

**Matter of Gilleo v Williams**

2008 NY Slip Op 33607(U)

December 2, 2008

Family Court, Westchester County

Docket Number: V-2798-03/04A

Judge: Kathie E. Davidson

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At a term of the Family Court  
of the State of New York,  
held in and for the  
County of Westchester, at  
111 Dr. Martin Luther King Jr. Blvd.,  
White Plains, New York  
on the 2<sup>nd</sup> day of December, 2008.

P R E S E N T:

**Hon. KATHIE E. DAVIDSON**  
Judge Family Court

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

**JASMINE GILLES,**

*Petitioner,*

Docket No.  
V-2798-03/04A  
FU# 92180

-against-

**DECISION and ORDER**

**WILLIE WILLIAMS,**

*Respondent.*

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This matter comes before the court by the filing of a petition for custody pursuant to Article 6 of the Family Court Act ("FCA") by the petitioner under docket number V-2798-03/04A. Petitioner seeks sole custody of the subject child, her daughter in common with the Respondent.

This case has a long history with the Westchester County Family Court, commencing on February 14, 2003 when Petitioner filed a petition for sole custody of subject child. Thereafter, the Court issued an Order of Custody and Visitation entered on

Consent on June 27, 2003 (Horowitz, J.) granting joint custody of subject child to Petitioner and Respondent with physical custody being awarded to Petitioner. Respondent was awarded weekly visitation.

On May 19, 2003, Petitioner filed a family offense petition alleging that Respondent was abusive towards her. As a result, an order of protection was issued on the same date (Horowitz, J.) whereby Respondent was not to harass, menace or communicate with Petitioner. This expired on February 14, 2004.

Over a year later, on June 25, 2004, Respondent's violence escalated resulting in a Criminal Court conviction of Attempted Murder in the Second Degree, Reckless Endangerment in the First Degree and other offenses for throwing his then ten month daughter, out of the window of Petitioner's apartment. As a result, Respondent was sentenced to thirty-two (32) years in prison and a permanent order of protection was entered on behalf of Petitioner and subject child, which shall remain in effect until June 25, 2039.

On November 15, 2004, Petitioner petitioned this Court for a Modification of the Order of Custody and Visitation entered on June 27, 2003 (Horowitz, J.) based upon Respondent's convictions and incarceration.

A Fact-Finding hearing commenced on October 19, 2005 and continued on August 13, 2007, February 15, 2008, and was

completed on April 1, 2008. Written summations were to be submitted to the Court by May, 2008.

Petitioner testified that due to Respondent's convictions and the permanent order of protection, joint custody was no longer practical. Further, Petitioner testified that as a result of the Criminal Court proceeding, Child Protective Services ("CPS") conducted an investigation on herself and her mother, which was later unfounded. Petitioner testified that she smoked marijuana occasionally in the past, but that she has not used drugs since 2003. She also stated that she never attended any drug treatment programs to address her drug use.

Respondent testified that he did not want to take subject child away from Petitioner. However, although he previously consented to Petitioner having physical custody, he is not willing to relinquish custody of subject child at this time. He believes that there should be some type of supervision over Petitioner's home due to his belief that Petitioner and her mother, with whom she resides, abuse drugs. He fears for his daughter's safety, and fears that her educational needs may not be met by Petitioner. Respondent testified that Petitioner abused drugs frequently in the past and that she is extremely jealous in nature. He further stated that she frequently violated the order of protection by allowing him into her home and by showing up at his door.

**NOW**, after examination and inquiry into the facts and circumstance of the case, after hearing the testimony herein, and after review of the relevant case law and statutes, this Court finds that sole custody of the subject child shall be awarded to the petitioner, for the reasons as hereinafter set forth.

The seminal case of Bennett v. Jeffries (40 N.Y.2d 543 [1976]), sets the standard in cases where a change in parental custody is being sought. There, the Court of Appeals held that when seeking to deprive a parent of custody of a child, extraordinary circumstances must exist.

Extraordinary circumstances is not to be read as that some particular, sudden or unusual event has occurred since the prior award. Rather, the court must evaluate the totality of the circumstances, "not whether there exists one or more circumstances that can be denominated extraordinary" (Friederwitzer v. Friederwitzer, 55 NY2d 89 [1982]). Therefore, some factors the court may examine are: 1) the parental guidance given by the custodial parent, 2) the financial status of each parent, and 3) the ability of each parent to provide emotional and intellectual support to the child.

In all cases, there is no prima facie right to the custody of the child in either parent. Ultimately, of paramount concern to the court is the best interests of the child (Eschbach v.

Eschbach, 56 N.Y.2d 167 [1982])). Generally, it is in a child's best interests to be raised by its parent, and under existing constitutional principles, the court is powerless to disqualify a parent, unless the parent is disqualified by gross misconduct or necessity. Examples of such are "fault or omission by the parent seriously affecting the welfare of a child, the preservation of the child's freedom from serious physical harm, illness or death, or the child's right to an education, and the like" (Bennett v. Jeffries, 40 N.Y.2d 543, 546).

Domestic Relations Law Section 240 (1)(a) provides that the court must consider acts of domestic violence when making a custody determination in the best interests of a child. Where either party in a custody action brings forth evidence of domestic violence, and such allegations are proven by a preponderance of the evidence, such behavior does not automatically warrant a denial of custody. However, it does relate to the fitness of the parents and "the parties' respective abilities to assume the role of primary custodian, especially where the violence has occurred in the presence of the child."

However, the courts have held that when violence occurs on multiple occasions in the presence of a child, even if that violence is not perpetrated by a parent, and when the violent conduct itself is considered to be an extraordinary circumstance, it is proper to award sole custody to the other parent (see

Khaykin v. Kanayeva, 47 A.D.3d 817 [2d Dept 2008]; Drew v. Gillin, 17 A.D.3d 719 [3d Dept 2005]; Assini v. Assini, 11 A.D.3d 417 [2d Dept 2004]; Matter of Scott JJ, 280 A.D.2d 4[3d Dept 2001]).

Moreover, where an incarcerated parent seeks custody of his/her child, dismissal of such petition without conducting a full hearing is appropriate, where the incarceration is not temporary, the parent is incarcerated at the time of the proceeding commenced, and the parent is not capable of fulfilling the obligations of a custodial parent (See, Randy K. v. Evelyn ZZ., 263 A.D.2d 624 [3rd Dept 1999]); see also Cierra L.B. v. Richard L.R., 43 A.D.3d 1416 [4th Dept 2007]).

In the instant case, it is evident to this Court that Respondent and Petitioner have shared a long, volatile history with each other. It is a history of domestic violence, with Respondent as the perpetrator. Evidence produced at trial shows bruises and human bite marks sustained by Petitioner as a result of her altercations with Respondent. This Court can surmise that subject child, at only a few months of age was present for such altercations, and ultimately became the victim.

Indeed, this Court afforded Respondent more rights that he was entitled to according to the case law by conducting a full hearing despite his conviction. He presented conflicting stories as to what actually happened to the subject child on the day she

was thrown from the window. His concern seems to rest not with the safety of his daughter, although he asserts that he is concerned for her well educational and physical safety, but with attempting to shift the blame of such incident onto Petitioner. Pending his incarceration and appeal of his conviction, Respondent has failed to offer an appropriate resource for his daughter. At one point during these proceedings, his mother came forward, having filed for custody of subject child. However, she never followed through with any supervised visitation mechanism put in place, nor did she participate or complete any evaluations. Finally, she never appeared in Court again.

Respondent has a permanent order of protection issued by the criminal court in effect until 2039. As a result, it is legally impossible for this Court to award respondent custody or visitation with subject child. In addition, should his appeal fail, he has approximately twenty eight years left to serve. Respondent admits to being violent with Petitioner. In his testimony, he admits to choking her and biting her back.

Accordingly, it is hereby,

**ADJUDGED and ORDERED** that the petitioner is awarded sole custody of the subject child; and it is further

**ORDERED** that the petition under docket number V-2798-03/04A filed by Petitioner is granted in its entirety; and it is further

This constitutes the Decision and Order of the Court.

**PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT,  
AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30  
DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT,  
35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO  
APPELLANT BY THE CLERK OF THE COURT, OR 30 DAYS AFTER  
SERVICE BY A PARTY OR THE LAW GUARDIAN UPON THE  
APPELLANT, WHICHEVER IS EARLIEST.**

Dated: December 2, 2008.

ENTER:

Hon. Kathie E. Davidson

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J.F.C.