

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X
E.C.,

Plaintiff,

Index No. 350414/2005

-against-

Decision
and
Order

F.C.,

Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

Background

This proceeding is to determine a single discreet issue in the larger context of a divorce. It has already been agreed between the parties that the Mother (plaintiff) shall serve as the custodial parent of the two children of the marriage. The specific issue is whether the custodial parent, in addition to attendant day-to-day decision making, shall also have final decision making authority on “major” issues in the lives of the children, when, after mutual consultation between the parents, agreement cannot be reached, or whether the parties shall have some sort of alternative arrangement. The Court and parties consider major issues to include, inter alia, education and school related activities, health, religion (if applicable), and vacations of any considerable duration. The determination of how these issues are to be decided, shall be integrated into the terms already set forth in a prior stipulation which addresses times for the children to spend with their Father (defendant).

The parties have two sons, M. (12) and A. (9). Both boys live in Manhattan with their Mother, and spend alternate weekends and one weekday dinner with their Father who resides in Brooklyn. M., though extremely intelligent, is multiply disabled, or “a special needs child;” he requires, and will always require, special education and accommodations, as well as constant attention to his physical and other functions. At the age of 12, M. is unable to care for his basic bodily needs. He cannot take charge of his sanitary hygiene and must be bathed several times a day. When he is at home, all care is provided by the Mother. Despite his intelligence which permits him to read extensively, including The New York Times every day, his ability to communicate is impaired and it is difficult for others to understand him.

A.’s development and needs are in conformity with those of other boys his age. He is a good student and a thriving fourth grader at a public school in Manhattan.

Trial and Discussion

The only witnesses at trial were the two parents.¹ Both are college educated, thoughtful people and the Court appreciates that they both love their children and care very much about their needs and best interests. But the Court had an opportunity to observe both parties. To the extent that they even look at each other, it is with stony

¹Counsel have not provided the Court with page references to the trial transcript.

silence. Mr. C. alluded to serious mistakes made by the Mother regarding the children about which he is clearly very angry, and for which he blames her, but the underlying facts were not presented at trial. Therefore, while the Court may consider the observable, unambiguous hostility, the underlying acts cannot be the subject of speculation. Moreover, Mother has credibly accused Father of such acts as locking her and the children out of the marital home, and refusing to make his car available for transporting the children during New York's Transit strike.

With history as a guide, both parents recognize that inevitably, issues will arise over which they disagree. Ms. C. seeks the right to make parental decisions when there is an issue in dispute that cannot be reasonably resolved in a reasonable amount of time, after consultation with Mr. C., with each parent having had an opportunity to be heard by the other. The Father prefers that if the parents cannot agree, then a third party "decider," or "tie-breaker" or "coordinator," be retained.

While theoretically appealing, joint decision making after divorce, is unworkable where the parents do not have an easy flow of communication as is obviously the situation here. Joint decision-making cannot be forced on hostile and on antagonistic parents (See Matter of Bishop v. Lansley, 106AD2d 732, 733 [3rd Dept 1984]). It also requires that the parties be able to reach agreement. Yet the issue here is what happens

when the parents cannot reach agreement, that joint decision making, as an “...alternative for relatively stable, amicable parents behaving in a mature civilized fashion...” but requiring cooperation for such an arrangement. (Trapp v. Trapp,² 136 AD2d 178 [1st Dept 1988]), citing Braiman v. Braiman, 44 NY2d 584 [1978].

Even though he urges joint decision-making, the Father’s actual preference is for a paid outside “umpire.” When, with the consent of counsel, the Court asked Mr. C. how he would react if he was awarded final decision making authority, he said that he would prefer to yield to someone outside the family to make ultimate decisions, rather than have difficult, even profound, decisions made by either himself or, certainly, his wife.

Defendant argues that in case of a “stalemate,” or a “deadlock,” that outsider, variously referred to as “a parenting coordinator,” “umpire,” “tie-breaker,” would decide; he/she would be an arbitrator whose decisions would be binding upon the parents, the children, the household. It is in effect, hiring a private judge who would be the ultimate decision maker, placed at the top of the family hierarchy creating a third tier above the parents and perhaps lessening the parents’ or custodial parent’s standing with the children. The concept suggested would not be mediation or couples or family therapy to facilitate

²The Trapp family were neighbors of mine but I had no involvement with their case.

communications. Rather, if, for example, one parent believes A. should go to High School of Science and the other parent thinks he should go to High School of Music

and Arts, the choice (if not left to A. himself), would be made by the outsider. Similarly, if one parent believes A. should go to sleep-away summer camp and the other disagrees, the so-called “parenting coordinator” would decide what A. does for the summer (and, indirectly, what the rest of the family does). The “tie-breaker,” a social worker or psychologist, or a lawyer, who, according to defendant, should be appointed by the Court, and paid on an hourly basis by the parties (in this case, the Father volunteers to pay for up to three sessions in a year), would be in charge. That person, however, if appointed by the Court, as defendant suggests, would in effect be an extension of the Court, in the same way as a Guardian or Receiver or any other fiduciary would be, with the Court ultimately having to supervise, approve and monitor the role of that individual; that would be counterproductive. “Parenting coordinators typically are granted quasi-judicial immunity consistent with their role (often specified in the court order of appointment) as guardian ad litem. “A parenting coordinator is an officer of the court . . .” (81 MI Bar Jn 1 26 [June, 2002])

The Father’s post trial memorandum³ argues, “So a parenting coordinator

³Defendant’s post trial memorandum refers to an annexed article, but no such article was provided by him.

affords the otherwise non custodial parent psychological support...” However, while

psychological support for a divorced parent is valuable, that is quite different from the best interests of the children. While the Father’s proposed resolution may be good for him, the Court is bound to determine what is in the best interests of the children. (See Friederwitzer v. Friederwitzer, 55 NY2d 89 [1982].

Although it is desirable to avoid returning to Court as issues arise, motions being clumsy, expensive, time consuming and often lacking finality, they, too, leave family decision making to an outsider, namely the presiding judge. But for the Court to order compliance with the decisions of a de facto judge, is, a highly dubious solution.

The Father has expressed anxiety that if the Mother has the authority she seeks, he will be estranged from the children. Yet this is based upon “a feeling” he has, with no evidence of such conduct or intent. To the contrary, he is the one who has declined additional time with the children. His post trial memorandum concludes - - without any evidence - - that, “There is also no question that Plaintiff, if awarded sole decision making authority, would obstruct Defendant’s relationship and involvement in his children’s lives by excluding him from participation.” But the Mother has expressed a willingness, in fact, a desire, to keep the Father involved in the lives of their

sons, and to have his input into the major decisions of their lives.

In addition to the time commitment, delay and expense of having a parenting coordinator where there are two devoted parents, it would be counterproductive to order that course, rather than one parent recognizing the appropriateness and authority of the other, (raising a somewhat Solomonic question about the true commitment to the best interests of the children).

It is telling that, as previously noted, Mr. C. testified that if joint decision-making authority is not awarded, he would prefer to abdicate those responsibilities to a third person, indicating that he does feel that someone else would make better decisions for his children than he himself, and that it would be preferable to yield to the decisions of an outsider who has never lived within the family, and does not know the children well, or, by definition, as well as the parents do, yet would in certain respects be governing the family.

Parenting coordinators must be “familiar with family law, conflict resolution, and mediation as well as family therapy and child development.” Not only must the person have expertise in all the listed areas, but she is “ultimately responsible for all decisions regarding . . . the visitation schedule,” must “form his or her own

judgment about the children's safety and, if in doubt, call in an expert to assess the situation," must "be a strong professional able to withstand relentless efforts at persuasion from both sides," and must "be skilled at defusing conflict and offering parents ways to continue communicating," among other tasks and skills . . . "[s]uch delicate undertakings assume a high level of knowledge and skill."

Let us assume that the idea of a parenting coordinator is a good one as a matter of policy. Who, precisely, will these super-people be? . . . But how many mental health professionals, let alone guardians or paraprofessionals, are equipped, by education or by character, to play this crucial and delicate role on which the child's well-being is so heavily dependent? Furthermore, were this model to be widely accepted, what would prevent a legion of well-meaning, but inexperienced parenting coordinators from setting up shop? Is a parenting coordinator who is less-accomplished and less sensitive and less educated necessarily better than the existing system that leaves these unhappy families to their own devices unless one or both parents seek assistance through the legal system? The question is a deadly serious one because the parenting coordinator is given immense power to make decisions and take actions that will have both an immediate and a lasting effect on the children the proposal is designed to protect.

Even if one accepts the dubious assumption that there is or would be a sufficient number of available, highly-trained, highly-skilled people to perform the role of parenting coordinator, who will pay for them? Only a small minority of families are likely to be able to afford the professional fees of such a highly-trained individual. (See Ellis, Review Essay, Caught in the Middle: Protecting The Children of High-Conflict Divorce 22 New York University Rev. L & Soc. Change 253 [1996]).

As another alternative defendant Father suggests "zones" or "spheres" of decision making, citing Mars v. Mars, 286 AD2d 201 [First Dept 2001]. Father argues that he is "better suited to have decision making authority over . . . psychological and/or psychiatric therapy, counseling or treatment; religion," in which he includes "schools, camps,

practices;” finances, including savings, money management and investment management.” However, there is no evidence of Father’s background or superior knowledge in any of these areas. He does agree that the parents should share educational decisions but he proposes that he have authority over basically everything else, leaving the Mother with only the responsibility and the daily care of the children. The Court rejects that model and finds that it is in the best interests of the children that the Mother, who is prepared to share information, activities, events with the Father as they arise, even outside his scheduled time with the children and who is prepared to share decision-making, and who is also the parent with whom they are living, should have ultimate decision making authority in case of a deadlock.

Conclusion

For the foregoing reasons, the Court finds that it is in the best interests of the children for the Plaintiff to make decisions for them, including when agreement cannot be reached by both parents.

Accordingly, plaintiff is awarded custody for all purposes.

This constitutes the Decision and Order of the Court.

Dated: September 28, 2007

ENTER:

J.S.C.