from Giovanni's developing a relationship with Kayla's rapist.

Respondent asserts that he has taken steps to insure Kayla's best interests in connection with the visitation. However, the evidence demonstrates that the visitation itself would be severely adverse to Kayla's best interests. Moreover, the court appropriately took into account that certain aspects of this difficult situation were unknown or unknowable at the time of the hearing, and made the responsible decision to revisit the issue every six months.

Respondent's efforts to minimize the gravity of the physical and emotional disruption that Giovanni would suffer in connection with traveling to and from the correctional facility *491 show a lack of insight into Giovanni's special needs. Respondent's purported expertise comes from reading excerpts of the Merck Manual and pamphlets on autism. Respondent has not seen his son since Giovanni was a young toddler and, in contrast to the hearing witnesses, has no first-hand knowledge of the behavioral issues that

Giovanni has manifested since that time. Accordingly, the court appropriately gave great weight to the other witnesses' testimony on this issue (*see e.g. Matter of Grimes v Pignalosa-Grimes*, 165 AD3d 796 [2d Dept 2018], *lv denied* 32 NY3d 914 [2019]; *see also Matter of Toshea C.J.*, 62 AD3d 587 [1st Dept 2009]).

Respondent's arguments premised on petitioner's visitation policy are belied by the policy's recognition that visitation should occur only when it is "safe" and the policy's creation of an exception to visitation with incarcerated parents, even where the permanency goal is reunification, when visitation would "pose a risk to the child's physical or emotional safety" (*see also* Family Ct Act § 1030 [c]).

Respondent contends that the court erred in saying that visitation would be creating rather than rehabilitating his relationship with Giovanni, although he does not dispute that he has not seen Giovanni for years. While there was testimony that Giovanni was aware that he had a father, it was not clear that he understood that his father was respondent; moreover, witnesses testified that he never asked to see his father or inquired about his whereabouts. We reject respondent's attempt to blame the court system's delays for severing his relationship with Giovanni; it was, above all, his own, admitted criminal conduct that has precluded him from being involved in his son's life.

Respondent's arguments concerning letter visitation are also unavailing. The court did not actually deny letter visitation, but took the measured, reasonable approach of allowing respondent to continue to send letters that would be kept in agency files until more information from mental health professionals had been obtained. Nor was this an improper delegation of authority by the court. The order contemplates not that these professionals will decide whether respondent's correspondence should be read or given to Giovanni but that they will provide medical guidance to the court to enable it to decide the issue.

We have considered respondent's remaining arguments and find them unavailing. Concur—Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

171 A.D.3d 651, 99 N.Y.S.3d
286, 2019 N.Y. Slip Op. 03271

**1 In the Matter of Jose C., Respondent,
v
Janet V., Appellant, and Kristina M., Respondent.

Supreme Court, Appellate Division,
First Department, New York
9111
April 30, 2019

CITE TITLE AS: Matter of Jose C. v Janet V.

HEADNOTE

Parent, Child and Family
Custody
Extraordinary Circumstances

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.
John R. Eyerman, New York, for Jose C., respondent.
Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for Kristina M., respondent.
Dawne A. Mitchell, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.
Order, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about December 7, 2017, which, after a hearing, awarded petitioner father sole physical and legal custody of the subject child, unanimously affirmed, without costs.

*652 In a custody proceeding between a parent and a nonparent, the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other like extraordinary circumstances (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]). The burden is on the nonparent to prove the existence of extraordinary circumstances (*see Matter of Darlene T.*, 28 NY2d 391, 394 [1971]). A grandparent of a minor child may demonstrate extraordinary circumstances where there was a prolonged separation of the parent and child for at least 24 continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the grandparent's household. The court may find extraordinary circumstances exist even where the prolonged separation lasts for less than 24 months (Domestic Relations Law § 72 [2] [a], [b]).

The court properly found that the grandmother failed to demonstrate the requisite extraordinary circumstances. Although the child continuously lived with her for approximately three years, she failed to demonstrate that the father voluntarily relinquished control of the child. Indeed, a large portion of the separation between the father and the child occurred during the father's formal attempts to obtain custody, which does not rise to the level of extraordinary circumstances (*Matter of Male Infant L.*, 61 NY2d 420, 429 [1984]; *Matter of Landaverde*, 95 AD2d 29, 31-32 [1st Dept 1983], *affd* 61 NY2d 420 [1984]).

In any event, the totality of the circumstances demonstrated that the award of custody to the father was in the best interests of the child. There was no evidence that the father could not properly care for the child. Moreover, despite the grandmother's frustration of his visitation, he was willing to foster a relationship between the grandmother, the mother and the child (*Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). Concur—Friedman, J.P., Gische, Webber, Kahn, Oing, JJ.

167 A.D.3d 494, 91 N.Y.S.3d
7, 2018 N.Y. Slip Op. 08568

**1 In the Matter of Michael G., Respondent,
v
Katherine C., Appellant.

Supreme Court, Appellate Division,
First Department, New York
7895
December 13, 2018

CITE TITLE AS: Matter of Michael G. v Katherine C.

HEADNOTES

Parent, Child and Family
Custody
Modification—Evidentiary Hearing Necessary

*495

Parent, Child and Family
Visitation
Suspension of Contact with Mother

Parent, Child and Family
Custody
Mother Enjoined from Filing Future Petitions without Leave of Court

Robert Schnapp, New York (Anna V. Boudakova of counsel), for appellant.
Philip A. Greenberg, P.C., New York (Philip A. Greenberg of counsel, for respondent.
Karen Freedman, Layers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.
Order, Family Court, New York County (Machelle Sweeting, J.), entered on or about December 11, 2017, which granted the father's petition for modification of custody and awarded him sole legal and physical custody of the subject child, suspended respondent mother's access to the child for a year, and prohibited the mother from filing any modification petitions for a period of one year, unanimously modified, on the law, to strike that portion of the order which prohibited the mother access to the child for a period of one year, and remand the matter for further proceedings consistent with this order, and otherwise affirmed, without costs.

There were adequate allegations before the Family Court to support a finding of changed circumstances, triggering an inquiry into what modification of the parties' so-ordered custody and visitation agreement would best serve the child's best interests. These include the father's sworn statement that the mother had unilaterally prevented him from exercising his visitation under the parties' so-ordered custody agreement (*see Matter of Ruiz v Sciallo*, 127 AD3d 1205, 1206 [2d Dept 2015]), the statement by counsel for the Administration for Children's Services (ACS) that a report that the father had abused the child was unfounded, and the concerns raised by the father and the child's attorney that the mother had coached the then three-year-old child to make false allegations against the father. Those allegations were sufficient to support the entry of a temporary order transferring physical and legal custody to the father until such time as the court could hold the necessary evidentiary hearing and enter a final order determining custody.

However, the court erred when, without holding an evidentiary hearing, it made a final order transferring physical and legal custody to the father and suspending all contact between the mother and the child for a year. Determination of the child's best interests requires examination of the totality of the circumstances (*Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]). We have consistently held that "an evidentiary hearing is necessary before a court modifies a prior order of custody or visitation," even where the court is familiar with the parties and child, and particularly where there are facts in dispute (*Matter of Santiago v Halbal*, 88 AD3d 616, 617 [1st Dept 2011]). Furthermore, while we have stated that a hearing on modification of a custody arrangement in the child's best interests "may be 'as abbreviated, in the court's broad discretion, as the particular ***496** allegations and known circumstances warrant,' it must include an opportunity for both sides, and the children's attorney when there is one, to present their respective cases, and the 'factual underpinnings of any temporary order [must be] made clear on the record' " (*Shoshanah B. v Lela G.*, 140 AD3d 603, 607 [1st Dept 2016] [citation omitted]).

**2 Here, the court made a final determination without taking any testimony or entering any documents into evidence. The court's reliance on statements made by the ACS caseworker during a court conference was inappropriate, since the mother's attorney had requested, but was denied, a

full hearing at which counsel could have cross-examined the caseworker. There is no indication in the record that the court possessed sufficient information to determine how to modify the custody and visitation arrangement in order to best serve the child's interests. In particular, there was no evidence about whether the mother held a genuine belief that the father had harmed the child, as she asserted, or about whether she was presently willing and able to support the relationship between the child and his father, nor was she given an opportunity to make such a showing.

Moreover, there is no basis in the record for the court's determination that it was in the best interests of the parties' young child that he have no contact with his mother for a year, particularly since the mother had been the child's primary caretaker, and both the father and the child's attorney had asked that the mother have supervised visitation with the child.

Accordingly, the matter is remanded to the court for immediate further proceedings to reinstate access between the mother and child, which may include supervised and/or therapeutic visitation, and for a full hearing on a modified custody and visitation plan that will serve the best interests of the child.

The court also erred in prohibiting the mother from filing any future petitions for custody or visitation without leave of court for a period of one year when neither the father nor the child's attorney sought this relief. "[P]ublic policy mandates free access to the courts" (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 404 [1975]). We have held that, in an appropriate case, a court may enjoin a party from continuing to litigate certain claims without prior approval of the court "to prevent use of the judicial system as a vehicle for harassment, ill will and spite" (*Matter of Sud v Sud*, 227 AD2d 319, 319 [1st Dept 1996]; *see also* ***497** *Komolov v Segal*, 96 AD3d 513, 514 [1st Dept 2012]). However, here, there is no evidence that the mother had a history of relitigating the same claim or otherwise engaging in frivolous litigation against the father that might have made such a ruling appropriate (*see also Matter of Sullivan v Sullivan*, 40 AD3d 865, 867 [2d Dept 2007] [Family Court properly declined to enjoin father from filing further petitions where there was no showing that his earlier petitions were not based on his genuine concern for the child's welfare]).

We have considered the mother's other claims, and find them unavailing. Concur—Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

169 A.D.3d 1409, 92 N.Y.S.3d
787, 2019 N.Y. Slip Op. 00761

**1 In the Matter of Lakeya P., Respondent,
v
Ajja M., Appellant, and Edward M.
et al., Respondents. (Appeal No. 2.)

Supreme Court, Appellate Division,
Fourth Department, New York
1197, 16-01443
February 1, 2019

CITE TITLE AS: Matter of Lakeya P. v Ajja M.

HEADNOTES

Parent, Child and Family
Custody
Adjournment of Hearing Not Warranted

Parent, Child and Family
Custody
Award of Custody to Great Aunt—Extraordinary Circumstances

Parent, Child and Family
Visitation
Supervised Visitation—Family Court's Nondelegable Responsibility to Determine Visitation Rights

Parent, Child and Family
Custody
Mother Did Not Abuse Judicial Process

D.J. & J.A. Cirando, PLLC, Syracuse (Elizabeth DeV. Moeller of counsel), for respondent-appellant.
Robert A. Durr, County Attorney, Syracuse (Maggie Seikaly of counsel), for respondent-respondent Onondaga County Department of Children and Family Services.
John G. Koslosky, Utica, Attorney for the Children.
Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 31, 2016, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole legal and physical custody of Wade M. and Edward M.

It is hereby ordered that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph to the extent that it delegates authority to petitioner to determine the duration and frequency of respondent Ajja M.'s supervised visitation with the children and vacating the sixth ordering paragraph, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In appeal No. 1, respondent mother appeals from an order that, inter alia, terminated the placement of the four subject children with the Onondaga County Department of Children and Family Services (DCFS), which is the petitioner in appeal No. 1 and a respondent in appeal Nos. 2 and 3. In appeal No. 2, the mother appeals from an order that, inter alia, granted sole legal and physical custody of the youngest two subject children to petitioner Lakeya P., their aunt. In appeal No. 3, the mother appeals from an order that, inter alia, granted sole legal and *1410 physical custody of the oldest two subject children to petitioner Denise E., their great aunt.

The mother's contention in appeal No. 1 that Family Court erred by imposing in two prior permanency orders concurrent and contradictory permanency goals—i.e., directing that DCFS "concurrently" plan for the goal of permanent placement of the children with a relative as well as for the goal of reunification with the mother—is not properly before us inasmuch as the mother did not appeal from those permanency orders (*see generally Matter of Amollyah B. [Tiffany R.]*, 161 AD3d 1558, 1558 [4th Dept 2018]; *Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]). We therefore dismiss the appeal from the order in appeal No. 1 (*see generally Pethick v Pethick*, 90 AD3d 1696, 1696 [4th Dept 2011]; *Abasciano v Dandrea*, 83 AD3d 1542, 1542-1543 [4th Dept 2011]).

With respect to appeal Nos. 2 and 3, we reject the mother's contention that the court erred in denying her attorney's request for an adjournment when the mother failed to appear for the last day of trial. "It is well settled that the determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Sanchez v Alvarez*, 151 AD3d 1869, 1869 [4th Dept 2017]). Here, the mother's attorney requested an adjournment on the ground that the mother was being evicted from her apartment and thus could not appear in court that day. The mother's caseworker, however, testified that the

eviction had been pending for some time, and the attorney conceded that it did not appear that marshals had actually been dispatched to remove the mother from her apartment. In light of those facts, and the mother's history of leaving while the proceedings were in progress, we conclude that the court did not abuse its discretion in denying the request for an adjournment (*see Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]; *Matter of Sanaia L. [Corey W.]*, 75 AD3d 554, 555 [2d Dept 2010]).

We also reject the mother's contention that the record did not support a finding of extraordinary circumstances necessary to justify an award of custody to a nonparent. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of* ***1411** *Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998]; *see Matter of Braun v Decicco*, 117 AD3d 1453, 1454 [4th Dept 2014], *lv dismissed in part and denied in part* 24 NY3d 927 [2014]). A determination that extraordinary circumstances exist may be based on, inter alia, a parent's failure to address serious mental health issues (*see Matter of Thomas v Armstrong*, 144 AD3d 1567, 1568 [4th Dept 2016], *lv denied* 28 NY3d 916 [2017]; *Matter of Johnson v Streich-McConnell*, 66 AD3d 1526, 1527 [4th Dept 2009]).

Here, in determining that extraordinary circumstances existed, the court relied on the circumstances underlying the initial finding of neglect, including that the mother suffered from acute depression and reported suicidal thoughts but refused treatment and that, after the children's subsequent removal by DCFS, she admitted that her untreated mental health conditions made her incapable of caring for the children. The court further found that, in the nearly two years since the children's removal, the mother had "wholly failed" to "participate and progress" in needed mental health services. After reviewing the record, we conclude that the court properly determined that petitioners in appeal Nos. 2 and 3 (petitioners) met their burden of establishing the existence of extraordinary circumstances (*see Thomas*, 144 AD3d at 1568).

We agree, however, with the mother that the court erred in granting her only so much supervised contact as was "deemed appropriate" by petitioners. The court is "required to determine the issue of visitation in accord with the best interests of the children and fashion a schedule that permits a noncustodial parent to have frequent and regular access" (*Matter of Aida B. v Alfredo C.*, 114 AD3d 1046, 1049 [3d Dept 2014]). "In doing so, the court may not delegate its authority to make such decisions to a party" (*id.*), which the court did here by delegating to petitioners its authority to set a supervised visitation schedule. We therefore modify the orders in appeal Nos. 2 and 3 accordingly and remit the matter to Family Court to determine the supervised visitation schedule.

Finally, we agree with the mother that the court erred in ordering that any petition filed by the mother to modify or enforce the custody orders must have a judge's permission to be scheduled. "Public policy mandates free access to the courts" (*Matter of Shreve v Shreve*, 229 AD2d 1005, 1006 [4th Dept 1996]), and it is error to restrict such access without a finding that the restricted party "engaged in meritless, frivolous, or vexatious litigation, or . . . otherwise abused the judicial process" (*Matter of Otrosinka v Hageman*, 144 AD3d 1609, 1611 [4th Dept 2016]). Here, it is undisputed that the mother had ***1412** not commenced any frivolous proceedings. In the absence of such a finding, it was error for the court to restrict the mother's access to the court, and we thus modify the orders in appeal Nos. 2 and 3 by vacating the sixth ordering paragraph of each order (*see id.*; *Matter of Schermerhorn v Quinette*, 28 AD3d 822, 823 [3d Dept 2006]). Present—Whalen, P.J., Smith, Centra, NeMoyer and Curran, JJ.

170 A.D.3d 731, 96 N.Y.S.3d
60, 2019 N.Y. Slip Op. 01602

**1 In the Matter of Laquanda Parris, Respondent,
v
Isaac Wright, Appellant. (Proceeding No. 1.)
In the Matter of Isaac Wright, Appellant,
v
Laquanda Parris, Respondent. (Proceeding No. 2.)

Supreme Court, Appellate Division,
Second Department, New York
2017-06061, V-156-14, V-158-14, V-159-14
March 6, 2019

CITE TITLE AS: Matter of Parris v Wright

HEADNOTE

Parent, Child and Family
Termination of Parental Rights
Vacatur—Limited Access

Giovanni Fernandez Harswick, New Rochelle, NY, for appellant.
Pace Women's Justice Center, White Plains, NY (Laurie C. Epstein and Bryan Cave LLP [Eric Rieder and Matias Ricardo Manzano] of counsel), for respondent.
Stephen Kolnik, Yonkers, NY, attorney for the children.

In related proceedings pursuant to Family Court Act article 6, the father appeals from an order of the Supreme Court, Westchester County (IDV Part) (Susan M. Capeci, J.), dated April 4, 2017. The order, insofar as appealed from, after a hearing, in effect, denied the father's petition for parental access with the parties' children.

Ordered that the order is reversed insofar as appealed from, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Westchester County, for a new hearing, with all convenient speed, on the father's petition and a new determination thereafter.

The determination of parental access is within the sound discretion of the hearing court based upon the best interests of the child (*see Matter of Lane v Lane*, 68 AD3d 995, 996-997 [2009]; *Matter of Sinnott-Turner v Kolba*, 60 AD3d 774, 775 [2009]; *Cashel v Cashel*, 46 AD3d 501, 501 [2007]). Parental access is a "joint right of the noncustodial parent and of the child" (*Weiss v Weiss*, 52 NY2d 170, 175 [1981]; *see McGrath v D'Angio-McGrath*, 42 AD3d 440, 441 [2007]). The denial of parental access to a natural parent is "such a drastic remedy" that it should only be considered when there is substantial evidence that parental access would be "detrimental to the welfare of the child" (*Bubbins v Bubbins*, 136 AD2d 672, 672 [1988] [internal quotation marks omitted]; *see Matter of Dey v Minvielle*, 154 AD3d 750, 751 [2017]). Parental access with a noncustodial parent is presumed to be in the best interests of the child (*see Matter of Granger v Misercola*, 21 NY3d 86, 90 [2013]; *Matter of Grimes v Pignalosa-Grimes*, 165 AD3d 796, 797 [2018]; *Matter of* **732 *Irizarry v Jorawar*, 161 AD3d 863, 864 [2018]). However, the presumption may be overcome upon a showing, by a preponderance of the evidence, that parental access would be "harmful to the child's welfare or not in the child's best interests" (*Matter of Kadio v Volino*, 126 AD3d 1253, 1254 [2015]; *see Matter of Dey v Minvielle*, 154 AD3d at 751).

Here, a preponderance of the evidence failed to demonstrate that supervised parental access with the father would be harmful to the children or that the father forfeited his right to parental access. Thus, the order of the Supreme Court, in effect, denying the father's petition for parental access with the children is not supported by a sound and substantial basis in the record (*see Matter of Dey v Minvielle*, 154 AD3d at 751; *Matter of Nixon v Ferrone*, 153 AD3d 625, 627 [2017]; *Matter of Gonzalez v Ross*, 140 AD3d 869, 872 [2016]).

Moreover, to the extent the order directs counseling and/or compliance with prescribed medication as a pre-condition for the father's future parental access or re-application for parental access, the order is improper, as a court may not order counseling as a condition of future parental access or re-application for parental access (*see Matter of Lane v Lane*, 68 AD3d at 997; *Matter of Thompson v Yu-Thompson*, 41 AD3d 487, 488 [2007]; *Jordan v Jordan*, 8 AD3d 444, 445 [2004]).

Since more than a year has passed since the order was issued, a new hearing should be held on the father's petition. Scheinkman, P.J., Leventhal, Connolly and Brathwaite Nelson, JJ., concur.

End of Document

170 A.D.3d 862, 96 N.Y.S.3d
119, 2019 N.Y. Slip Op. 01777

**1 In the Matter of Adam Saylor, Respondent,
v
Joyelle Bukowski, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
2018-05995, V-4172-17
March 13, 2019

CITE TITLE AS: Matter of Saylor v Bukowski

HEADNOTE

Parent, Child and Family
Custody
Modification

Joyelle Bukowski, Coram, NY, appellant pro se.
Mary Beth Daniels, Sound Beach, NY, attorney for the child.
In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Suffolk County (Matthew G. Hughes, J.), dated March 23, 2018. The order, insofar as appealed from, granted the father's petition for sole custody of the parties' child.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

The parties, who were never married, have one child, born in 2012. For approximately the first three years of the child's life, the mother was the child's primary caregiver and permitted the father very limited contact with the child. In 2015, the father filed a parental access petition in the Family Court. In July 2015, the parties entered into a temporary stipulation of settlement wherein the father would have parental access three days a week. However, the mother failed to comply with the parental access schedule. Moreover, the mother made several false allegations that the father had physically and sexually abused the child. By making the false allegations, the mother exposed the child to unnecessary, invasive medical examinations and interrogations. On March 16, 2017, the father filed a petition for sole custody of the child. After a hearing, the court granted the petition, and the mother appeals.

"The paramount concern in any custody . . . determination is the best interests of the child, under the totality of the circumstances" (*Matter of* **863 *James M. v Kevin M.*, 99 AD3d 911, 912-913 [2012]; *see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). "The factors to be considered in making a custody determination include the parental guidance provided by the custodial parent, each parent's ability to provide for the child's emotional and intellectual development, each parent's ability to provide for the child financially, the relative fitness of each parent, and the effect an award of custody to one parent might have on the child's relationship with the other parent" (*Matter of Maraj v Gordon*, 102 AD3d 698, 698 [2013] [internal quotation marks omitted]; *see Matter of Estrada v Palacios*, 148 AD3d 804 [2017]). "Where, as here, a complete evidentiary hearing has been held on the issue of custody, any determination depends to a great extent upon the hearing court's assessment of the credibility of the witnesses and of the character, temperament, and sincerity of the parties. The credibility findings of the Family Court will be accorded great weight and its determinations regarding custody and [parental access] will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Felty v Felty*, 108 AD3d 705, 707 [2013] [citations omitted]; *see Matter of Gooler v Gooler*, 107 AD3d 712, 713 [2013]).

Here, the Family Court's determination awarding sole custody of the child to the father has a sound and substantial basis in the record. The mother consistently and continuously interfered with the father's parental access by not abiding by the parental access schedule. Furthermore, she interfered with the father's parental access by making false allegations that the father was physically and sexually abusing the child and by continuing to make new claims of abuse even though all other claims had been determined to be unfounded (*see David K. v Iris K.*, 276 AD2d 421, 422 [2000]; *Young v Young*, 212 AD2d 114 [1995]).

To the extent that the mother raises issues regarding the temporary custody order, those issues are academic. The order awarding the father temporary custody of the child was superseded by the order awarding him permanent custody, and the temporary order is no longer of any effect. Any alleged defect in the temporary order does not render defective the permanent order, which was based upon a full and fair hearing (*see Matter of Julian S. [Patricia L.]*, 121 AD3d 796, 797 [2014]; *Matter of Miller v Shaw*, 51 AD3d 927, 927-928 [2008]).

The mother's remaining contentions are without merit. Balkin, J.P., Austin, LaSalle and Iannacci, JJ., concur.

169 A.D.3d 892, 94 N.Y.S.3d
622, 2019 N.Y. Slip Op. 01207

**1 R.K., Appellant-Respondent,
v
R.G., Respondent-Appellant.

Supreme Court, Appellate Division,
Second Department, New York
11797/07, 2017-10388
February 20, 2019

CITE TITLE AS: R.K. v R.G.

HEADNOTE

Parent, Child and Family
Support
Modification—Appointment of Parenting Coordinator

Stephen Kolnik, Yonkers, NY, for appellant-respondent.
Cohen Rabin Stine Schumann LLP, New York, NY (Tim James of counsel), for respondent-appellant.
Lawrence S. Horowitz, White Plains, NY, attorney for the child.

In a matrimonial action in which the parties' marriage was annulled by a judgment dated November 8, 2012, the mother appeals, and the father cross-appeals, from an order of the Supreme Court, Westchester County (Janet C. Malone, J.), dated June 28, 2017, as amended by an order of the same court dated February 23, 2018. The order dated June 28, 2017, as amended, insofar as appealed from, after a hearing, directed that the mother's four weeks of summer parental access with the parties' child be nonconsecutive, directed that the father shall have parental access with the parties' child on the first three weekends of every month, directed that the mother shall pay 58% of the cost of a parenting coordinator, and authorized the parenting coordinator to resolve issues between the parties. The order dated June 28, 2017, as amended, insofar as cross-appealed from, in effect, denied that branch of the father's motion which was to modify the custody provisions of the judgment of annulment so as to award him sole physical and legal custody of the parties' child, and awarded him only certain parental access.

Ordered that the order dated June 28, 2017, as amended by the order dated February 23, 2018, is modified, on the law, on the facts, and in the exercise of discretion, by (1) deleting the provision thereof directing that the mother's four weeks of *893 summer parental access with the parties' child be nonconsecutive, (2) deleting the provision thereof directing that the father shall have parental access with the parties' child on the first three weekends of every month and substituting therefor a provision directing that the father shall have parental access with the parties'child on alternate weekends and one overnight visit per week during the year; (3) deleting the provision thereof directing that the mother shall pay 58% of the cost of a parenting coordinator and substituting therefor a provision directing that the parties shall share equally in paying the cost of a parenting coordinator; and (4) by deleting the provision thereof authorizing the parenting coordinator to resolve issues between the parties; as so modified, the order dated June 28, 2017, as amended by the order dated February 23, 2018, is affirmed insofar as appealed and cross-appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings to set forth a new parental access schedule consistent herewith.

The parties were married in 2006 and are the parents of one child (hereinafter the child), born in 2007. In 2007, the mother commenced an action for a divorce and ancillary relief against the father in which the father counterclaimed for an annulment. Pursuant to a judgment of annulment dated November 8, 2012, the parties' marriage was annulled, the mother was awarded sole legal and physical custody of the child, and the father was given parental access. Subsequently, the father moved, inter alia, to modify the custody provisions of the judgment of annulment so as to award him sole physical and legal custody of the child.

Following a hearing, the Supreme Court determined that, while the parties did not dispute that there had been a change in circumstances, the best interests of the child would not be served by either parent having sole legal custody of the child, and that the hostility between the parties precluded an award of joint legal custody. Nonetheless, the court awarded the parents "equal legal rights and responsibilities to the [c]hild." Among other things, the court directed that the mother's four weeks of summer parental access with the parties' child be nonconsecutive, directed that the father shall have parental access with the child on the first three weekends of every month beginning with timely pick up of the child on Thursday at the child's school or camp, or other mutually agreed upon location, with the child to be timely returned on Monday morning to the child's school or camp, or other mutually

agreed location. Additionally, the court directed the parents to retain a ***894** parenting coordinator, and directed the mother to pay 58% of the cost of the coordinator. The court also determined that if the parents could not reach a mutual agreement after consulting with the parenting coordinator, "the Parent with whom the parenting coordinator agrees shall make the final decision."

To modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances such that modification is required to protect the best interests of the child (*see Gentile v Gentile*, 149 AD3d 916, 918 [2017]; *Nusbaum v Nusbaum*, 106 AD3d 791, 793 [2013]; *Matter of Fallarino v Ayala*, 41 AD3d 714 [2007]). The best interests of the child are determined by a review of the totality of the circumstances (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Inasmuch as custody determinations depend to a great extent upon an assessment of the character and credibility of the parties and witnesses, deference is accorded to the hearing court's findings in this regard (*see Matter of McKenzie v Williams*, 165 AD3d 673, 674 [2018]; *Matter of Gooler v Gooler*, 107 AD3d 712 [2013]; *Matter of Harry v Harry*, 92 AD3d 883, 884 [2012]). The court's findings will not be disturbed unless they lack a sound and substantial basis in the record (*see Matter of McKenzie v Williams*, 165 AD3d at 674; *Matter of Gasby v Chung*, 88 AD3d 709 [2011]). Under the circumstances presented, the Supreme Court's determination, in effect, denying that branch of the father's motion which was to modify the custody provisions of the parties' judgment of annulment so as to award him sole physical and legal custody of the child has a sound and substantial basis in the record, and therefore, it will not be disturbed (*see Matter of Vargas v Gutierrez*, 155 AD3d 751, 752-753 [2017]; *see also Matter of Sullivan v Sullivan*, 40 AD3d 865, 866 [2007]).

However, we disagree with the Supreme Court's determination to direct that the father shall have parental access with the child on the first three weekends of every month. "The extent to which the noncustodial parent may exercise [parental access] is a matter committed to the sound discretion of the hearing court, to be determined on the basis of the best interests of the child" (*Chamberlain v Chamberlain*, 24 AD3d 589, 592 [2005]; *see Bluemer v Bluemer*, 47 AD3d 652, 653 [2008]). However, a parenting schedule that deprives the custodial parent of any significant quality time with the child is excessive (*see Matter of Sarfati v DeJesus*, 158 AD3d 807, 808-809 [2018]; *Matter of Rivera v Fowler*, 112 AD3d 835, 836 [2013]; *Chamberlain v Chamberlain*, 24 AD3d at 593). Here, the parenting schedule awarding the father parental access ***895** with the school-aged child, who was born in 2007, three weekends per month was excessive, as, given the respective work and school schedules of the mother and child, it effectively deprived the mother of any significant quality time with the child (*see Matter of Sarfati v DeJesus*, 158 AD3d at 809; *Matter of Patrick v Farris*, 39 AD3d 864, 865 [2007]; *Chamberlain v Chamberlain*, 24 AD3d at 592-593). Under the circumstances of this case, we find that it would be more appropriate for the father to have parental access with the child every other weekend, and one overnight per week (*see Matter of Sarfati v DeJesus*, 158 AD3d at 809; *Matter of Rivera v Fowler*, 112 AD3d at 837).

Furthermore, we agree with the mother that the Supreme Court should have set forth a more precise holiday parental access schedule (*see Matter of Alvarado v Cordova*, 158 AD3d 794, 795 [2018]; *Matter of Rodriguez v Silva*, 121 AD3d 794, 796 [2014]). Additionally, while the court awarded the mother four weeks of nonconsecutive summer parental access, it did not direct the father's four weeks of summer parental access to be nonconsecutive. It is unclear from the order whether the court intended the parties to have four consecutive weeks of summer parental access. Accordingly, we remit the matter to the Supreme Court, Westchester County, to set forth a new parental access schedule consistent herewith.

"In custody and visitation matters, a court may appoint a parenting coordinator to mediate between the parties and oversee the implementation of their court-ordered parenting plan" (*Matter of Headley v Headley*, 139 AD3d 855, 856 [2016]; *see Shannon v Shannon*, 130 AD3d 604 [2015]; *Silbowitz v Silbowitz*, 88 AD3d 687, 687-688 [2011]). "[I]n the absence of any clear indication that one party was more culpable than the other, the parties should share equally in paying the fees of the parenting coordinator" (*Raviv v Raviv*, 64 AD3d 638, 640 [2009]; *see Matter of Headley v Headley*, 139 AD3d at 857). In this case, since the record contains no indication that either party was less culpable, the parties should share equally the costs of the parenting coordinator (*see Matter of Headley v Headley*, 139 AD3d at 857). Additionally, "equally sharing these costs will help ensure that the parties take responsibility for their conduct and are equally vested in the outcome" (*id.*).

Finally, we modify the order by deleting the provision thereof authorizing the parenting coordinator to resolve issues

between the parties, inasmuch as this constitutes an improper delegation of the Supreme Court's authority to resolve issues affecting the best interests of the child (*see Matter of* ***896** *Edwards v Rothschild*, 60 AD3d 675, 678 [2009]; *see also Silbowitz v Silbowitz*, 88 AD3d at 688). Mastro, J.P., Roman, Hinds-Radix and Maltese, JJ., concur.

172 A.D.3d 1488
Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of JUDITH DD., Appellant,
v.
AHAVA DD., Respondent.

526653
|
Calendar Date: March 25, 2019
|
Decided and Entered: May 2, 2019

Synopsis

Background: Following suicide of their father, paternal grandmother filed petition for visitation with children. The Family Court, Ulster County, Savona, J., granted motion by mother and attorney for children to dismiss the petition at the close of grandmother's proof, and grandmother appealed.

Holdings: The Supreme Court, Appellate Division, Mulvey, J., held that:

Family Court's dismissal of paternal grandmother's petition for visitation with children following the suicide of their father, at the close of grandmother's proof and before hearing was complete, did not result in denial of grandmother's due process rights;

Family Court did not abuse its discretion when, in connection with grandmother's petition for visitation with children, it denied grandmother's request for mental health forensic evaluations of the parties and of children; and

determination that it was not in children's best interests to have visitation with grandmother had basis in the record.

Affirmed.

Attorneys and Law Firms

****117** Gloria Marchetti–Bruck, White Plains, for appellant.

Betty J. Potenza, Highland, for respondent.

Daniel Gartenstein, Kingston, attorney for the children.

Before: Egan Jr., J.P., Lynch, Clark, Mulvey and Devine, JJ.

MEMORANDUM AND ORDER

Mulvey, J.

***1488** Appeal from an order of the Family Court of Ulster County (Savona, J.), entered March 22, 2018, which, in a proceeding pursuant to Family Ct Act article 6, granted a motion by respondent and the attorney for the children to dismiss the petition at the close of petitioner's proof.

Respondent (hereinafter the mother) is the mother of the three subject children (born in 2006, 2007 and 2011). The father committed suicide in June 2017 after federal investigators discovered photographic proof that he sexually molested the youngest child. In August 2017, petitioner, the paternal grandmother (hereinafter the grandmother), commenced this proceeding seeking visitation with the three children. After the grandmother rested her case at the hearing, the attorney for the children moved to dismiss the petition. The mother joined the motion. Family Court granted the motion and dismissed the petition, finding that it was not in the children's best interests to have visitation with the grandmother. The grandmother appeals. We affirm.

For a grandparent to obtain court-ordered visitation, the court must first find standing on a statutory basis, such as death of a parent, and then determine if visitation is in the children's best interests (*see* Domestic Relations Law § 72[1]; *Matter of E.S. v. P.D.,* 8 N.Y.3d 150, 157, 831 N.Y.S.2d 96, 863 N.E.2d 100 [2007]). When determining whether visitation is in the children's best interests, factors for courts to consider include the nature and quality of the relationship between the grandparent and the children, the grandparent's ability to nurture the children, his or her attitude toward the custodial parent, reasons for any objections ***1489** to visitation and the children's preference (*see Matter of Wendy KK. v. Jennifer KK.,* 160 A.D.3d 1059, 1061, 74 N.Y.S.3d 139 [2018]; *Matter of Velez v. White,* 136 A.D.3d 1235, 1236, 25 N.Y.S.3d 733 [2016]). "Courts should not lightly intrude on the family relationship against a fit parent's wishes, as the presumption that a fit parent's decisions are in the child's best interests is a strong one" (*Matter of Vandenburg v. Vandenburg,* 137 A.D.3d 1498, 1499, 28 N.Y.S.3d 736 [2016] [internal quotation marks, brackets and citations omitted]). "When

deciding a motion to dismiss at the close of a petitioner's proof, the court must accept the petitioner's evidence as true and afford the petitioner every favorable inference that could reasonably be drawn from that evidence, including resolving all credibility questions in the petitioner's favor" (*Matter of David WW. v. Laureen QQ.,* 42 A.D.3d 685, 686, 839 N.Y.S.2d 839 [2007]; *see Matter of Mary BB. v. George CC.,* 141 A.D.3d 759, 760, 34 N.Y.S.3d 736 [2016]).

****118** We reject the grandmother's argument that she was deprived of due process by Family Court's dismissal of the petition before the hearing was completed. The grandmother complains that she did not have an opportunity to hear testimony from the children's therapist or the mother, yet she did not call either of them as witnesses when she presented her own case. We cannot say that the court abused its discretion in denying the grandmother's request for mental health forensic evaluations of the parties and the children (*see Matter of Yetter v. Jones,* 272 A.D.2d 654, 657, 706 N.Y.S.2d 782 [2000]; *Matter of Farnham v. Farnham,* 252 A.D.2d 675, 677, 675 N.Y.S.2d 244 [1998]). The court did not abuse its discretion by not holding a *Lincoln* hearing, especially considering that no party requested one (*see Matter of Burrell v. Burrell,* 101 A.D.3d 1193, 1195, 954 N.Y.S.2d 713 [2012]; *Matter of Farnham v. Farnham,* 252 A.D.2d at 677, 675 N.Y.S.2d 244).

On the merits, the grandmother had standing because the father was deceased (*see* Domestic Relations Law § 72[1]), leaving as the only contested issue whether visitation with the grandmother was in the children's best interests. Although, in the context of this motion, Family Court improperly made credibility determinations against the grandmother and her witnesses, the record supports the court's dismissal of the petition. The grandmother testified that she previously saw the children at large family gatherings and for a few hours once or twice a month when she would visit with them and the father. The grandmother testified that, when the mother first told her that the father sexually abused their daughter, the grandmother said she did not believe it and may have told the mother that she was making it up or coaching the child. The grandmother conceded that she had advised the mother, early in her ***1490** marriage, to leave the father and go to a domestic violence shelter based on abuse, but she now believes that the mother instigated the violence against herself. When two of her own sons were sexually abused as children, the grandmother did not contact police or confront the abusers. In response to allegations of sexual abuse by one of her daughters against the grandmother and her husband, the grandmother said that her daughter was mentally ill; at least one of the grandmother's other children refused to allow her children to be alone with the grandmother in light of these allegations. When asked whether her family experienced more than the normal amount of sexual abuse, the grandmother – who had been a licensed marriage and family therapist until she retired in 2016 – stated that she did not know.

Although the grandmother now believes that the father sexually abused his daughter, she still believes that he was a good father even though, in her words, he did some bad things. She wants to tell the children that he was a good father and he loved them. She qualified that she would only do this if she talked to their therapist first but, when asked if she would still push for it if the therapist said she should not, the grandmother testified that she did not know. The grandmother repeatedly sought access to speak to the children's therapist for information about them. In contrast to her views of the father, the grandmother testified that the mother was, at least in some ways, a "terrible" mother because she missed some appointments.

When the grandmother called to speak to the children at one point after the father's death, the mother put the children on the phone and allowed them to talk to the grandmother. The grandmother did not recall whether she had asked the ****119** mother about visitation at that time. The grandmother did not try to call the children again or call the mother to ask how they were doing. At the father's burial, the grandmother said hello to the children but did not embrace them or otherwise comfort them. In later discussions, the mother offered the grandmother visits in the office of the children's therapist or supervised by the mother, but the grandmother rejected those offers; the grandmother wanted overnight visits alone with the children at her residence in Connecticut. Notably, the record indicates that the children had never been left alone with her before. Despite having spent time with the children, she was unaware that the 12–year–old child was on the autism spectrum and needed special attention. The grandmother was 85 years old, did not drive, received personal assistance herself, had trouble ***1491** walking and acknowledged that the children are active, but wanted to visit alone. When asked about the children's need for therapy to address the trauma they experienced, the grandmother mentioned only their father's suicide; she did not mention the sexual abuse he had committed against the youngest child.

The other witnesses testified regarding the grandmother's previous interactions with the children and they saw no reason

why she should not have visitation, though none of them had ever seen her with the children without at least one parent present. Even accepting the grandmother's evidence as true, giving her every favorable inference that can reasonably be drawn from the evidence and resolving credibility in her favor, the evidence indicated that the grandmother was hostile to the mother, she had never watched the children by herself and she did not seem equipped to appropriately deal with these three young children. This record supports a determination that it is not in the children's best interests for them to have visitation with the grandmother (*see Matter of Wendy KK. v. Jennifer KK.,* 160 A.D.3d at 1061, 74 N.Y.S.3d 139; *Matter of Vandenburg v. Vandenburg,* 137 A.D.3d at 1499–1500, 28 N.Y.S.3d 736; *Matter of Velez v. White,* 136 A.D.3d at 1236, 25 N.Y.S.3d 733; *Matter of Articolo v. Grasso,* 132 A.D.3d 1193, 1194–1195, 18 N.Y.S.3d 767 [2015]).

Egan Jr., J.P., Lynch, Clark and Devine, JJ., concur.
ORDERED that the order is affirmed, without costs.

All Citations

172 A.D.3d 1488, 100 N.Y.S.3d 115, 2019 N.Y. Slip Op. 03420

172 A.D.3d 1493
Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of MAURO NN., Appellant,
v.
MICHELLE NN., Respondent.

526720
|
Calendar Date: March 22, 2019
|
Decided and Entered: May 2, 2019

Synopsis

Background: Father filed petition to modify child custody order. The Family Court, Rensselaer County, E. Walsh, J., sua sponte dismissed application. Father appealed.

Holdings: The Supreme Court, Appellate Division, Aarons, J., held that:

father's appeal as to oldest child was rendered moot by child turning 18 years old;

father was not required to demonstrate change in circumstances as threshold matter to obtaining modification;

father's failure to comply with portions of order requiring anger-management counseling did not preclude him from seeking modification of custody; and

record was insufficiently developed to allow for independent review, and thus remand for hearing was warranted.

Reversed and remitted.

Attorneys and Law Firms

****111** Philip J. Vecchio, East Greenbush, for appellant.

Jo M. Katz, Troy, attorney for the children.

Before: Garry, P.J., Mulvey, Aarons, Rumsey and Pritzker, JJ.

MEMORANDUM AND ORDER

Aarons, J.

***1493** Appeal from an order of the Family Court of Rensselaer County (E.Walsh, J.), entered August 8, 2017, which dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of three children (born in 2000, 2004 and 2006). The parties shared joint legal custody of the children pursuant to a January 2017 order entered on consent with the mother having primary physical custody and the father having visitation on certain weekends. The January 2017 order also directed, among other things, that the father complete anger management and co-parenting counseling. The father commenced this proceeding to modify the January 2017 order and a hearing ****112** was held. During the father's case-in-chief, Family Court interrupted the cross-examination of the father ***1494** and, on its own motion, dismissed his petition for failure to make a prima facie case. The court specifically noted that the father failed to show that he engaged in anger management counseling as required by a prior court order. This dismissal was embodied in an August 2017 order, from which the father now appeals. [1]

We conclude that Family Court erred when it dismissed the petition on its own motion on the basis that the father failed to prove a prima facie case. In view of the January 2017 order providing that either party could seek to modify it without having to demonstrate a change in circumstances, the father was not required, as a threshold matter, to show a change in circumstances to warrant a best interests examination (*see Matter of Rosenkrans v. Rosenkrans,* 154 A.D.3d 1123, 1124, 62 N.Y.S.3d 216 [2017]; *Matter of Andrea CC. v. Eric DD.,* 132 A.D.3d 1028, 1029, 17 N.Y.S.3d 514 [2015]). As such, the sole issue for the court was what custody arrangement would serve the best interests of the children (*see Matter of Rosenkrans v. Rosenkrans,* 154 A.D.3d at 1124, 62 N.Y.S.3d 216). That said, custody determinations generally should be made after a full and plenary hearing (*see S.L. v. J.R.,* 27 N.Y.3d 558, 563, 36 N.Y.S.3d 411, 56 N.E.3d 193 [2016]; *Matter of Richardson v. Massey,* 127 A.D.3d 1277, 1278, 6 N.Y.S.3d 727 [2015]).

At trial, the father submitted evidence concerning the amount of the middle child's "illegal tardies" at school, as well as disciplinary issues with him. The father also testified about instances where he had been denied his visitation with the children by the mother. In dismissing the petition on its own motion, however, Family Court relied solely on the fact that the father failed to comply with those parts of the January 2017 order directing him to complete certain counseling. The extent to which the father failed to comply with such dictates is certainly one factor to be considered in the best interests analysis (*cf. Matter of Hess v. Hess,* 243 A.D.2d 763, 765, 674 N.Y.S.2d 128 [1997]). The court, however, erroneously treated this as the sole dispositive factor (*see Matter of Lionel PP. v. Sherry QQ.,* 170 A.D.3d 1460, 1462, 2019 WL 1389155 [2019]). Furthermore, the record is not sufficiently developed to allow us to make an independent determination given that the court dismissed the father's petition in the midst of his case-in-chief and the mother was not given the opportunity to controvert the father's proof. Accordingly, the matter ***1495** must be remitted for a new hearing on the father's petition with respect to the two younger children. Based upon our determination herein, the father's remaining assertions are academic.

Garry, P.J., Mulvey, Rumsey and Pritzker, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Rensselaer County for further proceedings not inconsistent with this Court's decision.

All Citations

172 A.D.3d 1493, 100 N.Y.S.3d 110, 2019 N.Y. Slip Op. 03423

Footnotes

1 Given that the oldest child turned 18 years old during the pendency of this appeal, the father's appeal insofar as it pertains to the oldest child is moot (*see Matter of Troy SS. v. Judy UU.,* 140 A.D.3d 1348, 1350, 34 N.Y.S.3d 506 [2016], *lv denied* 28 N.Y.3d 902, 40 N.Y.S.3d 350, 63 N.E.3d 70 [2016]; *Matter of Hayes v. Hayes,* 128 A.D.3d 1284, 1285 n 2, 9 N.Y.S.3d 743 [2015]).

170 A.D.3d 1436, 96 N.Y.S.3d
745, 2019 N.Y. Slip Op. 02390

**1 In the Matter of Aaron OO., Appellant,
v
Amber PP., Respondent.

Supreme Court, Appellate Division,
Third Department, New York
525099
March 28, 2019

CITE TITLE AS: Matter of Aaron OO. (Amber PP.)

HEADNOTE

Parent, Child and Family
Visitation
Right to Counsel—Fact-Finding Hearing—Incarcerated Father Prejudiced by Less than Meaningful Representation

Todd G. Monahan, Schenectady, for appellant.
Timothy S. Brennan, Schenectady, for respondent.
Veronica Reed, Schenectady, attorney for the children.

Clark, J. Appeal from an order of the Family Court of Schenectady County (Powers, J.), entered March 9, 2017, which dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, for visitation with the parties' children.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of three children (born in 2006, 2009 and 2013). Incarcerated since 2013, the father is currently serving a prison sentence of 40 years to life. In January 2016, the father commenced the instant proceeding seeking visitation with the children. A fact-finding hearing was conducted over a period of roughly five months and included testimony from both the father and the mother. Notwithstanding that the Attorney for the Children "endorse[d] some form of visitation," Family Court ultimately dismissed the father's petition without prejudice, finding that visitation was inconsistent with the children's best interests "at th[at] time." The father appeals, arguing that Family Court's determination is not supported by a sound and substantial basis and that he received ineffective assistance of counsel.

Our review of the record reveals that this proceeding was so affected by errors and deficient representation that we cannot let Family Court's order stand. Initially, it is apparent from the record that counsel for both the father and the mother appeared to be confused as to who bore the burden of proof. We thus find it necessary to reiterate the burden of proof applicable in proceedings like this one. Visitation with a noncustodial parent, even one who is incarcerated, is presumed to be in the best interests of the children (*see Matter of Granger v Misercola*, 21 NY3d 86, 91 [2013]; *Matter of Kari CC. v Martin DD.*, 148 AD3d 1246, 1247 [2017]). That presumption, however, may be rebutted by demonstrating, by a preponderance of the **1437 evidence, that visitation with the incarcerated parent would, under all of the circumstances, be harmful to the children's welfare or contrary to their best interests (*see Matter of Granger v Misercola*, 21 NY3d at 91-92; *Matter of Samuels v Samuels*, 144 AD3d 1415, 1415 [2016]; *Matter of Kadio v Volino*, 126 AD3d 1253, 1254 [2015]). In other words, the incarcerated parent is not required to demonstrate that visitation is in the children's best interests; rather, it is the parent opposing prison visitation that bears the burden of rebutting the presumption favoring visitation (*see Matter of Granger v Misercola*, 21 NY3d at 91-92; *Matter of Leary v McGowan*, 143 AD3d 1100, 1101 [2016]).

Additionally, as noted by the Attorney for the Children on appeal, the record is inexplicably devoid of evidence regarding the children. Although the father did not bear the burden of proof, his counsel failed to elicit basic testimony relevant to the issue of whether visitation or some other form of contact was in the children's best interests, as it is presumed to be (*see Matter of Granger v Misercola*, 21 NY3d at 91; *Matter of Kari CC. v Martin DD.*, 148 AD3d at 1247). For example, the father's counsel did not inquire of the father or the mother about the nature of the father's relationship with the oldest two children prior to his incarceration. A *Lincoln* hearing was not discussed on the record, and there was absolutely no testimony that could inform a determination as to the presence, or absence, of a bond between the father and any of the children (*compare Matter of Robert SS. v Ashley TT.*, 143 AD3d 1193, 1194 [2016]; *Matter of Culver v Culver*, 82 AD3d 1296, 1299-1300 [2011], *appeal dismissed* 16 NY3d 884 [2011], *lv denied* 17 NY3d 710 [2011]). * The father's counsel instead spent an inordinate amount of time questioning the mother about her finances, which, although relevant (*see Matter of Samuels v Samuels*, 144 AD3d at 1416-1417; *Matter of Culver v Culver*, 82 AD3d at 1299-1300), was explored in such painstaking detail that it was to the exclusion of all other pertinent lines of questioning.

He also engaged in an exhaustive and irrelevant inquiry regarding the mother's child from a different relationship. In short, the father's counsel displayed an overall lack of focus and purpose in both advocacy and the presentation of evidence on the father's behalf.

Furthermore, it is clear from the record that the father and his counsel were at odds more often than not. On several occasions, ***1438** the father complained on the record that his counsel had not communicated, much less conferred, with him between appearances (*see Matter of Mitchell v Childs*, 26 AD3d 685, 687 [2006]). The father and his counsel also had disagreements on the record. Toward the end of the hearing, the father's relationship with his counsel had deteriorated to such a degree that he requested that his counsel be released from representing him "due to [counsel's] lack of communication and information on the case." Family Court granted this request, but not until after summations began.

Under the circumstances of this case, we find that the father was prejudiced by the less than meaningful representation afforded to him throughout the fact-finding hearing (*see Matter of Mitchell v Childs*, 26 AD3d at 687). Accordingly, we must reverse Family Court's order and, given the passage of time, remit the matter for a new hearing, as well as the assignment of new counsel to the father (*see Matter of Mitchell v Childs*, 26 AD3d at 687; *Matter of John JJ.*, 298 AD2d 634, 636 [2002]).

In light of our determination, we need not address whether Family Court's determination is supported by a sound and substantial basis in the record.

Garry, P.J., Lynch, Devine and Pritzker, JJ., concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Schenectady County for further proceedings not inconsistent with this Court's decision.

FOOTNOTES

Footnotes

* Without such proof, the record simply does not support Family Court's finding that there was no "existing parent-child bond between the [f]ather and any of the[ ] three children."

170 A.D.3d 1460, 96 N.Y.S.3d
733, 2019 N.Y. Slip Op. 02398

**1 In the Matter of Lionel PP., Respondent,
v
Sherry QQ., Appellant. (And
Three Other Related Proceedings.)

Supreme Court, Appellate Division,
Third Department, New York
526341
March 28, 2019

CITE TITLE AS: Matter of Lionel PP. v Sherry QQ.

HEADNOTE

Parent, Child and Family
Custody
Change in Circumstances—Child's Poor Academic Performance—Court Erred in Conditioning Father's Custody and Child's Relocation upon New School Enrollment

Bailey, Johnson, DeLeonardis & Peck, PC, Albany (Monique B. McBride of counsel), for appellant.
Susan J. Civic, Saratoga Springs, for respondent.
John J. LaBoda Jr., Saratoga Springs, attorney for the child.

Aarons, J. Appeal from an order of the Family Court of Saratoga County (Wait, J.), entered May 26, 2017, which, among other things, granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody and visitation.

*1461 Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the unmarried parents of a son (born in 2004). The father is presently married and lives in New York City with his four other children. The mother, who has taken care of the child since his birth, is also married and lives in Saratoga County. Pursuant to a December 2014 order, the parties had joint legal custody of the child with the mother having primary physical custody and the father having parenting time on three weekends of each month, as well as during school vacations. In July 2016, the father commenced the first of these proceedings by filing a modification petition seeking primary physical custody of the child and to relocate him from Saratoga County to New York City based on, among other things, the child's poor academic performance. The mother moved to dismiss the modification petition for failure to state a cause of action, which Family Court denied. Following a trial and a *Lincoln* hearing, the court, among other things, granted the father's petition and awarded him physical custody of the child and permitted the relocation to New York City contingent upon his enrollment in Harlem's Children Zone, Promise Academy for the 2017-2018 school year. The mother appeals.

As an initial matter, we reject the mother's argument that the father's petition failed to sufficiently allege a change in circumstances to warrant an evidentiary hearing. Nor do we agree with her claim that the father failed to establish a change in circumstances at trial. The record discloses that the child's academic performance declined, which the mother failed to adequately address, and that the child had to attend summer school, thereby leading to a disruption of the father's summer parenting time with the child. Based on the foregoing, as well as the continued deterioration of the parties' relationship, we find that the father met his threshold burden of establishing a change in circumstances since the entry of the December 2014 custody order so as to warrant a best interests of the child analysis (*see Matter of Porter-Spaulding v Spaulding*, 164 AD3d 974, 976 [2018]; *Matter of Gasparro v Edwards*, 85 AD3d 1222, 1223 [2011]; *Matter of Adams v Franklin*, 9 AD3d 544, 546 [2004]; *compare Matter of Cooper v Williams*, 161 AD3d 1235, 1238 [2018]).

The record reveals that both parents love the child and provide a suitable home environment for him. The mother testified that she lived in a five-bedroom house where the child had his own room, that the child had a good relationship with the mother's family members, who were also living in the household, and that the child would go on outings with them. The *1462 father testified that he lived in a secure neighborhood and that the family ate meals together during which they would talk about their days. The father also engaged in a variety of activities throughout New York City with his family, and the child got along with his siblings.

As to the child's academic performance, the record discloses that, while residing with the mother, the child's grades were inconsistent in that he would excel on one quiz and then receive a failing grade on a subsequent one. The child also sometimes did not turn in homework assignments or handed them in late, and he failed his English class. Even though the mother was aware of the child's struggles in English class, she did not get him extra help. The father testified that, because the child was required to attend summer school, his summer

parenting time was impacted. According to the father, the mother did not provide structure for the child. Meanwhile, the father testified that he intended to enroll the child in Promise Academy—a school that his other children attended and was around the corner from his residence. Promise Academy had small class sizes and exposed its students to a variety of programs and classes. The father stated that Promise Academy was familiar with him due to his active participation in its programs. The father further stated that he and his wife reviewed his children's homework to ensure that it was thoroughly completed and that the children assisted each other with their school work.

Family Court determined that it was in the best interests of the child to award the father physical custody of the child and to permit the child to relocate to New York City. In making this determination, we note that the court took into account the child's relationship with the family members in each parties' household, the child's current school and Promise Academy, the parties' relative fitness to provide a safe and healthy environment and the structure in each household to support the child's educational needs. The court, however, conditioned such change of custody and relocation upon the child's enrollment in Promise Academy for the 2017-2018 school year. In our view, by imposing such condition, the court erroneously elevated the child's matriculation at Promise Academy from one factor to be considered in the best interests analysis to the sole dispositive factor. Inasmuch as no one factor is dispositive (*see Matter of Perestam v Perestam*, 141 AD3d 757, 759 [2016]), the order must be reversed and a new hearing to be conducted on the father's modification petition within 20 days of this Court's decision.

***1463** Finally, this Court was advised at oral argument by the Attorney for the Child that the child is presently on a waitlist for Promise Academy but that there are other schools in New York City where the child could be enrolled. Although our authority is as broad as that of Family Court, given that the record is not sufficiently developed to make independent findings as to these other schools (*see Matter of Shirreece AA. v Matthew BB.*, 166 AD3d 1419, 1425 [2018]), the matter must be remitted for such purpose.

Egan Jr., J.P., Clark and Mulvey, JJ., concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Saratoga County for further proceedings not inconsistent with this Court's decision.

167 A.D.3d 1529, 90 N.Y.S.3d
774, 2018 N.Y. Slip Op. 08813

**1 In the Matter of Jennifer Rice, Respondent,
v
Michael Wightman, Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
1243, 16-02236
December 21, 2018

CITE TITLE AS: Matter of Rice v Wightman

HEADNOTES

Trial
Place of Trial
Demand for Change of Venue—Child Custody Proceeding

Parent, Child and Family
Custody
Sole Legal and Residential Custody to Mother

Parent, Child and Family
Visitation
Improperly Conditioning Continued Visitation upon Participation in Therapeutic Counseling

D.J. & J.A. Cirando, Esqs., Syracuse (Elizabeth DeV. Moeller of counsel), for respondent-petitioner-appellant.
M. Kathleen Curran, Canandaigua, Attorney for the Child.
Appeal from an order of the Family Court, Ontario County (James E. Walsh, Jr., A.J.), entered October 3, 2016, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent sole legal and residential custody of the subject child.

It is hereby ordered that the order so appealed from is unanimously modified on the law by vacating the sixth, seventh, and eighth ordering paragraphs, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In this Family Court Act article 6 proceeding, respondent-petitioner father appeals from an order that, inter alia, modified a prior custody and visitation order by awarding petitioner-respondent mother sole legal and residential custody of the subject child and limiting *1530 the father's visitation with the child to family therapy sessions. The father contends that Family Court abused its discretion in denying his motion to change venue from Ontario County to Seneca County. We reject that contention. At the time the mother commenced this proceeding in Ontario County, the father resided in that jurisdiction, and the prior order that the mother sought to modify was entered in Ontario County. Thus, venue was proper in Ontario County (*see* Family Ct Act § 171), and the father failed to demonstrate "good cause" for transferring this proceeding to Seneca County (§ 174; *see Matter of Bonnell v Rodgers*, 106 AD3d 1515, 1515 [4th Dept 2013], *lv denied* 21 NY3d 864 [2013]).

We further conclude that the father waived his contention that the mother failed to establish the requisite change in circumstances warranting an inquiry into the best interests of the child inasmuch as he also alleged in his cross petition that there had been such a change in circumstances (*see Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]). In any event, we agree with the mother that she established the requisite change in circumstances inasmuch as the father's relationship with the subject child has deteriorated since the prior order (*see id.*; *Cook v Cook*, 142 AD3d 530, 533 [2d Dept 2016]; *Matter of Filippelli v Chant*, 40 AD3d 1221, 1222 [3d Dept 2007]). Contrary to the father's related contention, we conclude that the court did not err in modifying the prior order inasmuch as "there is a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award [sole custody] to the [mother]" and to reduce the father's visitation (*Matter of Brewer v Soles*, 111 AD3d 1403, 1404 [4th Dept 2013]; *see Matter of Noble v Gigon*, 165 AD3d 1640, 1640-1641 [4th Dept 2018]).

We agree with the father, however, that the court erred in conditioning the father's visitation upon his participation in therapeutic counseling. "Although a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" (*Matter of Avdic v Avdic*, 125 AD3d 1534, 1535 [4th Dept 2015]). Here, the court erred in making participation in counseling the "triggering event" in determining visitation (*id.*). We further conclude that the court impermissibly delegated the decision to hold family therapy sessions to the father's and the child's therapists and therefore improperly gave the therapists the authority to determine

if and when visitation would occur (*see Matter of* ***1531** *Christina KK. v Kathleen LL.*, 119 AD3d 1000, 1004 [3d Dept 2014]; *Matter of Roskwitalski v Fleming*, 105 AD3d 1432, 1433 [4th Dept 2013]). We therefore modify the order by vacating the sixth, seventh, and eighth ordering paragraphs, and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation between the father and the subject child. Present—Smith, J.P., Carni, Lindley, DeJoseph and Winslow, JJ.

167 A.D.3d 1543, 90 N.Y.S.3d
785, 2018 N.Y. Slip Op. 08822

**1 n the Matter of Linda M. Jones, Respondent,
v
Shane Laubacker et al., Appellants.

Supreme Court, Appellate Division,
Fourth Department, New York
1278.1, 18-00903
December 21, 2018

CITE TITLE AS: Matter of Jones v Laubacker

HEADNOTES

Parent, Child and Family
Visitation Rights of Grandparents
Grandmother Responsible for Escalating Minor Incident into Full-Blown Family Crisis

Parent, Child and Family
Visitation Rights of Grandparents
Not in Children's Best Interests

Muscato, Dimillo & Vona, LLP, Lockport (Brian J. Hutchison of counsel), for respondents-appellants.
Rybak, Metzler & Grasso, PLLC, Batavia (Jacqueline M. Grasso of counsel), for petitioner-respondent.
Jake M. Whiting, Leroy, Attorney for the Children.
Appeal from an order of the Family Court, Genesee County (Sanford A. Church, A.J.), entered May 3, 2018, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner visitation with the subject children.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs and the petitions are dismissed.

Memorandum: Petitioner, the paternal grandmother of the subject children (grandmother), commenced this Family Court Act article 6 proceeding seeking visitation with the children. Following a hearing, Family Court determined, inter alia, that visitation with the grandmother was in the children's best interests. Even assuming, arguendo, that the grandmother established standing by demonstrating "circumstances in which equity would see fit to intervene" (*Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 181 [1991]; *see* Domestic Relations Law § 72 [1]), we agree with respondent father and respondent mother that the court's best interests determination lacks a sound and substantial basis in the record (*see Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1434 [4th Dept 2012]). We therefore reverse the order and dismiss the petitions.

On Sunday, June 25, 2017, the grandmother hosted brunch at her home. Almost every weekend prior to that date, the older of the two subject children (child) had at least one overnight visit at the grandmother's home, and then the parents would come to the grandmother's home for Sunday dinner. Present for brunch on June 25 were the parents, the child, and her uncle. Following brunch, the father and the uncle, who are brothers, engaged in a heated argument, which *1544 involved yelling. Before leaving, the father told the grandmother, "[N]o more weekends."

That same day, a report of child abuse or maltreatment was made to the Office of Children and Family Services (OCFS). The reporter's identity is confidential, per the normal protocol. We note, however, that the grandmother is an attorney, a longtime practitioner in Family Court, and an administrative law judge in OCFS. The report was investigated by Child Protective Services (CPS) and determined to be unfounded.

On Tuesday, June 27, the grandmother sent the father a text message, asking whether he would bring the child to her home the next weekend or whether she had to file a petition in Family Court. The father did not respond. The grandmother sent a similar text message to the mother, who responded that, per the advice of CPS, there would be no visitation until the investigation concluded. The mother advised the grandmother to contact the parents' attorney with any questions. On Wednesday, June 28, the grandmother filed a petition seeking visitation with the child every weekend from Friday at 10:00 a.m. to Sunday at noon. The petition accused the father of committing "an incident of domestic violence" on June 25, and noted that a CPS investigation of the incident "has commenced."

The first court appearance was July 14. The court asked the parents whether they were willing to allow temporary visitation with the grandmother. They were not. The next day, the uncle filed a police report accusing the father of assaulting him at the grandmother's home on June 25. According to the uncle, the father "picked up a chair and slammed it down" while the child's feet were under it. The child was unhurt.

The father was yelling. The uncle told him to go outside. The father asked the uncle "to come outside like he wanted to fight." The uncle refused and responded, " 'you go outside.' " The father "went to push" the uncle, but the uncle "knocked [his] arms away." The father yelled, threw "papers and hair bands," and stomped away. The uncle wanted the father to be "held accountable for his actions."

A police officer interviewed the grandmother, who urged him to arrest the father for harassment. She explained to the officer that she works for OCFS reviewing CPS reports, including cases of fatality, and that she believed the father was going to kill the child. She stated: "When we were in court yesterday, I could see he hasn't changed his mind or demeanor . . . We asked about [temporary visitation]. Nothing, okay? So, it was clear to me that he still doesn't feel anything he did was inappropriate ***1545** . . . ." The grandmother then gave her version of the incident, which was consistent with the uncle's version. The District Attorney declined to press charges.

On November 24, the younger of the two subject children (baby) was born. Shortly thereafter, the grandmother filed a second petition seeking visitation with the baby. The matter proceeded to a fact-finding hearing, after which the court ordered the parents to allow the grandmother to exercise visitation with the children two weekends per month. A Justice of this Court stayed execution of the order pending appeal.

It is well established that a fit parent has a "fundamental constitutional right" to make parenting decisions (*Troxel v Granville*, 530 US 57, 69-70 [2000]; *see Hilgenberg*, 100 AD3d at 1434). For that reason, the Court of Appeals has emphasized that "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one" (*Matter of E.S. v P.D.*, 8 NY3d 150, 157 [2007]; *see Hilgenberg*, 100 AD3d at 1434).

The parents here are fit. Although the court did not make an express finding with respect to their fitness in its decision, it looked favorably upon the parents. Specifically, the court referred to the child's family situation as "fortunate," discussed her "good relationships" with her parents, and praised the "strength of her nuclear family." Moreover, the record is sufficiently complete for us to make our own finding that the parents are fit (*see generally Matter of Belcher v Morgado*, 147 AD3d 1335, 1336 [4th Dept 2017]). Their counselor provided glowing testimony about the parents' relationship with each other and with their children. Furthermore, the maternal grandmother, a retired neonatal nurse, testified that the parents are "great parents," the child "adores them," and she has no concerns about their parenting. The parents both testified that they have a loving relationship and provide the children with appropriate support and discipline. There was virtually no evidence to the contrary.

Because the parents are fit, their decision to prevent the children from visiting the grandmother is entitled to "special weight" (*Troxel*, 530 US at 70). Additionally, our examination of the record reveals that their decision is founded upon legitimate concerns. The father testified that he expected the argument following brunch to be forgiven by the next weekend and for the family relationship to return to normal. In light of the CPS investigation and the litigation in Family Court, however, he no longer felt comfortable leaving the child with the ***1546** grandmother. The mother testified to her observation that the child's behavior has improved since she stopped visiting the grandmother, whom the mother believed to be a bad influence. The court wholly ignored that testimony by the parents, erroneously refusing to give it the weight to which it is entitled.

Additional factors for the court to consider in rendering a best interests determination include "whether the grandparent and grandchild have a preexisting relationship, whether the grandparent supports or undermines the grandchild's relationship with his or her parents, and whether there is any animosity between the parents and the grandparent" (*Hilgenberg*, 100 AD3d at 1433, citing *E.S.*, 8 NY3d at 157-158). Although the grandmother and the child have an extensive preexisting relationship, the grandmother exhibited a willingness to use her position in the legal system to undermine the parental relationship by initiating Family Court proceedings almost immediately, rather than making a good faith attempt to fix her family relationships without resorting to litigation. That evidence makes it difficult to draw any conclusion other than that the grandmother "is responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact [her] behavior would have on the [family relationships] and making no effort to mitigate that impact" (*Matter of Articolo v Grasso*, 132 AD3d 1193, 1195 [3d Dept 2015]).

There is now palpable animosity between the parties. Approximately three months after the litigation commenced, the parents legally changed their hyphenated surname to

remove the grandmother's surname. "I'm no longer part of that family," the father testified at the hearing. "[T]his is not how families act towards each other." Furthermore, there is evidence demonstrating that the grandmother and the uncle are an emotional trigger for the father. That evidence was corroborated by the testimony of the parents' counselor, who testified that the father is mild-mannered, but that he became upset with the grandmother because she "was very controlling." The grandmother eventually acknowledged the extent of the animosity that had developed in her family. During rebuttal, she testified that it would be better to pick the children up and drop them off at a neutral location. "After listening to [the parents]," she testified, "it's probably best that they don't come to the house. That seems like that's going to be stressful and difficult for everybody." Although animosity alone is not a sufficient reason to deny visitation (*see E.S.*, 8 NY3d at 157), here, the animosity threatens to disrupt the harmonious functioning of the family unit.

***1547** Thus, upon consideration of all the relevant factors, we conclude that visitation with the grandmother is not in the children's best interests and that the court's determination to the contrary lacks a sound and substantial basis in the record (*see Hilgenberg*, 100 AD3d at 1433-1434). Present—Whalen, P.J., Peradotto, NeMoyer, Curran and Troutman, JJ.

166 A.D.3d 1334, 88 N.Y.S.3d
637, 2018 N.Y. Slip Op. 07986

**1 In the Matter of BB.Z., Appellant,
v
CC.AA., Respondent. (Proceeding No. 1.)
(And Four Other Related Proceedings.)
In the Matter of CC.AA., Respondent,
v
BB.Z., Appellant. (Proceeding No. 3.)

Supreme Court, Appellate Division,
Third Department, New York
524266
November 21, 2018

CITE TITLE AS: Matter of BB.Z. v CC.AA.

HEADNOTE

Parent, Child and Family
Custody
Relocation in Child's Best Interests

Timothy S. Brennan, Schenectady, for appellant.
CC. AA., respondent pro se.
Rappazzo & Bauscher, PLLC, Schenectady (Rebecca M. Bauscher of counsel), attorney for the child.

Clark, J. Appeal from an order of the Family Court of Schenectady County (Powers, J.), entered November 29, 2016, which, among other things, granted petitioner's application, in proceeding No. 3 pursuant to Family Ct Act article 6, for permission to relocate with the parties' child.

**2 BB.Z. (hereinafter the mother) and CC.AA. (hereinafter the father) are the parents of a child (born in 2009). Pursuant to a December 2015 order, the father had sole legal and primary physical custody of the child and the mother had parenting *1335 time with the child once a week. In January 2016, the mother commenced the first of these proceedings seeking to enforce the parenting time provisions set forth in the December 2015 order. A few days later, the father was the victim of a violent attack and, as a result of ongoing safety concerns, he relocated with the child to a nearby state. Following the attack, the mother filed a modification petition alleging that the child was not safe in the father's care and requesting primary physical custody of the child. The father, in turn, filed a modification petition requesting permission to relocate with the child and a reduction of the mother's parenting time to once a month.

In July 2016, the mother filed a second enforcement petition alleging, among other things, that she had seen the child only three times since the father's relocation. Family Court thereafter conducted a fact-finding hearing, at which both the mother and the father testified. At the conclusion of the fact-finding hearing, Family Court reserved decision and, while the parties were awaiting Family Court's decision and order, the mother filed two more petitions to enforce the parenting time provisions in the December 2015 order. By a decision and order entered in November 2016, Family Court, among other things, granted the father permission to relocate, reduced the mother's parenting time to every other week, dismissed the mother's modification petition and, with respect to the mother's enforcement petitions, granted the mother make-up time for previously missed parenting time. The mother now appeals, arguing that Family Court's determination to permit the father to relocate with the child is not supported by a sound and substantial basis in the record and that Family Court should have instead awarded her primary physical custody of the child.

It is well settled that a custodial parent's proposed relocation provides the change in circumstances that is ordinarily necessary to modify an existing custody order (*see Matter of Perestam v Perestam*, 141 AD3d 757, 757-758 [2016]; *Matter of Gates v Petosa*, 125 AD3d 1161, 1161 [2015]; *Matter of Batchelder v BonHotel*, 106 AD3d 1395, 1396 [2013]). The parent seeking to relocate bears the burden of demonstrating, by a preponderance of the evidence, that the proposed relocation is in the child's best interests (*see Matter of Hammer v Hammer*, 163 AD3d 1208, 1209 [2018]; *Matter of Barner v Hampton*, 132 AD3d 1098, 1099 [2015]). A determination as to the best interests of the child involves consideration of a variety of factors, including "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child *1336 and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]; *accord Matter of*

Adams v Bracci, 91 AD3d 1046, 1047 [2012], *lv denied* 18 NY3d 809 [2012]).

At the fact-finding hearing, the father testified that he was violently attacked in January 2016 outside the presence of the child and that, because of his involvement in the criminal prosecution of his assailant, his assailant and the assailant's associates posed an ongoing threat to him and, by extension, the child. The father stated that, as a result, he no longer felt safe living in or visiting the area. He testified that, since relocating with the assistance of a local District Attorney's office, he had secured adequate housing for himself and the child, obtained gainful employment and enrolled the child in a new school, where she had successfully finished ****3** out the remainder of the school year. The father also stated that, in their new location, he and the child had a large support system—a factor that Family Court reasonably found to be an emotional enhancement to the child's life (*see Matter of Lori DD. v Shawn EE.*, 100 AD3d 1305, 1307 [2012]; *Matter of Weber v Weber*, 100 AD3d 1244, 1247 [2012]).

Like the father, the mother expressed concern for the child's safety, but she opposed the father's relocation with the child, stating that the father had brought the danger upon himself, and she requested primary physical custody of the child. However, the evidence established that the mother's living situation had not changed since entry of Family Court's December 2015 order, which was entered following a fact-finding hearing. Indeed, the mother's testimony demonstrated that she continued to live with her significant other, a registered level two sex offender who, pursuant to the December 2015 order, could not be present during the mother's parenting time with the child. Furthermore, the record established that the father had been the child's primary caretaker for nearly her entire life and that, as found by Family Court, the mother had "often foregone meaningful participation in the child's care." Finally, as recognized by Family Court, the distance between the mother's home and the father's new home was not so prohibitive that the mother's parenting time with the child had to be severely ***1337** curtailed, and the court's order directed the father to bear the personal and financial responsibility of arranging for the child's transportation to and from the mother's biweekly parenting time. Under all of these circumstances, we find a sound and substantial basis in the record to support Family Court's determination that the child's best interests would be served by permitting the father to relocate out of state with the child, rather than awarding the mother primary physical custody (*see Matter of Lynk v Ehrenreich*, 158 AD3d 1004, 1005-1007 [2018], *lv denied* 31 NY3d 909 [2018]; *Matter of Hoffman v Turco*, 154 AD3d 1136, 1137-1139 [2017]; *Matter of Cole v Reynolds*, 110 AD3d 1273, 1274-1276 [2013]). Accordingly, we find no basis to disturb Family Court's determination.

Garry, P.J., Devine, Aarons and Pritzker, JJ., concur. Ordered that the order is affirmed, without costs.

166 A.D.3d 480, 89 N.Y.S.3d
83, 2018 N.Y. Slip Op. 07929

**1 In the Matter of Michael B., Appellant,
v
Latasha T.-M., Respondent.

Supreme Court, Appellate Division,
First Department, New York
7762, 7763
November 20, 2018

CITE TITLE AS: Matter of
Michael B. v Latasha T.-M.

HEADNOTES

Parent, Child and Family
Visitation
Mother's Violation of Visitation Order

Parent, Child and Family
Custody
Custodial Parent's Relocation Constituted Change in Circumstances

Carol L. Kahn, New York, for appellant.
Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for respondent.
Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

Appeal from order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about August 4, 2017, which, after a hearing, inter alia, awarded primary physical custody of the subject child to respondent mother, unanimously dismissed, without costs, as abandoned. Order, same court and Judge, entered on or about December 13, 2017, which, to the extent appealed from as limited by the briefs, denied the father's petition *481 for modification of custody, unanimously reversed, on the law, without costs, and the petition granted to the extent of remanding the matter for a full hearing on the issue of whether it is in the child's best interests to relocate with his mother to Florida on a permanent basis. The schedule for the father's phone/email/electronic contact with the child and for his summer visitation set forth in the August 4, 2017 order shall remain in effect pending further order of the Family Court.

The appeal from the August 4, 2017 custody order is dismissed as abandoned, as petitioner father currently raises no challenge to that determination (*see e.g. Ifill-Colon v 153 E. 149th Realty Corp.*, 160 AD3d 583, 584 [1st Dept 2018]; *Dias v Stahl*, 256 AD2d 235, 237 [1st Dept 1998]).

On or about September 13, 2017, the father filed a petition for writ of habeas corpus and a petition alleging that the mother had violated the August 4, 2017 custody order in that he had not seen or heard from the child or the mother in two weeks. The Family Court issued a writ of habeas corpus dated September 13, 2017 directing the mother to produce the child in court on September 19, 2017. It appears that this never occurred.

On December 13, 2017, Family Court held a brief hearing at which the father testified in person and the mother testified by telephone from Florida. No other witnesses were called, and no documentary evidence was introduced. The mother alleged that she had gone to Florida on September 4, 2017 to visit her mother, learned two days later that she had been evicted from her Bronx apartment while she was in Florida, and claimed that her physician had advised her not to travel because she was in the final month of a high-risk pregnancy. The mother testified that she did not intend to return to New York.

Family Court properly found that the mother violated the August 4, 2017 order by intentionally relocating to Florida without the father's consent or permission of the court, and that this impaired the father's visitation rights. The court did not abuse its discretion in remedying this impairment by ordering that the father have visitation on particular dates during the child's upcoming winter and spring school breaks, and by directing the mother to pay for the child's travel expenses (*see Matter of Yeager v Yeager*, 110 AD3d 1207 [3d Dept 2013]). Accordingly, we decline to disturb Family Court's determination of the father's violation petition.

**2 Family Court correctly determined that the mother's testimony about her unilateral relocation constituted a change in circumstances, triggering an inquiry into whether the child *482 remaining in the mother's custody in Florida is in the child's best interests (*see Matter of Bennett v Abbey*, 141 AD3d 882, 885 [3d Dept 2016]). However, the court abused its discretion in making a final determination on that issue without a full hearing at which the parties and the child's attorney had an opportunity to present relevant evidence. The question of a child's relocation out of state necessarily

requires "due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Matter of Tropea v Tropea*, 87 NY2d 727, 739 [1996]). "[C]ustody and visitation decisions should be made "with a view toward minimizing the parents' discomfort and maximizing the child's prospects of a stable, comfortable and happy life" (*id*. at 740, 742). Relevant factors include the parties' good faith in requesting or opposing the move, the child's attachments to each parent, the quality of the life-style that the child would have if the proposed move were permitted or denied, the effect that the move may have on any extended family relationships, and whether a visitation plan can be achieved that permits the noncustodial parent to maintain a meaningful parent-child relationship (*id*.). In this case, since the father had raised concerns in his petition about the child's education, the parties should have had the opportunity to present evidence about this, in addition to other relevant factors.

We have considered the father's remaining arguments and find them unavailing. Concur—Acosta, P.J., Renwick, Mazzarelli, Gesmer, Singh, JJ.

167 A.D.3d 528, 91 N.Y.S.3d
429, 2018 N.Y. Slip Op. 09000

**1 In the Matter of Abel A., Respondent,
v
Imanda M., Appellant.

Supreme Court, Appellate Division,
First Department, New York
7956
December 27, 2018

CITE TITLE AS: Matter of Abel A. v Imanda M.

HEADNOTE

Parent, Child and Family
Custody
Vacatur of Default—Meritorious Defense

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.
Andrew J. Baer, New York, for respondent.

Order, Family Court, Bronx County (Lisa S. Headley, J.), entered on or about February 1, 2018, which denied the mother's motion to vacate the order of custody dated January 9, 2018, that, after an inquest and upon her default, awarded the father custody of the children, unanimously reversed, on the law, without costs, the motion to vacate granted, and the matter remanded for further proceedings in Family Court in accordance with this decision.

The parties, Abel A. (father) and Imanda M. (mother), are the parents of the two subject children. In July 2017, after 17 months of the parties' separation, the father consented that the mother have sole custody of the children and the parties entered into a visitation agreement before the same court. Three months later, in October 2017, the father filed a petition for custody, alleging that the mother was interfering with his parenting time.

Upon the mother's failure to appear at an inquest on the father's petition for custody of the children, Family Court issued a custody determination. The mother moved to vacate that order, and the court denied it. We now reverse.

While the decision to grant or deny a motion to vacate a default rests in the sound discretion of the court, "default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously" (*Matter of Dayon G. v Tina T.*, 163 AD3d 461, 462 [1st Dept 2018] [internal quotation marks omitted]; *see Matter of Sims v Boykin*, 130 AD3d 835, 835-836 [2d Dept 2015]; *see also Matter of Melinda M. v Anthony J.H.*, 143 AD3d 617, 618 [1st Dept 2016]; *compare Matter of Rodney W. v Josephine F.*, 126 AD3d 605 [1st Dept 2015], *lv dismissed* 25 NY3d 1187 [2015]).

Although the mother did not demonstrate a reasonable *529 excuse for her default in the change of custody case, she had a meritorious defense. The children have resided primarily with her, and insufficient evidence was submitted to make an informed change of circumstances determination (*see* Family Ct Act § 467 [b] [ii]) that serves the best interests of the children (*see Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]; *Matter of Dayon G.*, 163 AD3d at 462-463).

Also, the court failed to sua sponte appoint an attorney for the children, which, based upon the insufficient evidence it had to make an informed best interests determination, would have been advisable (*see Richard D. v Wendy P.*, 47 NY2d 943, 944-945 [1979]; *compare A.C. v D.R.*, 36 AD3d 465, 466 [1st Dept 2007]).

Under these circumstances, Family Court improvidently exercised its discretion in denying the mother's request to vacate the final custody order. Accordingly, we remit the matter to Family Court, Bronx County, for further proceedings on the father's petition for custody of the children (*see Matter of Dayon G.* at 463), and direct that an attorney for the children be appointed (*see Richard D.*, 47 NY2d at 944-945).

We have considered the remaining arguments and find them unavailing. Concur—Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

171 A.D.3d 841, 95 N.Y.S.3d 856
(Mem), 2019 N.Y. Slip Op. 02583

**1 Walter Verfenstein, Respondent,
v
Xi Verfenstein, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
200103/16, 2017-09700
April 3, 2019

CITE TITLE AS: Verfenstein v Verfenstein

HEADNOTE

Parent, Child and Family
Custody
Change of School

Law Office of Steven Cohn, P.C., Carle Place, NY (Susan J. Bereche of counsel), for appellant.
Wisselman & Associates, Great Neck, NY (Lloyd C. Rosen and Christine M. Settineri of counsel), for respondent.
In an action for a divorce and ancillary relief, the mother appeals from an order of the Supreme Court, Nassau County (Hope Schwartz Zimmerman, J.), dated August 10, 2017. The order denied the mother's motion for permission to enroll the parties' child in a private school in Manhattan.

Ordered that the order is affirmed, with costs.

The parties married in 2007, and in 2009 had one child together, who is biracial. The parties separated in 2010, at which time they agreed that the child would live with the mother in Queens. When the child began attending kindergarten, the parties agreed that the child would attend public school near the father's home in Port Washington, and would live in the father's home on weekdays during the academic year.

The father commenced this action for a divorce and ancillary relief in 2016. In August 2016, the mother, who had moved to Manhattan, moved for permission to enroll the child in the United Nations International School (UNIS) in Manhattan, contending that the child's educational and emotional well-being as a biracial child would be better suited by being in an ethnically and cultural diverse academic environment. In October 2016, the parties entered into a so-ordered stipulation *842 in which they agreed to joint legal and physical custody of the child, with parental access as agreed between the parties. The stipulation did not resolve the issue of the child's school enrollment, so the Supreme Court directed a hearing on the mother's motion and ordered a forensic examination of the child. The parties and the child's paternal grandfather testified at the hearing, and the forensic examiner's report was admitted into evidence. The court also conducted an in-camera interview of the child. In an order dated August 10, 2017, the court denied the mother's motion, and the mother appeals.

The court's paramount concern in any custody dispute is to determine, under the totality of the circumstances, what is in the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Klein v Theus*, 143 AD3d 984, 985 [2016]; *Matter of Gooler v Gooler*, 107 AD3d 712, 712 [2013]; *Matter of Julie v Wills*, 73 AD3d 777, 777 [2010]). Inasmuch as a court's custody determination is dependent in large part upon its assessment of the witnesses' credibility and upon the character, temperament, and sincerity of the parents, the court's exercise of its discretion will not be disturbed if supported by a sound and substantial basis in the record (*see Matter of Supangkat v Torres*, 101 AD3d 889, 890 [2012]; *Matter of Reyes v Polanco*, 83 AD3d 849, 850 [2011]).

A multicultural environment "properly [is considered] to be very important for a biracial child" (*Matter of Cisse v Graham*, 120 AD3d 801, 805 [2014], *affd* 26 NY3d 1103 [2016]). Here, however, the mother's contention that the child's intellectual and emotional well-being as a biracial child requires moving the child from the Port Washington school district to UNIS is not supported by the evidence. While the mother testified that she had looked into the diversity of the student body population in the Port Washington school district, she conceded that she did not know the percentage of biracial children attending UNIS. No evidence was presented that the child had been denied his biracial identity in the Port Washington school district, or that his status as a biracial child in that school district had hindered his academic or personal development. In addition, the mother conceded at the hearing that she had "no issues" with the Port Washington school district, and that the child had excelled academically at his current school. Accordingly, the Supreme Court's determination that it was not in the best interests of the child to change schools is supported by a sound

and substantial basis in the record (*see Matter of Davis v Davis*, 240 AD2d 928, 929 [1997]).

The mother's remaining contentions are without merit. The ***843** father's remaining contention is improperly raised for the first time on appeal. Accordingly, we agree with the Supreme Court's denial of the mother's motion for permission to enroll the child in UNIS. Rivera, J.P., Chambers, Cohen and Barros, JJ., concur.

174 A.D.3d 67
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Kwana NEWTON,
Petitioner-Respondent,
v.
Christopher MCFARLANE, Respondent;
Kaishawna M. (Anonymous), Nonparty-Appellant.

2017–13478
|
(Docket Nos. V-20779-10/16I, V-33124-10/16I)
|
Argued—January 7, 2019
|
June 05, 2019

Synopsis

Background: Child appealed from an order of the Family Court, Sharon A. Bourne-Clarke, J., granting mother's petition to modify a prior custody order, which had awarded father sole legal and physical custody of the child and had been affirmed by the Supreme Court, Appellate Division, 127 A.D.3d 119, 5 N.Y.S.3d 910, so as to award mother sole legal and physical custody of the child.

Holdings: The Supreme Court, Appellate Division, Scheinkman, P.J., held that:

child's attorney had authority to pursue appeal;

child was aggrieved by modification order;

trial court was required to address whether mother established change circumstances before holding a full custody hearing;

trial court was required to articulate its reasoning as to changed circumstances and best interests before modifying prior custody order;

appellate court would make its own determination as to whether modification was warranted rather than remitting to trial court;

changed circumstances did not exist to warrant a review of child's best interests; and

modification of prior custody order was not in child's best interests.

Reversed.

****449** APPEAL by the child, in a proceeding pursuant to Family Court Act article 6, from an order of the Family Court (Sharon A. Bourne–Clarke, J.), dated December 21, 2017, and entered in Kings County, which, after a hearing, granted the mother's petition to modify a prior order of custody of the same court (William Franc Perry, J.) dated November 14, 2013, so as to award her sole legal and physical custody of the child.

Attorneys and Law Firms

Karen P. Simmons, Brooklyn, N.Y. (Laura Solecki and Janet Neustaetter of counsel), attorney for the child, the nonparty-appellant.

Austin I. Idehen, Jamaica, NY, for petitioner-respondent.

Golding & Associates, PLLC, New York, N.Y. (Momodou Marong of counsel), for respondent.

ALAN D. SCHEINKMAN, P.J., RUTH C. BALKIN, SYLVIA O. HINDS–RADIX, LINDA CHRISTOPHER, JJ.

OPINION & ORDER

SCHEINKMAN, P.J.

*****1** ***70** This appeal raises several important issues pertinent to child custody determinations. We conclude that: (a) the attorney for the child has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child; (b) the child is aggrieved, for appellate purposes, by an order determining custody; (c) the Family Court should not have held a full custody hearing without first determining whether the mother had alleged and established a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by the existing custodial arrangement; and (d) the Family Court erred in failing to give due consideration to the expressed preferences of the child, who is a teenager.

For the reasons set forth below, the order appealed from should be reversed, and the mother's petition to modify a prior

order of custody so as to award her sole legal and physical custody of the child should be dismissed.

Relevant Factual and Procedural Background

In 2013, the Family Court awarded the father sole legal and physical custody of the parties' child, a female who was born in January 2002 and is currently 17 years old. This Court affirmed (*see Matter of McFarlane v. Newton*, 127 A.D.3d 1199, 1199–1200, 5 N.Y.S.3d 910). In February 2016, after commencing two prior unsuccessful custody modification proceedings, the mother commenced this third modification proceeding seeking sole legal and physical custody of the child. The Family Court, ***71** over the objection of the attorney for the child, proceeded to hold a full custody hearing without first addressing whether the mother had alleged a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by the existing custodial arrangement. The court also held in camera interviews with the child on October 25, 2016, and October 6, 2017.

After the hearing, the Family Court stated its conclusion that the mother had established the existence of sufficiently changed circumstances and that awarding sole custody to the mother was in the child's best interests; however, the court wholly failed to explain the bases for these conclusions in its order. The order merely stated:

> "The Court finds that the mother has demonstrated sufficient change in circumstance ****450** to warrant a best interests review by the court. Upon review of all the testimony heard and evidence received, the Court finds that it is in the best interest of the child to reside with the petitioner mother. As such the petition for modification is granted."

*****2** While the court added that a "[f]ull decision [is] to follow," no such subsequent decision was ever issued.

The child, by her court-appointed attorney, appeals, contending that the Family Court's determinations that there was a change in circumstances and that awarding custody to the mother was in the child's best interests lacked a sound and substantial basis in the record. While the father has not filed his own notice of appeal, the father, in his brief to this Court, supports the position taken by the attorney for the child. The mother, in opposing the appeal, contends that the attorney for the child lacks "standing" to appeal on the child's behalf and that the child is not aggrieved by the order changing custody.

On the motion of the attorney for the child, this Court stayed enforcement of the order appealed from pending determination of this appeal.

The Attorney for the Child Has Authority to Pursue the Appeal

We first address the mother's contention that the attorney for the child lacks "standing" to appeal on behalf of the child from the custody determination. Although the mother characterizes her argument as one challenging the standing of the attorney for the child to take the appeal, in actuality, she is arguing that the attorney for the child lacks authority to take ***72** this appeal on behalf of the child. This Court has, in the past, consistently entertained appeals in custody cases taken solely by the child, through the attorney appointed to represent that child (*see e.g. Matter of Noel v. Melle,* 151 A.D.3d 1065, 58 N.Y.S.3d 475; *Matter of Rodriguez–Donaghy v. Donaghy*, 138 A.D.3d 1123, 28 N.Y.S.3d 907; *Matter of Feldman v. Feldman*, 79 A.D.3d 871, 912 N.Y.S.2d 438), albeit without discussing the authority of the attorney for the child to take an appeal on the child's behalf.

Children who are the subject of custody proceedings often require the assistance of counsel to help protect their interests, to help them articulate their perspectives, positions, and wishes to the court, and to assist them with advice and information during the pendency of the proceedings (*see* Family Ct Act § 241; *see also* NYSBA Committee on Children and the Law, *Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings*, Jan. 2015, available at *https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55895* [last accessed May 15, 2019]). When an attorney is appointed by the court to represent a child in a contested custody proceeding,[*] that attorney must be afforded the same opportunity as the attorneys for the parents and other contestants to fully participate in the proceeding (*see Matter of White v. White,* 267 A.D.2d 888, 890, 700 N.Y.S.2d 537). An attorney appointed to represent a child in a custody proceeding has the duty and the obligation to zealously represent the child (*see Matter of Donna Marie C. v. Kuni C.*, 134 A.D.3d 430, 21 N.Y.S.3d 49). In order to fulfill that weighty responsibility, the appointed attorney for the child has the right, equal to the right of the attorneys for the litigants, to fully appear and participate in the litigation, ****451** including the right to call, examine, and cross-examine witnesses, and the right

to advance arguments on behalf of the child (*see Matter of Krieger v. Krieger*, 65 A.D.3d 1350, 886 N.Y.S.2d 463). These rights do not evaporate upon the conclusion of the case in the hearing court; rather, these rights may be protected and enforced by the taking of an appeal on behalf of the child (*see Matter of Michael S. v. Sultana R.*, 163 A.D.3d 464, 473, 82 N.Y.S.3d 364).

*****3** The right of an attorney appointed to represent a child to take an appeal on behalf of the child is confirmed by section 1120(b) of the Family Court Act. That statute provides that ***73** whenever an attorney has been appointed by the Family Court to represent a child, the appointment continues without the necessity of a further court order where the attorney files a notice of appeal on behalf of the child or where one of the parties files a notice of appeal. The statute thus recognizes that an attorney appointed by the Family Court to represent a child has the right to pursue an appeal on behalf of the child.

Matter of McDermott v. Bale, 94 A.D.3d 1542, 943 N.Y.S.2d 708, relied upon by the mother, supports our conclusion that the attorney for the child has authority to appeal on the child's behalf. In *McDermott*, the attorney for the child refused to join in a settlement stipulation agreed to by the parents. The Family Court approved the stipulation over the attorney for the child's objection, and the attorney, on behalf of the child, took an appeal from the resulting order. While the Appellate Division, Fourth Department, ruled that the attorney for the child could not unilaterally scuttle a proposed settlement by withholding consent, the Court entertained the appeal that was taken by the attorney on the child's behalf, and considered the arguments advanced by that attorney in opposition to the settlement.

We recognize that in *Matter of Lawrence v. Lawrence*, 151 A.D.3d 1879, 54 N.Y.S.3d 358 and *Matter of Kessler v. Fancher*, 112 A.D.3d 1323, 978 N.Y.S.2d 501, the Appellate Division, Fourth Department, dismissed appeals taken by the attorney for the child from orders dismissing custody modification petitions. In those cases, the parent whose petition was dismissed did not appeal. The Court reasoned that children could not compel their parents to litigate positions that the parents had elected to abandon. While we do not necessarily agree with the stated rationale, we do agree that it may be inappropriate to entertain litigation by a child for a change in custody where the parent to whom the custody of the child would be transferred is unwilling to accept the transfer. Likewise, it may be inappropriate to entertain litigation by a child to prevent a change in custody where the parent who has had custody is no longer opposed to the change. The present case does not present such a concern since the father, while not having filed and perfected his own appeal, has submitted a brief in which he urges reversal of the order from which the child has appealed. Further, since enforcement of the order has been stayed pending determination of this appeal, the father remains the custodial parent. Hence, this is not a circumstance where the child is attempting to compel a custody award in favor of an unwilling parent.

***74** We thus conclude that the attorney for the child has authority to take an appeal on behalf of the child from the custody determination made by the Family Court.

The Child Is Aggrieved by the Order Appealed From

The mother contends that the child is not aggrieved by the order changing ****452** custody and that, therefore, the child's appeal should be dismissed. We do not agree.

Aggrievement is an appellate concept which is designed to screen out appeals taken by those who have only a mere academic interest, or no interest at all, in the outcome (*see* Siegel & Connors, N.Y. Prac § 525 [6th ed 2018]; CPLR 5511 [only an aggrieved party may appeal an otherwise appealable paper]). "[A] person is aggrieved when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part" (*Mixon v. TBV, Inc.*, 76 A.D.3d 144, 156–157, 904 N.Y.S.2d 132 [emphasis omitted]; *accord Burro v. Kang*, 167 A.D.3d 694, 697, 90 N.Y.S.3d 298; *Finkelstein v. Lincoln Natl. Corp.*, 107 A.D.3d 759, 759, 967 N.Y.S.2d 733). Here, during the hearing, the attorney for the child opposed the mother's petition for sole custody and advocated for the father's continued custody, which position was based in large part on the child's clearly expressed preference to remain living with the father. In a technical sense, having sought and been denied different relief by the Family Court and having opposed the relief that was granted to the mother, the child should be considered aggrieved by the determination by the Family Court (*see e.g. Matter of Alexander Z. [Anne Z.]*, 151 A.D.3d 421, 421, 52 N.Y.S.3d 861 [stating that "the children may have been aggrieved by the order of disposition, which placed the children into their father's custody with supervision by petitioner agency for 12 months"]; *Matter of Angel D. v. Nieza S.*, 131 A.D.3d 874, 875, 16 N.Y.S.3d 724 [noting that "[t]o the extent the appellant child is aggrieved by the [custody] order, we find that the court's determination ... has a sound and substantial basis in the record" (citations omitted)]; *Matter*

of Baxter v. Borden, 122 A.D.3d 1417, 1418, 998 N.Y.S.2d 541 [assuming, arguendo, that "the [subject] children are aggrieved by the [custody] issue raised on appeal by the Attorney for the Children"]; *see also Matter of Denise V.E.J. [Latonia J.]*, 163 A.D.3d 667, 669, 82 N.Y.S.3d 140 [noting that the subject child was aggrieved by an order denying the child's motion to participate in person at a permanency hearing]).

*****4** Substantively, and more importantly, it cannot be denied that a teenaged child has a real and substantial interest in the ***75** outcome of litigation between the parents as to where the child should live and who should be entrusted to make decisions for the child. It seems self-evident that the child is the person most affected by a judicial determination on the fundamental issues of responsibility for, and the environment of, the child's upbringing. To rule otherwise would virtually relegate the child to the status of property, without rights separate and apart from those of the child's parents. As Chief Judge Charles D. Breitel stated in the landmark case of *Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 356 N.E.2d 277: "a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of ... constitutional magnitude." Among those rights is the child's right to have his or her best interests, and his or her position concerning those interests, given consideration by the court.

The suggestion that a child cannot be aggrieved by a decision to award sole custody to one of the parents against the child's wishes is also contrary to the policy reasons underlying the assignment of an attorney for the child. The assigned attorney is tasked with advocating for the child's wishes and best interests, precisely because the child has a real and vital interest ****453** in the outcome and a voice that should be heard. To that end, the Family Court Act makes clear that attorneys for children "often [are] indispensable to a practical realization of due process of law ... [as] children ... often require the assistance of counsel to help protect their interests and to help them express their wishes to the court" (Family Ct Act § 241).

We cannot accept the contention that the child is not aggrieved by the Family Court's order awarding sole custody to the mother despite the child's expressed preference that the father remain her custodial parent (*see Matter of Alexander Z. [Anne Z.]*, 151 A.D.3d at 421, 52 N.Y.S.3d 861; *Matter of Angel D. v. Nieza S.*, 131 A.D.3d at 875, 16 N.Y.S.3d 724; *Matter of Baxter v. Borden*, 122 A.D.3d at 1418–1419, 998 N.Y.S.2d 541).

The Family Court Should Not Have Held a Full Custody Hearing Without First Addressing Whether the Mother Had Alleged and Shown a Sufficient Change in Circumstances to Warrant an Inquiry into Whether the Child's Best Interests Were Served by the Existing Custodial Arrangement

The Family Court, over the objection of the attorney for the child, proceeded to hold a full custody hearing without first addressing whether the mother had alleged, and, if so, proven, a sufficient change in circumstances to warrant a full ***76** inquiry into whether the child's best interests were served by the existing custodial arrangement. This was error.

The standard for modification of an existing custody or parental access order is well known. "In order to modify an existing court-sanctioned custody [arrangement], there must be a showing of a subsequent change in circumstances so that modification is required to protect the best interests of the child" (*Henrie v. Henrie*, 163 A.D.3d 927, 928, 79 N.Y.S.3d 691; *see Matter of Feliciano v. King*, 160 A.D.3d 854, 855, 74 N.Y.S.3d 342; *Matter of Miller v. Shaw*, 160 A.D.3d 743, 744, 74 N.Y.S.3d 70; *Matter of Baalla v. Baalla*, 158 A.D.3d 676, 677, 71 N.Y.S.3d 138; *Weisberger v. Weisberger*, 154 A.D.3d 41, 50, 60 N.Y.S.3d 265). While hearings are generally required in cases in which there is no existing permanent order of custody (*see S.L. v. J.R.*, 27 N.Y.3d 558, 563, 36 N.Y.S.3d 411, 56 N.E.3d 193), hearings are not automatically required whenever a party seeks a change in custody or parental access (*see e.g. Matter of Feliciano v. King*, 160 A.D.3d 854, 74 N.Y.S.3d 342; *Matter of Resnick v. Ausburn*, 123 A.D.3d 728, 998 N.Y.S.2d 405; *Matter of Acworth v. Kollmar*, 119 A.D.3d 676, 989 N.Y.S.2d 612).

The existence of custody litigation, by itself, can create trauma and uncertainty for the child, as well as trauma, uncertainty, and expense for the parents. Repetitive applications for modification brought by disgruntled litigants in order to harass or vex their former spouses or domestic partners are not unheard of. Litigation over established court-approved child custody and access arrangements can be unsettling and traumatic for children, particularly for children of sufficient age or maturity to comprehend, and worry, about potentially significant changes in their daily lives, such as what home they live in, what family members they live with, what schools they go to, what friends they have, and what activities they undertake. The prospect of having to be interviewed by a judge, consult with counsel, be examined

by a forensic clinician, and deal with parents who are embroiled with each other in litigation, can create significant anxiety and stress, which, by itself, may be harmful to a child's development. While courts must be vigilant to assure that children are fully protected ****454** and their best interests secured, courts must also consider, in the context of modification petitions, whether an appropriate basis for judicial intervention has been appropriately articulated.

*****5** Before subjecting children and their parents to additional litigation, courts require that, before a full hearing is ordered, the parent seeking a change of custody must make an evidentiary showing of a change in circumstances demonstrating a ***77** need to conduct a full hearing into whether a change of custody is appropriate in order to insure the child's best interests (*see Henrie v. Henrie*, 163 A.D.3d at 928, 79 N.Y.S.3d 691; *Matter of Feliciano v. King*, 160 A.D.3d at 855, 74 N.Y.S.3d 342; *Gentile v. Gentile*, 149 A.D.3d 916, 918, 52 N.Y.S.3d 420). In determining whether such a change has occurred, the court should consider the totality of the circumstances (*see Matter of Edwards v. Edwards*, 161 A.D.3d 979, 75 N.Y.S.3d 596; *Matter of Moore v. Gonzalez*, 134 A.D.3d 718, 719, 21 N.Y.S.3d 292; *Matter of Connolly v. Walsh*, 126 A.D.3d 691, 693, 5 N.Y.S.3d 241).

Courts have dismissed modification petitions without a hearing where the allegations, even if assumed to be true, fail to set forth that a material change in circumstances has occurred between the making of the existing court order and the time of the modification application (*see Matter of Hugee v. Gadsden*, 172 A.D.3d 863, 100 N.Y.S.3d 297, 2019 N.Y. Slip Op. 03596, 2019 WL 2030127 [2d Dept. 2019]; *Matter of Valencia v. Ripley*, 128 A.D.3d 711, 9 N.Y.S.3d 112; *Matter of Besen v. Besen*, 127 A.D.3d 1076, 5 N.Y.S.3d 891; *Matter of Castagnini v. Hyman–Hunt*, 123 A.D.3d 926, 996 N.Y.S.2d 922; *Macchio v. Macchio*, 120 A.D.3d 560, 990 N.Y.S.2d 641; *Magee v. Magee*, 119 A.D.3d 658, 989 N.Y.S.2d 615; *see also Matter of Cruz v. Figueroa*, 132 A.D.3d 669, 132 A.D.3d 669). Hearings have been denied, and modification requests dismissed, where the allegations were conclusory and unsubstantiated (*see Matter of Feliciano v. King*, 160 A.D.3d 854, 74 N.Y.S.3d 342; *Nash v. Yablon–Nash*, 16 A.D.3d 471, 790 N.Y.S.2d 718) and where the allegations were before the court on a prior occasion and found wanting (*see Matter of Acworth v. Kollmar*, 119 A.D.3d 676, 989 N.Y.S.2d 612).

Here, before plunging full-bore into a contested custody hearing, the Family Court should have first considered whether the mother's petition for modification alleged sufficient facts which, if established, would have warranted a full inquiry into the existing custodial arrangement. There had been two prior modification petitions filed by mother. While neither of these petitions nor the orders resolving them were included in the original papers furnished to us on this appeal, these documents are in the records of the Family Court. We may, and do, take judicial notice of them. "[C]ourts may take judicial notice of a record in the same court of either the pending matter or of some other action" (*Caffrey v. North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 126, 73 N.Y.S.3d 70; *accord Chateau Rive Corp. v. Enclave Dev. Assoc.*, 22 A.D.3d 445, 446; *Matter of Allen v. Strough*, 301 A.D.2d 11, 18, 752 N.Y.S.2d 339).

In her first modification petition, dated October 24, 2014, the mother asserted that there was a change in circumstances ***78** based upon the allegation that the father had not been providing the mother with her rightful parental access with the child, and that the scheduled time for weekend parental access pickup of 6:30 p.m. was not suitable for the mother and the child because it caused them to return to the mother's home in New Jersey late in the evening. The resulting order, dated March 9, 2015, found that there had been no change in ****455** circumstances with respect to the prior order of custody, but it did direct that the mother's weekend visits with the child take place exclusively at a relative's home in New York and not at the mother's New Jersey residence.

In her second modification petition, dated September 28, 2015, the mother alleged that the discovery of explicit images on the child's phone constituted a change in circumstances that warranted a modification of the prior custody order. This second petition was dismissed by the Family Court in an order dated October 13, 2015, "due to [the] failure to state [a] cause of action." No appeal was taken from the order of dismissal.

*****6** The present petition, the mother's third attempt at modification, dated February 16, 2016, alleged that there had been a change in circumstances in that, while in the father's care, the child's hygiene and dental health were poor, she was not completing her homework and was getting into trouble at school, and she had shared semi-nude photographs of herself and of a boy via social media. The mother asserted that she was in possession of school records showing that "the child is in trouble and not getting the attention and guidance she needs," and that the child was sleeping on a blow-up mattress in the father's home.

Because the mother's second and third petitions were brought relatively close together and contained some similar, or overlapping, allegations, the Family Court should have more carefully evaluated the relevant circumstances before directing the commencement of an extensive evidentiary hearing. While it is true that child custody orders are generally not given res judicata effect (*see e.g. Matter of Estevez v. Perez*, 123 A.D.3d 707, 998 N.Y.S.2d 413) because they are subject to modification, in determining whether there is an appropriate predicate for modification, a primary consideration is whether there has been a change in circumstances since the order sought to be modified was made (*see Matter of Hugee v. Gadsden*, 172 A.D.3d 863, 100 N.Y.S.3d 297, 2019 N.Y. Slip Op. 03596; *Matter of Richard GG. v. M. Carolyn GG.*, 169 A.D.3d 1169, 94 N.Y.S.3d 644; *Matter of McKenzie v. Williams*, 165 A.D.3d 673, 85 N.Y.S.3d 205).

***79** Where a sufficient basis for conducting a modification hearing has been presented, the hearing itself is generally limited to events occurring after the conclusion of the last hearing or proceeding (*see Matter of Hugee v. Gadsden*, 172 A.D.3d 863, 100 N.Y.S.3d 297, 2019 N.Y. Slip Op. 03596; *Matter of DiCiacco v. DiCiacco*, 89 A.D.3d 937, 932 N.Y.S.2d 714). In this case, the Family Court, if a hearing was required at all, should have confined the scope of the testimony to the changes alleged to have occurred between the determination of the second modification petition and the filing of the third, at least until it was in a position to assess whether a material change in circumstances had occurred sufficient to warrant a full inquiry into whether the existing custody arrangement was in the child's best interests.

The Family Court Failed to Issue an Appropriate Decision and the Record Does Not Support the Existence of Changed Circumstances

We reiterate the oft-stated proposition that "[f]indings of the Family Court which have a sound and substantial basis in the record are generally entitled to great deference on appeal because any custody determination depends to a great extent on the court's assessment of the credibility of the witnesses and the character, temperament, and sincerity of the parties" ****456** (*Matter of Agyapon v. Zungia*, 150 A.D.3d 1226, 1227, 56 N.Y.S.3d 198; *see Matter of Guerra v. Oakes*, 160 A.D.3d 855, 856, 74 N.Y.S.3d 102; *Weisberger v. Weisberger*, 154 A.D.3d at 51, 60 N.Y.S.3d 265). Inherent in the proposition that a reviewing court will give deference to the findings made by the hearing court is that the hearing court issued either a written or oral decision setting forth its findings of fact and conclusions of law (*see* CPLR 4213[b]). No deference can be given to a decision which does not exist or to findings which were not made.

In this case, the Family Court stated only its conclusion that the mother had established changed circumstances and that awarding custody to the mother was in the child's best interests. Although the court promised that a full decision would follow, no decision was ever issued.

While the Family Court may well have intended to issue a decision at a later date, it should not have directed a change in custody without so much as even an oral articulation of its reasons for that direction. This case was not emergent, and even if it had been and the court had been unable to issue a ***80** timely written decision, the court could have placed an oral decision on the record and outlined the basis for its determination. The court failed in its duty to explain its reasoning as to both changed circumstances and best interests (*see Matter of Whitaker v. Murray*, 50 A.D.3d 1185, 1186–1187, 855 N.Y.S.2d 288; *Walash v. Walash*, 183 A.D.2d 1, 3, 589 N.Y.S.2d 51; *Moheban v. Moheban*, 149 A.D.2d 488, 540 N.Y.S.2d 717; *McDermott v. McDermott*, 124 A.D.2d 715, 508 N.Y.S.2d 467). The parties, the child, and their counsel were entitled to an explanation for the court's upending of the status quo. This Court, in evaluating the likelihood of success on the merits for purposes of the motion for a stay of the determination below, was left to puzzle at the basis for the action taken. Simply put, the Family Court's failure to explain its decision to vastly alter the life of a child by removing her from the home of the custodial parent with whom she had resided for approximately nine years is unacceptable.

*****7** The absence of a decision has made our appellate review of the determination appealed from more challenging and burdensome than it would otherwise be (*see e.g. McDermott v. McDermott*, 124 A.D.2d at 715, 508 N.Y.S.2d 467; *see also Matter of Whitaker v. Murray*, 50 A.D.3d at 1186, 855 N.Y.S.2d 288; *Matter of Machado v. Del Villar*, 299 A.D.2d 361, 751 N.Y.S.2d 489). Since this Court's authority is as broad as that of the hearing court (*see Matter of Nevarez v. Pina*, 154 A.D.3d 854, 855, 62 N.Y.S.3d 175; *Trimarco v. Trimarco*, 154 A.D.3d 792, 62 N.Y.S.3d 166; *Matter of Doyle v. Debe*, 120 A.D.3d 676, 680, 991 N.Y.S.2d 135), and since the record is adequate to permit our review and further delay is not in the interest of the child or the parties, we will not remit the matter to the Family Court for factual findings (*see Matter of Lewis v. Speaker*, 143 A.D.3d 822, 824, 39 N.Y.S.3d 200) and will, instead, make our own.

The record does not support the mother's assertion that the child's dental health and hygiene were poor. No evidence was offered as to the child's dental health. While the mother testified that the child's hygiene was "terrible" and that she was trying to teach the child those skills, these claims were refuted by the father.

Although the child had both academic and behavorial difficulties in school, these difficulties were of long-standing nature and were not due to any failings of the father. The father took appropriate steps to address the child's learning disabilities by working with her teacher and obtaining ****457** appropriate services for the child (*see Matter of Cooper v. Williams*, 161 A.D.3d 1235, 1238, 75 N.Y.S.3d 374 [father did not demonstrate ***81** a change in circumstances where the mother did not conceal one child's ADHD diagnosis and there was no evidence that the children's poor school performance was due to the custodial arrangement or failings of the mother]; *Matter of Tiffany H.-C. v. Martin B.*, 155 A.D.3d 501, 502, 65 N.Y.S.3d 34 [father failed to demonstrate a change in circumstances based on poor school performance where he failed to obtain information about the children's education and where the mother took appropriate steps to address the children's learning disabilities by working with the school and obtaining appropriate services]). The father had sought private counseling for the child based on the school counselor's recommendation, but the services ended because the child missed sessions while she was visiting the mother. The suggestion that the mother might do a better job with these school issues than the father was belied by an episode in which the mother, during a telephone discussion with a family counselor, admittedly cursed at the counselor, ending the discussion with the mother. The counselor continued sessions with the father and the child.

In sum, while the child struggled academically, her difficulties were neither new nor related to the father's parenting; on the contrary, the evidence strongly suggested that the child's academic challenges were long-standing and that the father had developed numerous effective strategies for helping the child and motivating her. Thus, the child's academic struggles did not constitute a change in circumstances (*see Matter of Cooper v. Williams*, 161 A.D.3d at 1238, 75 N.Y.S.3d 374; *Matter of Tiffany H.-C. v. Martin B.*, 155 A.D.3d at 502, 65 N.Y.S.3d 34).

The record establishes that the father responded appropriately to the discovery of the explicit photographs on the child's phone. When the father picked up the child after the visit during which the mother found the photos, he took away the child's phone and did not give it back to her for approximately five months. He also repeatedly discussed the seriousness of the issue with the child. He also discussed the incident with a private counselor, the school counselor, and the child's teachers. When the father returned the phone to the child, he did not enable Internet access or allow the child to password protect the phone. He also monitored the phone, and there have been no similar incidents. In contrast, although the mother was concerned that the child might again misuse Internet access, the mother did not take the phone away from the child, and had not tried to block Internet access or asked ***82** anyone else to do so. The mother was not even aware that parental control restrictions could be implemented, and did not know whether they were in place on the child's phone.

*****8** While the child's taking and/or distribution of explicit photos is a matter of concern given the way in which photos can spread on the Internet, the father's response to this incident was much more proactive. While this was a modern-age parenting challenge, there is nothing in the record to suggest that the father handled the situation inappropriately and certainly not to an extent that would constitute a change in circumstances warranting a review of custody (*see Matter of Koch v. Koch*, 121 A.D.3d 1201, 1202, 993 N.Y.S.2d 794 [father's ability, inter alia, to administer appropriate discipline supported award of custody to him]; *Matter of Danielle TT. v. Michael UU.*, 90 A.D.3d 1103, 1104, 933 N.Y.S.2d 449 [court properly awarded custody to mother who, inter alia, was more ****458** likely to follow through with disciplining the children]).

The mother also asserted that she had moved from a location in New Jersey that was approximately three hours from Manhattan to one that was only 45 minutes from Manhattan. The mother's move to a closer out-of-state residence did not constitute a change in circumstances warranting a review of the child's best interests (*see Matter of William O. v. John A.*, 151 A.D.3d 1203, 1204, 55 N.Y.S.3d 822).

The Family Court Erred in Failing to Give Due Consideration to the Teenaged Child's Expressed Preferences

Even assuming that the mother had carried her burden of establishing a change in circumstances, her requested modification of the prior order of custody was not in the child's best interests. The child was clearly well-established in her community in Brooklyn, where she had attended school

since second grade, had friends and family, and had a stable home life with the father and paternal grandmother (*see Weisberger v. Weisberger*, 154 A.D.3d at 54, 60 N.Y.S.3d 265 [maintenance of status quo, while not decisive, is a positive value entitled to great weight]; *Lieberman v. Lieberman*, 142 A.D.3d 1144, 1145, 38 N.Y.S.3d 81 [same]). Moreover, the record amply demonstrates that the father took an interest in the child's school performance, participating in individualized education program meetings, engaging a math tutor for her, and planning for her transition from middle to high school (*see Matter of Anderson v. Sparks*, 18 A.D.3d 656, 657, 795 N.Y.S.2d 631 [custody properly awarded to the father where, inter alia, he provided a stable home and enrolled the child in a ***83** school in which she was doing well, whereas the mother failed to demonstrate that the child would attend school if left in her care]). The record also establishes that the father was proactive in his response to the child's school behavior, including the completion of homework, whereas the mother relied on the father to enforce those rules (*see Matter of Edwards v. Rothschild*, 60 A.D.3d 675, 678, 875 N.Y.S.2d 155 [award of custody to the father was provident where the mother had a good relationship with the children but "had difficulty in setting boundaries and making mature decisions for them," and changing schools would be disruptive]).

The Family Court erred in failing to give due consideration to the expressed preferences of the child, who was 14 and 15 years old at the time of the proceedings in the Family Court, and who communicated a clear desire to remain in the father's custody. As stated in *Matter of Nevarez v. Pina,* 154 A.D.3d at 856, 62 N.Y.S.3d 175, "while not necessarily determinative, the child's expressed preference is some indication of what is in his or her best interests and, in weighing that factor, a court must consider the age and maturity of the child as well as the potential for influence having been exerted on the child." Similarly, in *Matter of Turvin v. D'Agostino*, 152 A.D.3d 610, 611, 58 N.Y.S.3d 155, this Court noted that a 15–year–old child's expressed preference is a relevant factor in determining the child's best interests in connection with issues of custody and relocation (*see e.g. Matter of Tofalli v. Sarrett*, 150 A.D.3d 1122, 1122, 56 N.Y.S.3d 184 [holding that the Family Court erred in failing to give due consideration to the expressed preferences of children who had demonstrated "maturity and ability to articulate their preferences"]; *Matter of Brownell v. Manemeit*, 142 A.D.3d 499, 500, 35 N.Y.S.3d 729 ["Particularly relevant in this case is the clearly stated preference of the child, especially considering her age and maturity"]; ****459** *Matter of Noonan v. Noonan*, 109 A.D.3d 827, 829, 971 N.Y.S.2d 158 [finding that the Family Court failed to adequately consider the child's expressed wishes regarding custody]; *Matter of Luo v. Yang*, 103 A.D.3d 636, 637, 959 N.Y.S.2d 255 [noting that the expressed preference of a 14–year–old child was a relevant factor in affirming a custody award]; *Matter of Manfredo v. Manfredo*, 53 A.D.3d 498, 500, 861 N.Y.S.2d 399 ["While the express wishes of the child are not controlling, they are entitled to great weight, particularly where the child's age and maturity would make his or her input particularly meaningful" (internal quotation marks omitted)]; *Matter of Ortiz v. Maharaj*, 8 A.D.3d 574, 575, 779 N.Y.S.2d 220 [noting that the ***84** stated preference of a 12–year–old child to live with his father was a relevant factor in a custody determination]).

Conclusion

*****9** Therefore, for the reasons set forth above, the order dated December 21, 2017, is reversed, on the law and the facts, and the mother's petition to modify the prior order of custody dated November 14, 2013, so as to award her sole legal and physical custody of the child is dismissed.

BALKIN, HINDS–RADIX and CHRISTOPHER, JJ., concur.
ORDERED that the order dated December 21, 2017, is reversed, on the law and the facts, without costs or disbursements, and the mother's petition to modify the prior order of custody dated November 14, 2013, so as to award her sole legal and physical custody of the child is dismissed.

All Citations

174 A.D.3d 67, 103 N.Y.S.3d 445, 2019 WL 2363541, 2019 N.Y. Slip Op. 04386

Footnotes

* We do not address here the circumstance of an attorney who has been privately retained by one of the adult litigants without court sanction (*see Davis v. Davis*, 269 A.D.2d 82, 711 N.Y.S.2d 663).