

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

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CAF 22-01920

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF TRICIA A.C.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

SAUL H. AND JULIE H.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),
FOR PETITIONER-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County
(Frederick G. Reed, A.J.), entered November 18, 2022. The order
dismissed the petition with prejudice.

It is hereby ORDERED that the order so appealed from is affirmed
without costs.

Memorandum: In appeal Nos. 1 and 2, petitioner appeals from
orders that dismissed with prejudice her petitions seeking to enforce
a post-adoption contact agreement with respect to her two biological
children, who had been adopted by respondents. The agreement, which
was incorporated into a judicial surrender of petitioner's parental
rights to the subject children, provides that petitioner shall be
permitted a minimum of three visits per year with the children, with
petitioner being required to contact the adoptive parents three times
each year to schedule those visitations. If petitioner missed two
scheduled visits in a row, she would lose her rights to future
visitations unless she could prove that her failure to attend was the
result of an emergency. The agreement further provides that
petitioner will be afforded phone contact with the children once a
month. Petitioner alleged in the petitions that respondents
improperly refused her visitation. Following a fact-finding hearing,
Family Court dismissed the petitions on the ground that petitioner
failed to have regular visitation with her children and that resuming
visitation is not in the children's best interests. We affirm.

It is well settled that an order incorporating a post-adoption

contact agreement "may be enforced by any party to the agreement . . . [, but t]he court shall not enforce an order [incorporating such an agreement] unless it finds that the enforcement is in the child's best interests" (Domestic Relations Law § 112-b [4]; see *Matter of Bilinda S. v Carl P.*, 193 AD3d 1355, 1356 [4th Dept 2021], lv denied 37 NY3d 904 [2021]). Thus, this agreement should be enforced only if it is in the children's best interests (see *Bilinda S.*, 193 AD3d at 1356; *Matter of J.B. [Lakoia W.-Paul B.]*, 188 AD3d 1683, 1683 [4th Dept 2020]; *Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1337 [4th Dept 2011]). Here, at the fact-finding hearing, the evidence established that petitioner made minimal and inconsistent efforts to schedule visits with the children and had not seen them for over two years. The evidence further established that petitioner did not attend at least one scheduled visitation. The children's treating psychologist opined at the hearing that it was not in the children's best interests to resume contact with petitioner. His opinion was based, in part, on his observation that since the children's contact with petitioner had ceased, the children's behaviors had improved. The court's determination that it is not in the best interests of the children to resume visits with petitioner is supported by a sound and substantial basis in the record (see *Matter of Sapphire W. [Mary W.-Debbie R.]*, 120 AD3d 1584, 1585 [4th Dept 2014]; *Kristian J.P.*, 87 AD3d at 1337-1338).

Petitioner's further contention that the provision of the agreement allowing her monthly telephone contact with the children is severable from the other provisions of the agreement and should be enforced is unpreserved for our review (see *Matter of Frandiego S.*, 270 AD2d 144, 144 [1st Dept 2000]; see generally *Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], lv denied 34 NY3d 901 [2019]). In any event, given petitioner's inconsistent and minimal prior monthly phone contact with the children, it would not be in the children's best interests to enforce that provision.

All concur except OGDEN, J., who dissents and votes to modify in accordance with the following memorandum: I agree with the majority in both appeals that Family Court's determination that it was not in the children's best interests to resume visitation with petitioner is supported by a sound and substantial basis in the record.

I disagree, however, with the majority in both appeals with respect to petitioner's monthly telephone contact with the children, and therefore I respectfully dissent. In the proceedings in Family Court, petitioner sought enforcement of the post-adoption contact agreement, and she contended, among other things, that she had been denied her monthly telephone contact with the children. Thus, contrary to the majority's determination, petitioner's contention seeking enforcement of the part of the agreement providing for such contact is preserved for this Court's review (see generally *Matter of Frandiego S.*, 270 AD2d 144, 144 [1st Dept 2000]). Furthermore, in my view, the court should have granted the petition insofar as it sought to enforce that part of the agreement providing that petitioner have monthly telephone contact with the children. During the hearing, the children's treating psychologist was not asked and did not opine

whether phone contact with the children would be detrimental to the best interests of the children. Moreover, the court's findings of fact and conclusions of law focused on the resumption of in-person physical visitation rather than petitioner's phone contact with the children. I therefore conclude that the court erred in failing to grant the petitions to that extent (*see generally Matter of Sapphire W. [Mary W.—Debbie R.]*, 120 AD3d 1584, 1585 [4th Dept 2014]), and I would modify the respective orders accordingly.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court