DECISION

Debra Baker–Plaintiff v. James Baker–Defendant, 29610-2007

SUPREME COURT SUFFOLK COUNTY
Family Law

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Cite as: Debra Baker v. James Baker, 29610-2007, NYLJ 1202464436957, at *1 (Suffolk Cty. Sup., August 4, 2010)

Justice Jerry Garguilo

August 4, 2010

Plaintiff's Attorney: Wand, Powers & Goody, LLP Huntington, NY

Defendant's Attorney: Bruce P. Vetri, Esq. Bayport, NY

Decision After Hearing

*1

The above captioned matter comes before the Court to determine the re-location petition of the plaintiff, Debra Baker. On July 16th and 19th of 2010, the Court conducted an evidentiary hearing.

The Petitioner, Debra Baker, seeks permission to re-locate from Long Island, New York to the State of Florida. The Respondent, James Baker, opposes the application.

The parties were married on September 30, 2000 and have two children, a boy, age nine and a girl, age six. On or about October 8, 2008, the parties entered into a Stipulation of Settlement which resolved all issues in their divorce action. Pursuant to the Stipulation, the Petitioner-mother was given custody of the infant issue of the marriage and the Respondent-father was allowed supervised visitation on every Saturday from 1:00 p.m. to 6:00 p.m. It was clearly the intent of the parties that the supervision aspect of the visitation would be re-visited if, and when, the Respondent-father successfully completed an alcohol rehabilitation program and proved his sobriety. The Stipulation of Settlement did not address the issue of re-location.

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As noted hereinabove, the Petitioner brings before the Court a petition seeking permission to re-locate with the children to the State of Florida. The Respondent filed a cross petition seeking modification of the supervised visitation schedule claiming that he is presently sober and therefore capable of visiting the children without supervision.

The parties find themselves in dire financial straits. The former marital home, where the Petitioner resides with the children, is in the latter stages of foreclosure. There is no equity in the house. The Petitioner had been employed, long-term, as a bookkeeper. Since December of 2009, she remains unemployed as her employer downsized and was forced to terminate her services. Her unemployment benefits are soon to expire. Her search for suitable employment, to date, has failed. A significant obstacle towards re-employment are anticipated child care expenses estimated to be $200 per week.

The Respondent is admittedly a recovering alcoholic. During the course of the hearing, the Court took as an exhibit a letter confirming the Respondent's satisfactory completion of "In-Patient Chemical Dependence Treatment at St. Charles Hospital In-Patient Chemical Dependence Rehabilitation Program." The Respondent was discharged from that program on October 23, 2009. The Respondent offered credible testimony that he has been alcohol free since discharge, successfully completing a stay at a sober house and attends Alcoholics Anonymous meetings.

The Respondent is currently employed by a company known as Universal Home Improvement. His take home pay is $600 per week. Of the gross take home, the Respondent has most recently been paying $350 per week toward his child support obligation. It should be noted that the Petitioner was required to commence a Family Court action prior heretofore to enforce the Respondent's obligation to pay child support. It is apparent that since the Respondent gained employment, he has substantially met his obligations, including additional monies towards his arrears. The Respondent's living arrangements are provided by his employer. He maintains an apartment at the work site which is suitable for one person

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Respondent testified that his employer and he agreed that as long as he remains sober, his employment, as well as residence, will be maintained.

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The Respondent's father, James Baker, Sr., testified. He indicated that he was the person who supervised Respondent's visitation during 2008 and the very early portion of 2009. He withdrew from the role in the early part of 2009 for two reasons. He was diagnosed with bladder cancer which required significant surgical intervention and prior thereto, he asked his son, the Respondent, to leave his home for reasons that are not entirely clear.

It was made abundantly clear at the hearing that the Respondent exercised little to no visitation through the first trimester of 2010. The Respondent credibly testified that he loves his children and awaited his successful completion of a rehabilitation program, as well as time in a sober house, to exercise due diligence towards re-establishing a normal visitation schedule. The Respondent pled with the Court not to take his children away as he loves them dearly and is now sufficiently rehabilitated to become a permanent presence in their lives.

The Petitioner credibly testified that her parents reside in Florida and own a home. Further, she testified that her parents home in Florida would be the place where she would re-locate at least until she finds full-time employment. She further indicated that she has extended family in Florida.

Particularly difficult is the balancing of the pros and cons of allowing re-location. Resulting from the foreclosure, the Petitioner and children can be removed from the marital premises in short order. In the last year and one half, the Respondent has exercised little or no visitation. The same is almost understandable as Respondent's primary concern was working towards sobriety and employment. In the event the Petitioner and children are removed from the marital premises, there is no place for them to go. Common sense, logic and a realistic view of life on Long Island clearly indicate that the Petitioner and children cannot maintain a residence, heat, clothe themselves, provide for transportation and enjoy only the basic necessities on the monies that are currently available.

The Petitioner offered testimony concerning the educational requirements of the children. She indicated that appropriate schools are available in the area to which she seeks re-location. Although the Respondent offered testimony that the schools were not appropriate, the same was based on hearsay and not corroborated by anything the Court could consider.

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During the course of the hearing, the parties were directed to consider the teaching of Tropea v. Tropea, 87 NY2d 727, 665 N.E.2d 145, 642 NYS2d 575. The holding of the Tropea case follows:

We hold that, in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination. These factors include, but are certainly not limited, to each parent's reasons seeking or opposing the move, the quality of the relationships between the child and the custodial and non-custodial parent, the impact of the move on the quantity and quality of the child's future contact with the non-custodial 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 non-custodial parent and the child through suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed re-location would serve the child's best interest. Tropea v. Tropea, 87 NY2d 727, 741.

Clearly, the financial realities of this case reveal that neither parent is currently in a position to fund frequent trips between New York and Florida. Equally clear is the trauma awaiting the children upon seeing the only home they have known being taken away with Deputy Sheriffs posting the property with an order to remove all inhabitants and contents. Homelessness is a real probability.

The Petitioner's reasons for seeking the re-location are driven by economics. Those factors have been discussed as have the Respondent's wishes to resume some form of a meaningful relationship with the children. Continuation of a meaningful relationship between the non-custodial parent and the children is indeed a consideration, see, Mathie v. Mathie, 65 AD3d 827, 884 NYS2d 433 (2nd Dept., 2009). The operative word in the Mathie decision is "continuation." The Respondent herein essentially has no track record in the arena of visitation.

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In the case of Sylvian v. Paul, 68 AD3d 883, 890 NYS2d 624 (2nd Dept., 2009), a mother's petition to re-locate to Florida was denied. In part, the application to re-locate was denied because the court pointed out that the child had a strong and loving relationship with the non-custodial parent. In the matter at bar, there is no doubt that the children enjoy seeing their father. But, once again, the Respondent could not establish an existing strong and loving relationship.

These findings are not meant to be critical of the Respondent. The record is replete with evidence that he has confronted his addiction and has taken strong steps towards recovery. For that, he is to be lauded.

In the case of Malcolm v. Jurow-Malcolm, 63 AD3d 1254, 879 NYS2d 834, the court noted that the proposed re-location was not motivated by bad faith but, rather, an opportunity to reside in close proximity to supportive family members and to secure flexible employment. This Court finds that the Petitioner's application is clearly not motivated by bad faith. Economic hardships are a reality. The availability of a supportive family unit in Florida, as well as apparent opportunities to secure employment

and reduced child care costs, are real considerations.

The Court will allow the Petitioner to re-locate to Florida. The Petitioner will be directed to reside in her parents' home, with the children, until such time as she finds gainful employment which allows her to secure her own residence suitable for the children. The re-location is conditional. The Petitioner, at her own cost and expense, will see to it, prior to re-location, that the Respondent, as well as the children, are provided the appropriate internet access via a Skype device which allows a real time broadcast of communications between the Respondent and his children. Thereafter, the Petitioner will make the children available three times per week for not less than one hour per connection to communicate via Skype with their father.

The Respondent, in New York, shall enjoy two weeks of unsupervised visitation with the children during the children's spring recess from school. Additionally, the Respondent, in New York, shall enjoy one week of unsupervised visitation with the children during their winter recess from school.

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The parties are directed to provide the Court with a modified visitation schedule agreed upon on or before the last business day of August, 2010. In addition to the three weeks noted hereinabove, said schedule must allow the Respondent free, unsupervised access to the children in Florida during reasonable times if and when he chooses to visit.

Upon the Petitioner's retention of gainful employment, it shall be her responsibility to fund round-trip air transportation for the children during the times of New York visitation with the Respondent. Until then, the Respondent may deduct sums due and owing for child support to purchase the appropriate airline tickets.

All other prayers for relief not specifically determined herein are deemed denied.

The foregoing constitutes the DECISION AND ORDER of this Court.