

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D55333
L/htr

_____AD3d_____

Submitted - February 23, 2018

WILLIAM F. MASTRO, J.P.
JOHN M. LEVENTHAL
BETSY BARROS
VALERIE BRATHWAITE NELSON, JJ.

2016-10279
2016-10280

DECISION & ORDER

In the Matter of Carmen S. Veras, appellant, v Eddie Padilla, respondent.
(Proceeding No. 1)

In the Matter of Eddie Padilla, respondent, v Carmen S. Veras, appellant.
(Proceeding No. 2)

(Docket Nos. V-5194-15, V-5195-15, V-10002-15, V-10003-15)

Steven P. Forbes, Jamaica, NY, for appellant.

David Laniado, Cedarhurst, NY, for respondent.

Esther Kind, Fresh Meadows, NY, attorney for the children.

In related proceedings pursuant to Family Court Act article 6, the maternal aunt appeals from (1) a decision of the Family Court, Queens County (Craig Ramseur, Ct. Atty. Ref.), dated September 7, 2016, and (2) an order of the same court, also dated September 7, 2016. The order, upon the decision, made after a hearing, dismissed the maternal aunt's custody petition for lack of standing.

ORDERED that the appeal from the decision is dismissed, without costs or disbursements, as no appeal lies from a decision (*see Matter of Ania N. [Marzena N.]*, 138 AD3d 862; *Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509); and it is further,

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ORDERED that the order is reversed, on the facts and in the exercise of discretion, without costs or disbursements, and the matter is remitted to the Family Court, Queens County, for an expedited hearing and a new determination as to whether the aunt has standing to seek custody of the children based on the existence of extraordinary circumstances and, if warranted, a determination on the merits of her custody petition.

Prior to her death, the mother had sole custody of the subject children. Following the mother's death, the children moved into the maternal aunt's home, and the maternal aunt filed a petition for custody of the children. The father also filed a custody petition. After a hearing, the Family Court dismissed the aunt's petition on the ground that she lacked standing to seek custody, and awarded sole custody of the children to the father. The aunt appeals.

On this appeal, "[w]e have no occasion to apply the proper legal test to the facts at hand" (*Matter of Michael B.*, 80 NY2d 299, 317). This Court has been informed by the attorney for the children that, during the pendency of the appeal, a child protective proceeding pursuant to Family Court Act article 10 was commenced against the father, and the children were ordered removed from the father's care based upon allegations of, inter alia, domestic violence, inadequate housing, and threats made by the father to the Administration for Children's Services, which resulted in the arrest and incarceration of the father. Although these new allegations are de hors the record, they are considered in these child custody proceedings to the extent they indicate that the record before us may no longer be sufficient for determining the father's fitness and right to custody of the children (*see id.* at 317-318; *Matter of Baptiste v Gregoire*, 140 AD3d 746, 747-748). The new circumstances require remittal to the Family Court for an expedited hearing and a new determination as to whether the aunt has standing to seek custody of the children based on the existence of extraordinary circumstances and, if warranted, a determination on the merits of her custody petition.

Accordingly, we remit the matter to the Family Court, Queens County, for a hearing and determination on those issues. We express no opinion as to the appropriate determination (*see Matter of Baptiste v Gregoire*, 140 AD3d at 748).

MASTRO, J.P., LEVENTHAL, BARROS and BRATHWAITE NELSON, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court