

## Cook v. Cook

142 A.D.3d 530 (N.Y. App. Div. 2016) · 36 N.Y.S.3d 222 · 2016 N.Y. Slip Op. 5743  
Decided Aug 10, 2016

08-10-2016

Donald J. COOK, respondent-appellant, v. Lynn A. COOK, appellant-respondent.

Jaspan Schlesinger LLP, Garden City, NY (Steven R. Schlesinger, Jeffrey D. Lebowitz, Katharine E. O'Dette, and Marissa J. Pullano of counsel), for appellant-respondent. Campagna Johnson, P.C., Hauppauge, NY (Thomas K. Campagna and Nicholas E. Arazoza of counsel), for respondent-appellant. Catherine Miller, Hauppauge, NY, attorney for the children.

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Jaspan Schlesinger LLP, Garden City, NY (Steven R. Schlesinger, Jeffrey D. Lebowitz, Katharine E. O'Dette, and Marissa J. Pullano of counsel), for appellant-respondent.

Campagna Johnson, P.C., Hauppauge, NY (Thomas K. Campagna and Nicholas E. Arazoza of counsel), for respondent-appellant.

Catherine Miller, Hauppauge, NY, attorney for the children.

CHERYL E. CHAMBERS, J.P., THOMAS A. DICKERSON, COLLEEN D. DUFFY, and HECTOR D. LaSALLE, JJ.

530 **Opinion** \*530 Appeal by the mother from an order of the Supreme Court, Suffolk County (Carol MacKenzie, J.), dated July 23, 2015, and appeal by the mother and cross appeal by the father from an order of that court dated August 18, 2015. The order dated July 23, 2015, insofar as appealed

from, denied that branch of the mother's motion which was to appoint a forensic evaluator to conduct an evaluation of the parties and their children. The order dated August 18, 2015, insofar as appealed and cross-appealed from, after a hearing, granted that branch of the father's petition which was to modify a settlement agreement dated May 3, 2012, which was incorporated but not merged into the parties' judgment of divorce dated September 25, 2012, so as to award him residential custody of the parties' child Jonathan, denied that branch of the father's petition which

531 \*531 was to modify the custody terms of the settlement agreement so as to award him residential custody of the parties' child Madison, and granted that branch of the father's motion which was to hold the mother in civil contempt for violating certain provisions of the settlement agreement and of a so-ordered stipulation of settlement dated August 8, 2013, regarding the father's telephone communication with the parties' children.

ORDERED that the order dated July 23, 2015, is affirmed insofar as appealed from, without costs or disbursements; and it is further,

ORDERED that the order dated August 18, 2015, is modified, on the law, (1) by deleting the provision thereof granting that branch of the father's motion which was to hold the mother in civil contempt for violating certain provisions of the settlement \*225 agreement dated May 3, 2012, which was incorporated but not merged into the parties' judgment of divorce dated September 25, 2012, and of the so-ordered stipulation of

settlement, dated August 8, 2013, regarding the father's telephone communication with the parties' children, and substituting therefor a provision denying that branch of the motion, and (2) by deleting the provision thereof denying that branch of the father's petition which was to modify the settlement agreement so as to award him residential custody of the parties' child Madison, and substituting therefor a provision granting that branch of the petition; as so modified, the order dated August 18, 2015, is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Suffolk County, for further proceedings to establish an appropriate visitation schedule for the mother with the parties' child Madison; and it is further,

ORDERED that pending the new determination, the mother shall have the same visitation schedule with the parties' child Madison as she currently has with the parties' child Jonathan.

The parties have two children, a son, Jonathan, born in May 2002, and a daughter, Madison, born in July 2005. In a settlement agreement dated May 3, 2012, which was incorporated but not merged into the parties' judgment of divorce dated September 25, 2012, the parties agreed that they would share joint legal custody of the children, that the mother would have primary residential custody of the children, and that the father would have visitation. The settlement agreement provided, inter alia, that “[e]ach party shall have the right to communicate with the children by telephone at all reasonable times and for reasonable periods of time when the children [are] with the other party and neither party shall interfere with or restrict \*532 or impair such right of communication.” The parties thereafter entered into a stipulation of settlement, dated August 8, 2013, which was so-ordered by the Supreme Court, which provided, inter alia, that “the parties agree to promote and encourage communication, via telephone or otherwise, between the children and the other parent.”

On or about April 23, 2015, the father filed a petition in the Family Court, Suffolk County, inter alia, to modify the custody provisions of the settlement agreement so as to award him sole custody of the children, with visitation to the mother. On or about June 4, 2015, the mother moved in the Supreme Court, Suffolk County, inter alia, to modify the custody provisions of the settlement agreement so as to award her sole custody of the children, with supervised visitation to the father, to consolidate the Family Court proceeding with the Supreme Court action, and for the appointment of a forensic evaluator to conduct evaluations of the parties and the children. Thereafter, the father moved in the Supreme Court, inter alia, to hold the mother in civil contempt for violating the provisions of the settlement agreement and the so-ordered stipulation of settlement directing that the parties had the right to communicate with the children by telephone at all reasonable times, that neither party shall interfere with, restrict, or impair such right of communication, and that the parties should promote and encourage communication between the children and the other parent.

In an order dated July 23, 2015, the Supreme Court, inter alia, granted the branch of the mother's motion which was to consolidate the Family Court proceeding with the Supreme Court action, denied the branch of the mother's motion which was to appoint a forensic evaluator to conduct \*226 evaluations of the parties and the children, and referred for a hearing the custody and visitation issues, and the branch of the father's motion which was to hold the mother in civil contempt. The mother appeals from the order dated July 23, 2015.

Following the hearing, in an order dated August 18, 2015, the Supreme Court, inter alia, awarded the father residential custody of the parties' son Jonathan, with visitation to the mother. The court determined that the mother should retain residential custody of the parties' daughter Madison. The court also granted the branch of the

father's motion which was to hold the mother in civil contempt because it determined that she had interfered with the father's telephone communication with the children. The mother appeals and the father cross-appeals from the order dated August 18, 2015.<sup>533</sup> The Supreme Court providently exercised its discretion in denying that branch of the mother's motion which was to appoint a forensic evaluator to conduct evaluations of the parties and the children, as the court possessed sufficient information to render an informed decision regarding custody consistent with the subject children's best interests (*see Matter of Keyes v. Watson*, 133 A.D.3d 757, 21 N.Y.S.3d 263 ; *Matter of Stones v. Vandenberg*, 127 A.D.3d 1213, 1215, 7 N.Y.S.3d 535 ; *McDonald v. McDonald*, 122 A.D.3d 911, 998 N.Y.S.2d 389 ; *Matter of Solovay v. Solovay*, 94 A.D.3d 898, 941 N.Y.S.2d 712 ).

“A party seeking the modification of an existing court-ordered child custody arrangement has the burden of demonstrating that circumstances have changed since the initial custody determination” such that modification is necessary to ensure the children's best interests (*Musachio v. Musachio*, 137 A.D.3d 881, 882–883, 26 N.Y.S.3d 591 ; *see Matter of Klotz v. O'Connor*, 124 A.D.3d 662, 662–663, 1 N.Y.S.3d 352 ). “In determining whether a custody agreement that was incorporated into a judgment of divorce should be modified, the paramount issue before the court is whether, under the totality of the circumstances, a modification of custody is in the best interests of the [children]” (*Matter of Honeywell v. Honeywell*, 39 A.D.3d 857, 858, 835 N.Y.S.2d 327 ; *see Anonymous 2011–1 v. Anonymous 2011–2*, 102 A.D.3d 640, 641, 958 N.Y.S.2d 181 ). To determine whether modification of a custody arrangement is in the best interests of the children, the court must weigh several factors of varying degrees of importance, including, inter alia, (1) the original placement of the children, (2) the length of that placement, (3) the children's desires, (4) the relative fitness of the parents, (5) the quality of the

home environment, (6) the parental guidance given to the children, (7) the parents' relative financial status, (8) the parents' relative ability to provide for the children's emotional and intellectual development, and (9) the willingness of each parent to assure meaningful contact between the children and the other parent (*see Anonymous 2011–1 v. Anonymous 2011–2*, 136 A.D.3d 946, 948, 26 N.Y.S.3d 203 ; *Cuccurullo v. Cuccurullo*, 21 A.D.3d 983, 984, 801 N.Y.S.2d 360 ).

Here, the father demonstrated a sufficient change in circumstances to warrant modification of the custody provisions of the settlement agreement so as to award him residential custody of Jonathan. The record supports the Supreme Court's determination that Jonathan's relationship with the mother has deteriorated since the prior custody arrangement was agreed to (*see Matter of Burke v. Cogan*, 122 A.D.3d 625, 626, 997 N.Y.S.2d 141 ; *Matter of \*227 Filippelli v. Chant*, 40 A.D.3d 1221, 1222, 836 N.Y.S.2d 314 ; *Matter of Maute v. Maute*, 228 A.D.2d 444, 643 N.Y.S.2d 225 ), and that the father exhibits a greater sensitivity to his emotional and <sup>534</sup> psychological needs, particularly with respect to the environment in Jonathan's new school (*see Matter of Dorsa v. Dorsa*, 90 A.D.3d 1046, 1047, 935 N.Y.S.2d 343 ). We discern no reason to disturb the court's determination that the father's testimony was more credible than the mother's testimony. Additionally, the attorney for the children advocated for residential custody to be awarded to the father, since Jonathan, who was 12 years old when the father's petition was filed, communicated a preference to reside with him. While the express wishes of a child are not controlling (*see Matter of Ross v. Ross*, 86 A.D.3d 615, 928 N.Y.S.2d 303 ; *Matter of Bond v. MacLeod*, 83 A.D.3d 1304, 921 N.Y.S.2d 671 ), the child's wishes should be considered and are entitled to great weight, where, as here, the child's age and maturity would make his input particularly meaningful (*see Matter of Coull v. Rottman*, 131 A.D.3d 964, 15 N.Y.S.3d

834 ; *Matter of Rosenblatt v. Rosenblatt*, 129 A.D.3d 1091, 12 N.Y.S.3d 230 ; *Koppenhoefer v. Koppenhoefer*, 159 A.D.2d 113, 558 N.Y.S.2d 596 ). Accordingly, the court's determination to modify the custody provisions of the settlement agreement so as to award the father residential custody of Jonathan has a sound and substantial basis in the record.

However, the Supreme Court's determination that the evidence did not demonstrate a sufficient change in circumstances warranting modification of the custody provisions of the settlement agreement so as to award the father residential custody of the parties' child Madison is not supported by a sound and substantial basis in the record. It "has long [been] recognized that it is often in the child's best interests to continue to live with his [or her] siblings" (*Eschbach v. Eschbach*, 56 N.Y.2d 167, 173, 451 N.Y.S.2d 658, 436 N.E.2d 1260 ), and "the courts will not disrupt sibling relationships unless there is an overwhelming need to do so" (*Matter of Lao v. Gonzales*, 130 A.D.3d 624, 625, 13 N.Y.S.3d 211 ; see *Matter of Shannon J. v. Aaron P.*, 111 A.D.3d 829, 831, 975 N.Y.S.2d 152 ). It is undisputed that Jonathan and Madison have a close relationship, and, based upon the recommendations of the children's therapist that they should not be separated, the position of the attorney for the children that they should remain with the same custodial parent, and evidence that the father demonstrated more of an ability and willingness to assure meaningful contact between the children and the mother, and to foster a healthier relationship between the children and the mother, than the mother would have fostered between the children and the father, the court should have awarded residential custody of Madison to the father (see *Eschbach v. Eschbach*, 56 N.Y.2d at 173–174, 451 N.Y.S.2d 658, 436 N.E.2d 1260 ; *Matter of Shannon J. v. Aaron P.*, 111 A.D.3d at 831, 975 N.Y.S.2d 152 ; *Matter of Pappas v. Kells*, 77 A.D.3d 952, 909 N.Y.S.2d 157 ; *Matter of Tori*

*v. Tori*, 67 A.D.3d 1021, 890 N.Y.S.2d 74 ).\*535 The Supreme Court also erred in granting that branch of the father's motion which was to hold the mother in civil contempt. In order to hold a party in civil contempt, the moving party must establish the following elements by clear and convincing evidence: " 'First, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. Second, it must appear, with reasonable certainty, that the order has been disobeyed. Third, the party to be held in contempt must have had knowledge of the court's order.... Fourth, prejudice to the right of a party to \*228 the litigation must be demonstrated' " (*Thimm v. Thimm*, 137 A.D.3d 775, 776, 28 N.Y.S.3d 693, quoting *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 29, 19 N.Y.S.3d 475, 41 N.E.3d 340 [citations, internal quotation marks, and brackets omitted]; see *Mollah v. Mollah*, 136 A.D.3d 992, 993, 26 N.Y.S.3d 298 ; *Wood v. Wood*, 134 A.D.3d 1028, 1029, 22 N.Y.S.3d 499 ). Here, the father failed to sustain his burden because the evidence did not establish that the mother's actions with respect to the father's telephone communication with the children violated an unequivocal mandate contained in the settlement agreement or the so-ordered stipulation of settlement (see *Matter of Hughes v. Kameneva*, 96 A.D.3d 845, 946 N.Y.S.2d 211 ; *Matter of Nelson v. Nelson*, 194 A.D.2d 828, 598 N.Y.S.2d 609 ; *Matter of Frandsen v. Frandsen*, 190 A.D.2d 975, 594 N.Y.S.2d 87 ).

We note that the joint record on appeal contains certain material that is de hors the record. We have not considered this material (see *Stanton v. Carrara*, 28 A.D.3d 642, 813 N.Y.S.2d 515 ; *Czernicki v. Lawniczak*, 25 A.D.3d 581, 806 N.Y.S.2d 876 ).

