Family Court of the State of New York
City of New York

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NEW YORK, N.Y. 10013

FAX TRANSMITTAL

Date: May 21, 2004

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Number of pages including cover sheet: 10

Message:

Attached please find a copy of the decision on Aylsworth v. Marks. You will also receive a copy via mail.

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK, COUNTY OF NEW YORK

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In the Matter of a Proceeding under
Article 6 of the Family Court Act

DECISION AND ORDER

JOHN AYLSWORTH,

Docket No.: V-01744-5/03

Petitioner,

-against-

BRIDGET MARKS,

Respondent.

- -

GOLDBERG, J.:

This Court conducted a lengthy evidentiary hearing over fourteen court dates concerning which party should be awarded custody of the parties' twin daughters. Written summations were subsequently submitted and the case has been pending decision by the Court. It must be noted that the parties were never married to each other and that the children are the product of an extramarital affair by the petitioner. Respondent was unmarried as of the last court appearance on May 5, 2004.

By order to show cause, respondent has sought to reopen the trial in this action, on a limited basis, requesting that the Court hear and consider newly discovered evidence of further infidelity by the petitioner, arguing it is relevant and material to the determination of custody. Petitioner opposed the motion to reopen, however, requested that if the Court did reopen the matter that petitioner be allowed to introduce evidence of respondent's posing in pornographic photographs and evidence of her bad judgment since the trial's conclusion, including creating a "media circus". The law guardian in the matter does not oppose the motion to reopen but asks that if the trial is reopened then the Court not limit the evidence to the petitioner's alleged adultery but also allow and consider evidence concerning respondent's communications with the

press and her judgement in seeking media involvement, arguing that both the acts of petitioner and respondent post-trial have bearing on the court's best interests determination.

Once a party has rested, the party generally does not have a legal right to reopen the case and introduce additional evidence. See Carmody-Wait 2d, New York Practice with Forms, § 59:32 (database updated April 2004). However, the Court has the power to permit a litigant to reopen the case under appropriate circumstances, though such discretion should be sparingly exercised. See, Barson v. Mulligan, 77 A.D. 192, 79 N.Y.S. 31. Further, a reopening of a trial may not be granted solely for impeaching the credibility of a witness, but instead the newly discovered evidence must go beyond mere impeachment and disclose a misstatement of fact on a material issue or have independent probative value on a material issue. See, In re Baruch's Estate, 131 N.Y.S.2d 84.

In the instant matter, Respondent seeks to offer evidence of Petitioner's newly discovered alleged affair arguing, in sum, "[t]he existence of this relationship is critical to the determination of custody and visitation and will establish that Petitioner is not a credible witness". See Respondent's Order to Show Cause ¶18. After reviewing the trial transcript, the Court does not find that this evidence is in direct conflict with any testimony by the Petitioner and therefore would only serve as an attempt to impeach the petitioner which is not a ground to reopen the trial.

Petitioner's request to reopen the hearing and allow testimony regarding the publication of pornographic photographs of the respondent is similarly not in direct conflict of any trial testimony but is supported by the testimony. The allegation that the photographs remain in circulation is of no moment. This is also deemed to solely be an attempt to discredit the petitioner and is similarly not found to be a basis to reopen this hearing.

Although the petitioner and the law guardian both ask that the Court reopen the hearing to hear evidence regarding Respondent's communications with the media and allowing the twins'

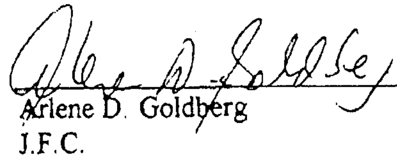
photograph to appear in the newspaper, the Court also finds this to be an insufficient basis to reopen. While respondent's communication with the media may have bearing on her capacity to make decisions that are in the best interests of the children, the court finds that the probative value of the proposed testimony is outweighed by the prejudicial effect of any further delay on the parties and most importantly on the children.

The motions to reopen are denied.

This constitutes the decision and order of the court.

Notify parties.

Dated: May 20, 2004
New York, NewYork



Arlene D. Goldberg
J.F.C.

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK, COUNTY OF NEW YORK

In the Matter of a Proceeding under
Article 6 of the Family Court Act

DECISION AND ORDER
ON CUSTODY

JOHN AYLSWORTH,

Docket No.: V-01744-5/03

Petitioner,

-against-

BRIDGET MARKS,

Respondent.

GOLDBERG, J.:

This Court conducted a lengthy evidentiary hearing concerning which party should be awarded custody of the parties' out-of-wedlock, four-year-old twin daughters, who have resided with their mother in New York City since they were born. Written summations were subsequently submitted and the case has been pending decision by the Court. During that time, additional litigation ensued by way of orders to show cause including a motion by petitioner for a gag order and a motion by respondent to reopen the custody trial. Both motions were denied, the latter motion through a written decision dated May 20, 2004.

The Court herein now sets forth its decision[1] and order on which parent shall have custody of the twins, AMBER LYNN AYLSWORTH, d.o.b. September 8, 1999, and SCARLETT LEE AYLSWORTH, d.o.b. September 8, 1999.

In making the custody decision the sole concern and focus of the Court has been, as it must be, determining what custodial arrangement will best serve the interests of these two young children and promote their welfare and happiness. Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S. 2d 658 (1982); Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893 (1982); DRL §70(a). To that end, the Court has conducted an exhaustive and painstaking review of all

[1]An expanded version of the decision, more fully detailing the evidence and findings, will be provided to the parties on a later date.

of the evidence, the relevant case law and the competing claims and arguments raised by the parties and by the children's law guardian. The Court has also carefully considered the various factors that are relevant to the best interest analysis as developed by the case law. In making its determination the Court has weighed and given due consideration to the testimony and recommendations of Dr. Billick, the forensic evaluator assigned by the court, Lisa Lubell, a certified social worker with a specialty in child sex abuse, and Julie Dowling, a certified social worker, both of whom were called as witnesses by the children's law guardian. All three of those witnesses, for stated reasons, recommended that custody of the children be awarded to the petitioner father. Of course, the contrary opinions and recommendations of the mother's psychiatric and other mental health/social work expert witnesses have also been considered. However, none of them did a forensic evaluation of the father and mother or of the children. Indeed, these witnesses, all of whom were hired by the mother, essentially reached their conclusions solely on her one sided statement of circumstances and events. As such, these witnesses views on the custody and related issues are of little probative value and are consequently given little weight.

In this case, the mother alleged that the father sexually abused both children during court ordered supervised visitation. Dr. Billick and Ms. Lubell, testified to a reasonable degree of certainty, based on a variety of factors, that those allegations were untrue and that the children had been coached to say that the father had "touched their peepee." The Court credits the testimony of both Dr. Billick and Ms. Lubell. Furthermore, their conclusions are supported by other evidence in the case. What emerges from the credible evidence in the case is that the mother due to her anger over the father's failure to divorce his wife and marry her, either alone or together with Pam Soleimon, the mother's good friend, coached the children to make the allegations that they did. The evidence further shows that the charges were made to deny the

father access to the children. There was also abundant and credible evidence that the children made many negative statements about the father and aspects of his life during court ordered visitation and when the children were interviewed by psychiatrists and social workers during the pendency of the case. There was also convincing evidence that on many occasions the children attributed their thoughts and statements to things they had been told by their mommy or by Pam. The mother's denial that she never said anything negative to the children about their father was simply not credible. In fact, many aspects of the mother's testimony were not credible. In any event, the mother did admit to speaking to others in the house about the father and that the children may have overheard those conversations.

It is well settled that a custodial parent has an affirmative duty to protect and nurture the child's relationship with the other parent. This principle is of such importance that courts have concluded that a custodial parent's interference with the relationship between a child and a non-custodial parent is "an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [offending party] is unfit to act as a custodial parent". See Entwistle v. Entwistle, 61 A.D.2d 380, 380-84, 402 N.Y.S.2d 213, 216, *appeal dismissed by*, 44 N.Y.2d 851. Interference with the parent-child relationship can take many forms, but a more subtle and insidious form of interference which has the potential for greater and more permanent damage to the emotional psyche of a young child is the psychological poisoning of a young person's mind by turning him or her away from the non-custodial parent. See e.g., Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957. It is axiomatic that a parent is not acting in the child's best interest when he or she deliberately frustrates or interferes with visitation or makes false sexual abuse allegations. See David K. v. Iris K., 276 A.D.2d 421, 714 N.Y.S.2d 297.

It was the opinion of Dr. Billick, Ms. Lubell and Ms. Dowling that the petitioner, for stated reasons, is unable to foster a positive relationship between the twins and their father. The

evidence in the case supports that view. While the mother testified that she can foster the relationship and encourage visitation, her demeanor and tone indicated that she was not sincere in those assertions.

The respondent contends that even if the court found that the sex abuse charges were not bona fide, two instances of false allegations cannot justify a change in custody. However, at least one court has found that sufficient. See, Matter of Karen B. v. Clyde M., 151 Misc 2d 794, affd. sub. nom. Karen PP v.Clyde QQ, 197 AD2d 753 (3d Dept 1993). In that case, which involved a four-year old child, the mother made two reports of sex abuse by the father. A five-month period separated the two reports. Additionally, the experts, who had interviewed the child, rendered conflicting opinions on the validity of the child's allegations. The Family court concluded that "it is likely that the mother programmed her daughter to accuse the father of sexually abusing the child so that she could obtain sole custody and control or even preclude any contact that the father might have with his daughter." The evidence in this case supports a similar finding. The court in Karen B. also expressed the belief that "any parent that would denigrate the other by casting the false aspersion of child sex abuse and involving the child as an instrument to achieve his or her selfish purpose is not fit to continue in the role of parent." Moreover, in this case we are not solely dealing with fabricated sex abuse charges but with allowing an atmosphere to prevail at home in which the father is denigrated.

This Court is extremely mindful of the fact that the mother has been the custodial parent since the children were born and that the change in custody will be a stressful and traumatic experience for the children. However, the general rule that a court give preference to the initial custody arrangement, whether set by court order or by mutual agreement[2], is not absolute and is

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[2]In this case there was no court order or expressed mutual agreement. The mother obtained de facto custody when the twins were born.

certainly not controlling when circumstances show that continuation of such custody arrangement would be adverse to the child's best interests. See e.g., Fanelli v. Fanelli, 215 A.D.2d 718, 627 N.Y.S.2d 425. Furthermore, that a change in custody may prove to be temporarily disruptive to the child is not determinative as all changes in custody are disruptive. See Matter of Nehra v. Uhlar, 43 N.Y.2d 242, 248, 401 N.Y.S.2d 168, 171; Vernon v. Vernon, 296 A.D.2d 186, 746 N.Y.S.2d 284. Moreover, according to Dr. Billick, the trauma of the event may be adequately addressed through therapy and the long term benefits of the change outweigh the potential harm.

The evidence in this case shows that the father is an experienced and caring parent, having four adult children, who unanimously gave him high marks as a father, as did petitioner's wife of 34 years. All persons who have seen him interact with the twins testified that he is a very good parent and that the twins love him and are happy when they are with him. The testimony establishes that he can foster the relationship between the mother and the children whereas the mother cannot.

While petitioner has had extramarital affairs, his failings impact on his ability to be a good husband, not a proper custodial parent, irrespective of whether his wife continues with the marriage. In contrast, the mother's failings, her unbridled anger toward the father and inability to foster the paternal parental relationship, make her ill suited to be the custodial parent for the children. To leave the children in her custody would expose them to further emotional damage and likely make a healthy and wholesome father/daughter relationship impossible.

In sum, the court finds that it is in the best interests of the children that the Petitioner be awarded custody, as supported by the children's law guardian and the forensic evaluator. However, as the mother has had such a strong presence in the children's lives and given their attachment to her, the court finds that a permanent move to California at this time would prove to be detrimental as it would deny the mother meaningful and regular visitation with the children.

The Petitioner testified that he would be willing to move to New York to obtain custody. Therefore, the court finds that the father's custody should be conditioned, as advocated by the law guardian, to living within forty (40) miles of the New York metropolitan area where the mother resides. The Court further finds and ORDERS that the mother's visitation and telephone contact with the children be monitored and supervised pending any further order of the court. The Court further finds and ORDERS that the mother is not to permit Pam Soleimon to have any contact with the children. It is further ORDERED that the physical exchange of the children shall not occur until June 1, 2004 at 12:00 p.m. so that the children may complete their school year unless the parties mutually agree to the exchange occurring on a different date. As of June 1, 2004, the father may take the children to California or anywhere else for summertime vacation for a consecutive four week period. The children shall then have supervised visitation time with the mother for a one-week period.

Counsel and the Law Guardian are to submit to the Court, proposed supervisors and additional visitation proposals. The mother is hereby ORDERED not to make any negative comments to the children about the father or this custody award.

It is so ordered

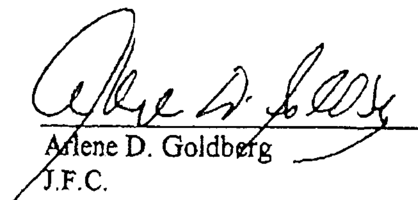
This constitutes the decision and order of the court.

The May 24, 2004 court control date is hereby vacated.

Notify parties and the children's law guardian.

ENTER

Dated: May 21, 2004
New York, NewYork



Arlene D. Goldberg
J.F.C.