

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1168

CA 12-00643

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

BETH ANNE GRANT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SCOTT C. GRANT, DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (MICHELLE M.F. SCHWACH OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

CHRISTOPHER J. BRECHTEL, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR
GARRETT G., IAN G. AND ALEXIS G.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 14, 2011. The order denied that part of the motion of plaintiff seeking permission to relocate with the parties' children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision that, "if Plaintiff relocates to Ohio, notwithstanding this Court's Decision, the Defendant shall be granted custody of the parties' three (3) minor children with an appropriate access schedule to be arranged between the children and the Plaintiff" and as modified the order is affirmed without costs.

Memorandum: Plaintiff mother moved, inter alia, to modify the parties' custody arrangement by permitting her to relocate to Ohio with the parties' three children. Pursuant to their custody arrangement, the parties shared joint custody of the children, but the mother had primary physical custody and defendant father had visitation. Additionally, the parties had agreed that the children would not be removed from Erie County without the father's consent or in the absence of a court order. The father opposed the mother's motion and cross-moved for custody in the event that the mother relocates. Following a hearing regarding only the issue of relocation, Supreme Court denied that part of the mother's motion seeking permission to relocate with the children and further ordered that, "if the [mother] relocates to Ohio, notwithstanding this Court's Decision, the [father] shall be granted custody of the parties' three (3) minor children with an appropriate access schedule to be arranged between the children and the [mother]." The court reserved decision

on all other relief requested by the parties.

We conclude that the court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) in determining that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation is in the children's best interests (see *Matter of Murphy v Peace*, 72 AD3d 1626, 1626-1627; *Matter of Seyler v Hasfurter*, 61 AD3d 1437, 1437; *Matter of Jones v Tarnawa*, 26 AD3d 870, 871, lv denied 6 NY3d 714). "The determination of the trial court, which heard and observed the witnesses, is entitled to great deference and should not be disturbed where, as here, it had a sound and substantial basis in the record" (*Salerno v Salerno*, 273 AD2d 818, 818; see *Matter of Battaglia v Hopkins*, 280 AD2d 953, 954). We modify the order, however, by vacating the provision that custody of the children will be transferred to the father in the event that the mother relocates to Ohio. That provision, "while possibly never taking effect, impermissibly purports to alter the parties' custodial arrangement automatically upon the happening of a specified future event without taking into account the child[ren]'s best interests at that time" (*Matter of Brzozowski v Brzozowski*, 30 AD3d 517, 518; see *Matter of Carter v Kratzenberg*, 209 AD2d 990, 990; *Rybicki v Rybicki*, 176 AD2d 867, 871).

We further conclude that, contrary to the mother's contention, the court did not fail to render a decision regarding the other relief requested in her motion, but rather expressly reserved decision on those issues. Thus, the mother's remaining contentions are not properly before us.