

Rubio v Rubio

2010 NY Slip Op 33548(U)

November 18, 2010

Sup Ct, Queens County

Docket Number: 24476/01

Judge: Timothy J. Flaherty

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acknowledged that Jayleine was unhappy with her father about being forced to return to New York. Accordingly, it was agreed that Jayleine would return to New York in early July and that thereafter she and her father would participate in a series of therapeutic visitation sessions under the supervision of Dr. A.J. Quatrano, a Clinical Psychologist. The plan was to hold two sessions during the week following her arrival in New York and two more sessions during the following week.

Pursuant to the agreement Jayleine was brought to New York during the first week of July. Having no place of their own and in light of the strained relationship between Jayleine and her father, mother and child were quartered in the home of her maternal aunt, along with some eight other relatives.

Jayleine was interviewed by Dr. Quatrano on July 7, 2010. On July 8, 2010 the initial therapeutic visitation was held between Jayleine and the plaintiff under Dr. Quatrano's supervision. The session was a disaster, both because Jayleine wept uncontrollably in the presence of her father and because her father made absolutely no effort to address the child's emotional breakdown nor console her in any way.

Efforts to schedule further therapeutic visitations with Dr. Quatrano during the summer as previously agreed to were unsuccessful, first, because the father failed to communicate with Dr. Quatrano until the latter part of July and subsequently, because the father elected to take his new wife and other children on a three week vacation in August to the Dominican Republic where he stayed with his new wife's relatives.

As such, he absented himself from the August 10, 2010 session of the Court. Jayleine and her mother, who remained quartered in the overcrowded home of the maternal aunt, did appear and on that day the Court conducted an in camera interview of the child, in the presence of her attorney, but outside of the presence of her mother and the two attorneys for the parties. During the interview the child described her experiences in North Carolina over the past year as well as her feelings and desires concerning her future.

In open Court counsel for the mother indicated his intention to serve and file a new motion for permission to "relocate" the child to North Carolina. The Court, recognizing the impending need to register the child in a school, the unacceptable temporary living conditions mother and child were enduring, the increasing difficulty of the mother remaining away from her North Carolina job, and the fact that the father was going to be out of

the country for most of the balance of the month, concluded that the best interests of the child required that she and her mother be permitted to temporarily return to North Carolina.

With the commencement of a new school year on the horizon and in anticipation of a new motion to relocate the Court sought to conduct a new evidentiary hearing by the end of August, that is, as soon as plaintiff would return from his Dominican Republic vacation. Unfortunately, the three necessary attorneys were unable to agree upon a short adjourned date and the case was adjourned to September 27, 2010.

Mother and child returned to North Carolina. Jayleine re-registered in school where she remains as of the date of this decision and order. During the interim, counsel for the plaintiff served and filed a writ of prohibition in the Appellate Division. Because that Court rejected plaintiff's counsel's request for a temporary restraining order, the Court was able to conduct a hearing, commencing on the scheduled date, September 27, 2010. During the pendency of the continued hearing, the Appellate Division denied the writ on the merits in an order dated October 12, 2010. The hearing on the motion was completed on October 22, 2010 after which decision was reserved.

The Law

In making a determination whether or not to grant a motion to relocate the Court must first look to Tropea v Tropea, 87 NY2d 727 (1996). Although Tropea outlines a series of factors that a court may consider ["the quality of the relationships between the child and the custodial and non-custodial parents, the impact of the move on the quantity and quality of the child's future contact with the non-custodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally, and educationally, and the feasibility of preserving the relationship between the non-custodial parent and child through suitable visitation arrangements" [at 740-741]] it is beyond doubt that the "primary focus must be on the best interests of the child." [at 739].

Plaintiff's counsel has argued that the Appellate Division's determination on March 16, 2010 is dispositive of the issue of relocation and that this Court is without power to consider the merits of the instant motion. The Court disagrees. First, the Appellate Division's denial of plaintiff's writ of prohibition on the merits would appear to dispose of this claim [see order of the Appellate Division dated October 12, 2010 (2010 NY Slip Opinion 7355)]. Second, in Matter of Fegadel v

Anderson, 40 AD3rd 1091 (2nd Dept 2007) the Appellate Division affirmed a lower court's decision to grant a second motion to relocate, based upon a change of circumstances even though, as in this case, the appellate court had previously ruled that relocation was inappropriate [Fegadel, supra, 9 AD3rd 409 (2nd Dept 2004)]. Accordingly, in reaching its determination in this case, the Court has not only considered whether relocation is in the best interests of the child, but also whether the circumstances have changed since the order rendered in 2009.

Of course in at least one crucial respect, the history of the litigation in this case has created a change of circumstances that weighs heavily upon the appropriate resolution of the instant motion. That circumstance is that, since September 1, 2009, almost fifteen months ago, ten year old Jayleine has in fact resided in Lewisville, North Carolina, where she has thrived both educationally and emotionally in her new environment. She is now well into her second school year in North Carolina and has consistently and passionately expressed her strong desire to remain in North Carolina and not be forced to return to New York.

Thus, it is important to recognize that, while the instant application has been characterized as a motion to "relocate" based upon a "change of circumstances", the reality of the situation from the critical perspective of the child is that this is not a motion to relocate at all. She is already in North Carolina and has been there for fifteen months.

Rather it is a legal proceeding to determine whether it is in the best interests of the child for this Court to compel her to leave her home in North Carolina, against her will. This is not to suggest that the burden of proof does not lie with the custodial parent to establish that which is in the best interests of the child [Tropea, supra]. It is simply a recognition of the geographical realities of the situation at bar.

The Facts

Turning to the facts adduced at the two hearings [the 2009 hearing has been made a part of the record of the 2010 hearing], it cannot be seriously disputed that Jayleine's life has been emotionally, economically and educationally enhanced by her move to North Carolina. Because her parents' marriage had failed even before she was conceived, Jayleine has been raised by her mother since birth [cf., Matter of Linn v Wilson, 67 AD3rd 1767 (4th Dept 2009)]. There is no dispute by the parties and no

question in the mind of the Court that defendant is and has always been a good and devoted mother to the child.

As the primary caretaker Jayleine's mother had struggled to make ends meet in New York, taking on as many as three jobs at once while attempting to make a home for her child. For most of her life in New York, home consisted of a shared room [with her mother] in a house owned and occupied by another family. By 2009 because damage to the house made it unlivable, mother and child were forced to move into a home with Jayleine's maternal aunt where living conditions were cramped and crowded.

These living conditions are in stark contrast to her new home in North Carolina. There, Jayleine and her mother live in their own home for the first time in her life. The home is a three bedroom apartment in a development with a swimming pool. Jayleine [and her mother] each have their own bedroom for the first time in her life. The obvious sharp improvement in her housing conditions is an important consideration in assessing whether permitting her to stay in North Carolina is in her best interests [cf., Matter of Winston v Gates, 64 AD2d 815 (3rd Dept 2009); Matter of Armstrong v Crout, 33 AD2d 1079 (3rd Dept 2006)]. The change in living conditions is also a change of circumstances of dramatic proportions [Fegadel, supra].

Defendant's ability to provide Jayleine with such a significant upgrade in living conditions was clearly an outgrowth of the radically different costs of living in New York, as opposed to North Carolina. Defendant's rent for their three bedroom apartment in North Carolina is \$650 a month. Comparable apartments in neighborhoods in Queens, where both parties agree contain desirable school districts [plaintiff is a professional educator who provided testimony on this issue] would cost at least twice as much, according to hearing testimony and Fair Market Rent statistics compiled by the Department of Housing and Urban Development.

In North Carolina defendant works a night shift at a hospital as a phlebotomist. She has also employed a woman to stay at the apartment at night to care for Jayleine while she is at work. The third bedroom is used by the employee to sleep. This arrangement allows defendant to have home child care for her daughter, an arrangement would clearly be economically impossible in New York with the comparable or even slightly higher wage she could earn here.

Economics appears to be the most important factor in defendant's desire to relocate and, to the extent that this enures to the benefit of the child, is certainly a necessary consideration for the Court to evaluate in deciding the motion. In Matter of Wirth v Wirth, 56 AD3rd 787 (2nd Dept 2008) the Court reversed a lower court's refusal to permit relocation, noting that Tropia, supra held that "[Economic necessity ... may present a particularly persuasive ground for permitting the proposed move' [id at 739].

The facts in Wirth are strikingly similar to the case at bar. In Wirth,

"[T]he mother amply demonstrated that, even if she were to obtain full-time employment at a salary commensurate with her prior employment, she could not afford both an apartment and daycare"

In reversing the 2009 determination of this Court the Appellate Division expressed concern about the "speculative" nature of the testimony concerning defendant's housing and vocational prospects in North Carolina. Clearly, what may have been "speculative" in 2009 is now immutable fact and to that extent is most assuredly a significant change in circumstance that warrants consideration by the Court [Fegadel, supra].

This Court finds that defendant's move to North Carolina was economically necessary for the best interests of the child. This Court further finds that returning mother and child to New York would cause an economic hardship that would not be in the best interests of the child.

It is also apparent to the Court that Jayleine is flourishing in North Carolina. She is now in her second year in school there and is doing well both socially and academically in that environment. Indeed, her academics have improved since the move.

In New York Jayleine first attended school in East Williston and then a parochial school in Queens before moving to North Carolina and enrolling in a third school. Relocation to New York would necessitate enrolling in a fourth school, a pedagogical choice that even the plaintiff recognizes will entail difficulties for the child. Thus compelling her to move to a new school is not in her best educational interests.

Jayleine is benefitting as well in North Carolina because of the increased time defendant is able to spend with her. .

Indeed, defendant has arranged to work nights and employ "night care" for her daughter so that she can be home both when Jayleine leaves for school in the morning and when she returns from school in the afternoon. Thus by this arrangement, this working mother is also able to be a virtual full time mother.

The improved housing, the life style, the economic and educational circumstances and the continuing nurturing of her mother have all coalesced into creating a happy and stable environment for the child in North Carolina. This is a setting that this Court is loathe to disturb.

Significantly, counsel for the child has consistently expressed a strong recommendation that Jayleine be permitted to live in North Carolina. While a

"Law Guardian's recommendation regarding an issue pending in Family Court is not controlling, ... given the unique nature of a Law Guardian's relationship with his or her client, it is one that deserve[s] serious consideration. (see Matter of Armstrong v Crout, 33 AD3rd 1079,1082...) "[Yolanda R. v Eugene I.G., 38 AD3rd 288 (1st Dept 2007) (citations omitted)].

In the case at bar the Court notes that the counsel for the child has had a long standing relationship with her client. For this reason her recommendation weighs heavily on the resolution of this case [see also Matter of Aruty v Mormando, 70 AD2d 683 (2nd Dept 2010)].

Finally, the Court is mindful of the strongly expressed statements of Jayleine herself, who intensely wishes to stay in North Carolina. She has expressed these views to the plaintiff on numerous occasions. Indeed, she has begged him to permit her to stay. She has sought the intervention of her paternal grandmother to prevail upon plaintiff-father to allow her to stay. She has expressed her desires to Dr. Quatrano. She has expressed her views through her attorney. She has stated her views on the subject to the Court during an in camera proceeding.

The prospect of being compelled to return to New York has had a profound negative emotional impact on her. Since learning that she may have to leave North Carolina she has had difficulty sleeping, suffered abdominal pains and sucking of her thumb. She has been attending therapy sessions in North Carolina to cope with her distress at the prospect of leaving.

At the single therapeutic visitation session that took place this summer in New York Jayleine wept incessantly when her father reacted with stony disinterest to her pleas to allow her to stay in North Carolina, causing further damage to an already deteriorating relationship with her father, which is rooted in his role in forcing the prospective move.

The Court is aware that the wishes of the child are not determinative. But neither can they be ignored, particularly where, as here, Jayleine is bright, mature and of an age where she has the ability to comprehend the consequences of relocation [see generally Scheinkman, New York Practice Series - New York Law of Domestic Relations Section 22:10]. Moreover, given the aforementioned domestic, economic, educational and environmental factors set forth herein, her wishes are both rational and understandable and the Court affords them due weight in reaching its decision. The Court also gives due weight to the serious emotional angst that a decision adverse to Jayleine's wishes will have upon her.

The Court appreciates that its determination both in 2009 and 2010 is not without adverse consequences. The rancor between her parents both before and after the move to North Carolina, peppered as it has been with lack of communication, orders of protection, visitation transfers at police stations, an arrest and threats of arrests certainly has done Jayleine no good. Nor has the contentious litigation on the issue of relocation been helpful. She is, as Judge Titone observed in Tropea,

"the innocent victim ... of [her] parents decision to divorce and [is] the least equipped to handle the stresses of the changing family situation." [id., at 739]. This is why "while the respective rights of the ... parents are ... significant ... it is the rights and needs of the children that must be accorded the greatest weight." [id. at 739].

In the end, that is the governing principal that has been on the mind of the Court throughout and is at the heart of its ultimate determination to allow Jayleine to remain in North Carolina.

In making this determination it remains a goal of this court to foster a continuing relationship between Jayleine, her father and her paternal family. Of course the primary responsibility for making this a reality lies with Jayleine's father and mother.

Both parents bear some responsibility for failing to insure that Jayleine sees her father and his family in New York on a regular basis. But plaintiff had engaged in a pattern of behavior since Jayleine moved to North Carolina that indicates a willingness to sacrifice his relationship with his daughter unless it occurs on his terms.

Remarkably, he failed to even once visit his daughter in North Carolina for an entire school year claiming it to be inconvenient. Equally troubling is the gamesmanship he has engaged in when in 2009 he purchased Christmas presents for Jayleine but refused to actually give them to her unless she comes to his home. As a result she has yet to receive them. He has excluded her from a family trip to Florida and another to the Dominican Republic. This pattern was climaxed by his inexcusably callous reaction to Jayleine's emotional breakdown in Dr. Quatrano's office. As a result plaintiff's relationship with Jayleine is now virtually non-existent.

That said, the Court agrees with Dr. Quatrano's view that the father-daughter relationship is reparable. Indeed, since the father's resistance to Jayleine's move to North Carolina has been at the center of her resentment and anger toward him, it is the view of the Court that this decision can and will begin the process of healing the damage.

Suitable visitation arrangements are a critical and necessary component of rebuilding and enhancing the relationship between Jayleine and her father [Tropea, supra]. The visitation schedule set forth below tracks the schedule agreed to by the parties on September 4, 2009.

Accordingly, the motion to relocate the child Jayleine Rubio to North Carolina is granted and it is further

Ordered that the plaintiff shall exercise parenting time on the second weekend of every month unless both parties agree on other weekends, and it is further

Ordered that the plaintiff must be available at all visits with the child, spend his parenting time with the child and not leave the child with other relatives or friends. If he cannot fulfill these terms he will forfeit the visit or make it up and it is further

Ordered that the plaintiff is to notify the defendant as soon as he knows when the visit[s] will take place, giving her reasonable time to prepare the child for said visit and it is further

Ordered that the plaintiff shall exercise parenting time with the child on Thanksgiving Day and Thanksgiving weekend every year and it is further

Ordered that the child shall spend Christmas Day with the defendant and the defendant shall determine where she wants to spend Christmas Day and it is further

Ordered that the child shall spend four consecutive weeks with the plaintiff during her summer vacation. Plaintiff must notify the defendant what month he wishes to exercise during the summer as soon as he knows his summer schedule and it is further

Ordered that airfare and other transportation expenses for both the child and the defendant shall be paid by the plaintiff for parenting time with the plaintiff and it is further

Ordered that any other visitation shall be exercised as mutually agreed to by the parties.

This constitutes the decision and order of the Court

DATE: November 18, 2010

Timothy J. Flaherty, J.S.C.