

Pitkanen v. Huscher

167 A.D.3d 901 (N.Y. App. Div. 2018) · 90 N.Y.S.3d 249 · 2018 N.Y. Slip Op. 8661
Decided Dec 19, 2018

2017–09465 Docket Nos. V–15515–16, V–18939–16

12-19-2018

In the Matter of Donna PITKANEN, Respondent, v. Ryan HUSCHER, Appellant. (Proceeding No. 1) In the Matter of Ryan Huscher, Appellant, v. Donna Pitkanen, Respondent. (Proceeding No. 2)

Del Atwell, East Hampton, NY, for appellant. Brian A. Picarello, Islandia, NY, for respondent. Glenn Gucciardo, Northport, NY, attorney for the child.

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Del Atwell, East Hampton, NY, for appellant.

Brian A. Picarello, Islandia, NY, for respondent.

Glenn Gucciardo, Northport, NY, attorney for the child.

ALAN D. SCHEINKMAN, P.J., JOHN M. LEVENTHAL, JOSEPH J. MALTESE, VALERIE BRATHWAITE NELSON, JJ.

901 DECISION & ORDER*901 In related proceedings pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Suffolk County (Frank A. Tantone, J.), dated August 25, 2017. The order, after a hearing, granted the mother's petition for custody of the parties' child, denied the father's petition for custody of the child, and awarded the mother sole legal and residential custody of the child, with parental access to the father.

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

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 N.Y.2d 167, 171, 451 N.Y.S.2d 658, 436 N.E.2d 1260 ; *Matter of Klein v. Theus*, 143 A.D.3d 984, 985, 39 N.Y.S.3d 529 ; *Matter of Gooler v. Gooler*, 107 A.D.3d 712, 712, 966 N.Y.S.2d 208 ; *Matter of Julie v. Wills*, 73 A.D.3d 777, 777, 899 N.Y.S.2d 669). Further, "[a]lthough joint custody is encouraged as a voluntary alternative, it is appropriate only in cases where the parties involved are relatively stable, amicable parents who can behave in a mature, civilized fashion" (*Matter of Timothy M. v. Laura A.K.*, 204 A.D.2d 325, 325–326, 611 N.Y.S.2d 284 [internal quotation marks and citation omitted]). Inasmuch as a court's custody determination is dependent in large part upon its assessment of the witnesses' 251 credibility *251 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 A.D.3d 889, 890, 954 N.Y.S.2d 915 ; *Matter of Reyes v. Polanco*, 83 A.D.3d 849, 850, 922 N.Y.S.2d 104). Here, the Family Court's determination that the child's best interests would be served by awarding sole legal and residential custody to the mother has a sound and substantial basis in the record and will not be disturbed (*see Matter of Murphy v. Lewis*, 149 A.D.3d 748, 51 N.Y.S.3d 155 ; *Matter of Goodman v. Jones*, 146

A.D.3d 884, 886, 45 N.Y.S.3d 192 ; *Matter of McPherson v. McPherson*, 139 A.D.3d 953, 953, 30 N.Y.S.3d 705).

902 Contrary to the father's contentions, the Family Court's *902 parental access schedule does not excessively restrict his access to the child. The determination of access to a noncustodial parent is within the sound discretion of the hearing court, based upon the best interests of the children, and it should not be set aside unless it lacks a sound and substantial basis in the record (*see Matter of Dennis D. [Justesen]*, 83 A.D.3d 700, 702, 922 N.Y.S.2d 90). Here, the Family Court's parental access schedule has a sound and substantial basis in the record and will not be disturbed (*see Matter of McDaniel v. McDaniel*, 140 A.D.3d 1167, 34 N.Y.S.3d 499).

A respondent in a custody proceeding has the right to be represented by counsel (*see Family Ct Act § 262[a][iii]* ; *Matter of Moiseeva v. Sichkin*, 129 A.D.3d 974, 975, 13 N.Y.S.3d 123 ; *Matter of Belmonte v. Batista*, 102 A.D.3d 682, 682, 961 N.Y.S.2d 174), but may waive that right, provided that he or she does so knowingly, voluntarily, and intelligently (*see Matter of Stephen Daniel A. [Sandra M.]*, 87 A.D.3d 735, 736, 930 N.Y.S.2d 14). "In order to determine whether a party is validly waiving the statutory right to counsel, the Family Court must conduct a 'searching inquiry' to ensure that the waiver is knowing, voluntary, and intelligent" (*Matter of Osorio v. Osorio*, 142 A.D.3d 1177, 1178, 38 N.Y.S.3d 241, quoting *Matter of Jung [State Commn. on Jud. Conduct]*, 11 N.Y.3d 365, 373, 870 N.Y.S.2d 819, 899 N.E.2d 925 ; *see Matter of Rosof v. Mallory*, 88 A.D.3d 802, 802, 930 N.Y.S.2d 901 ; *Matter of*

Spencer v. Spencer, 77 A.D.3d 761, 761, 908 N.Y.S.2d 597 ; *Matter of McGregor v. Bacchus*, 54 A.D.3d 678, 679, 863 N.Y.S.2d 260). "While there is no rigid formula to be followed in such an inquiry, and the approach is flexible, the record must demonstrate that the party was aware of the dangers and disadvantages of proceeding without counsel" (*Matter of McGregor v. Bacchus*, 54 A.D.3d at 679, 863 N.Y.S.2d 260 [internal quotation marks and citation omitted]; *see Matter of Pugh v. Pugh*, 125 A.D.3d 663, 664, 2 N.Y.S.3d 608).

Here, the Family Court conducted a sufficiently searching inquiry to ensure that the father's clear and unequivocal waiver of his right to counsel was knowingly, voluntarily, and intelligently made (*see Matter of Graham v. Rawley* , 140 A.D.3d 765, 767, 33 N.Y.S.3d 371). The court advised the father of the dangers and disadvantages of giving up the fundamental right to counsel, and the father acknowledged his understanding of those perils and repeated his desire to proceed pro se (*see Matter of Ryan v. Alexander* , 133 A.D.3d 605, 606, 18 N.Y.S.3d 717). Accordingly, we agree with the court's determination to allow the father to represent himself. Contrary to the father's further contention, the court did not improvidently exercise its discretion in failing to provide stand-
252 by counsel which the father never *252 requested (*see People v. Pettus* , 22 A.D.3d 869, 870, 803
903 N.Y.S.2d 186 ; *903 *People v. Howell* , 207 A.D.2d 412, 413, 615 N.Y.S.2d 728).

SCHEINKMAN, P.J., LEVENTHAL, MALTESE and BRATHWAITE NELSON, JJ., concur.