

C.A.M. v L.C.M

2017 NY Slip Op 32843(U)

March 20, 2017

Family Court, Allegany County

Docket Number: V-00039-15/16 B

Judge: Thomas P. Brown

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STATE OF NEW YORK: COUNTY OF ALLEGANY
FAMILY COURT

C.A.M.,

Petitioner

-against-

L.C.M.,

Respondent

DECISION

Docket No.: V-00039-15/16 B

V-00040-16 B

File No.: 2057

This matter came before the Court upon the mother's Petition for Modification of an Order of Custody dated July 1, 2016, seeking to modify this Court's Order of September 11, 2015. The subject order granted the parties joint custody of their son and daughter with primary placement to the father and detailed secondary placement to the mother.

The parties had separated from bed and board, ending their relationship of twelve years, in January of 2015, when the mother moved from the marital residence to a Village located ten miles or so from the marital residence and in a different school district.

The father petitioned the Court for custody of the children on or about January 15, 2015, and the parties, by order dated March 17, 2015, were awarded joint custody of the children with primary placement to the father and restricted secondary placement to the mother, due to her relationship with a Robert P.

Subsequently, the mother petitioned to modify the March 17, 2015 order. By order dated September 11, 2015, the Court modified the previous order by continuing joint custody but expanding the mother's secondary placement and eliminating the restriction regarding contact with Robert P.

Less than a year after the September 11, 2015 order, the mother sought modification of the custodial arrangement, asking for primary placement of the parties' son. She did not seek custody of the parties' older daughter because she was over the age of 18 years and was residing in Genesee County, New York, while attending college.

In her current petition, the mother alleged that the child has stated to her that he does not want to live with his father and that he is afraid of his father when his father has been drinking. The mother stated that the child indicated he will be more fearful of the father after his sister moves away to college. The mother also stated the child has asked to live with her several times.

The Court conducted a hearing including an *in camera* with the child which concluded on November 30, 2016.

At the hearing, the mother and the father testified. No other witnesses testified. The child indicated his desires regarding custodial placement during the *in camera* with the Court.

In her testimony, the mother testified that her life has stabilized. She has a safe and stable home, her social relationships do not pose a hazard to the child, she has full time, steady employment, and she is obtaining reliable transportation.

She testified that the father, however, has been heavily drinking over the summer months prior to the hearing. Significantly, she testified that the child was having a very difficult time adjusting to his sister moving from the father's home. His school grades were poor and he had been acting out. The child will not sleep alone at his father's home and most oftentimes sleeps in the same bed as the father. On the contrary, the mother indicated that the child sleeps on the couch (and not with her) when he is at the mother's home.

The mother indicated that the father has complied with the current order in reference to her court ordered parental access including placement and telephone calls to the child. However, she indicated the father has been difficult regarding additional access and holiday access, stating that it is

“his way or no way”. However, she acknowledged on cross examination that oftentimes her requests for such additional or holiday access have not been timely. The mother indicated she would be similarly compliant with court ordered placement or visitation and she would be cooperative with the father regarding additional access if she were granted primary placement.

The mother further testified that the father’s general treatment of her has been good although there have been occasional times of marital discord, which have not been physical.

Transportation for the mother has been difficult because of the distance between her home and the father’s home. She does not own an automobile and, thus, has to rely on others for transportation. These transportation difficulties have inhibited her additional placement time with the child as well as her involvement with the child’s education including his academic difficulties. However, she testified that she was in the process of acquiring an automobile.

The Court has had a full opportunity to consider the evidence presented during the hearing. The Court has further had the opportunity to observe the demeanor of the witnesses called to testify and has made determinations regarding the character and credibility of those witnesses. The Court now makes the determination which follows.

Upon consideration of the totality of the circumstances, the Court determines that the best interests of the child require that the mother’s application for a change in custody or primary placement be denied. However, the child’s best interests do require that there be a substantial increase in the mother’s parental access.

Accordingly, the mother’s secondary placement shall be as follows:

- I. Alternate weekends from Friday at 6 PM to Sunday at 6PM. If the alternate weekend placement is followed by a school holiday, then in such event, the alternate weekend placement shall be extended to Monday at 6 PM
- II. The winter school recess in odd calendar years and the spring recess in even calendar years.
- III. Alternate week placement during the summer school recess beginning the first Friday following the end of the school year at 6 PM.
- IV. One half of the Thanksgiving school recess.
- V. One half of the Christmas school recess.
- VI. Thanksgiving Day from 9 AM to 6 PM in odd calendar years
- VII. Christmas Eve Day from 9 AM to 9 PM in even calendar years.
- VIII. Christmas Day from 9AM to December 26 at 12 noon in odd calendar years.
- IX. During the school year, Wednesday evening from after school until 8 PM.
- X. Such other and further placement as the parents can agree.

- XI. The parents shall share transportation with the parent exercising placement responsible to pick up the child from the other parent's home.
- XII. Both parents shall be entitled to receive all information and records directly from the child's school, medical providers, and other service providers.
- XIII. Neither parent shall abuse alcohol or other mood altering substances while the child is in his/her care.
- XIV. Each parent shall have liberal and reasonable telephone contact with the child during the other parent's placement time.

As noted, the Court has considered the totality of the circumstances in reaching its determination herein including, but not limited to, the age and maturity of the child and his expressed wishes; the relationship of the child with each parent; the quality of each parent's home; the stability of the current custodial arrangement; and the financial ability of each parent to support the child including his/her ability to provide transportation to facilitate a relationship with the other parent

While both parents appear to be equally fit to parent the child, the stability of the current custodial arrangement has been afforded great weight by the Court. Following the parties' break up, the father has provided a safe and stable home for the child and his older sister. He has supported the child

financially, emotionally, and educationally including maintaining the child in the same school district. Until recently, the mother's life lacked stability. To her credit, she has made positive steps to improve her life and she now appears to be in a position to provide the child with a safe and stable home. She, too, can support the child financially, emotionally, and educationally. However, the father has done nothing which would require him to forfeit his role as the child's primary custodial parent.

Under the foregoing circumstances, the Court emphasizes that the "stability" of the current custodial arrangement, albeit with increased time to the mother, is entitled to great weight in deciding whether custody or primary placement should be changed.

The Court acknowledges the mother's testimony regarding the father's alleged alcohol abuse. However, the Court determines that the evidence was insufficient to establish that the father was, in fact, abusing alcohol.

The Court further acknowledges the child's wishes and desires yet recognizes his young age and, more important, his emotional state because of his sister's leaving the father's home to attend college within a year or so after his parents' separation. Essentially, he has suffered the loss of daily contact with the two most important female figures in his life. It has, to say the least, been extremely difficult for him. A change in primary placement may, at first glance, appear to be a practical solution to resolve the child's emotional stress. However, upon closer examination, a change in primary placement may significantly change his relationship with his father, will require the child to change school districts, and, most likely, will not change his relationship with his sister, thereby creating new stressors for the child, or, perhaps substitute one group of stressors for another. More important, there is nothing in the record, professional opinion or otherwise, which would definitively show a change in primary placement would benefit the child. Accordingly, it is the Court's opinion that the child's best interests require that the current custodial arrangement continue. The Court is hopeful that increased time with the mother will assist the child in adjusting to the new composition of the father's household. Additionally, it is incumbent upon both parents to set aside their personal differences and work together to assist the

child in getting through this difficult time in his life. Individual and family counselling may be appropriate.

For reasons of confidentiality, the Clerk of this Court is directed to prepare a separate order containing only the custodial provisions of this Decision and Order.

Dated: March 20, 2017

THOMAS P. BROWN
JUDGE OF THE FAMILY COURT