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

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CAF 22-01641
PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF SANDY B. MARTIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GARY J. MARTIN, RESPONDENT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (James K. Eby, R.), entered September 6, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody of the subject children with leave to relocate to Tennessee.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order entered after a hearing that, inter alia, awarded petitioner mother sole legal and physical custody of the parties' children and granted the mother permission to relocate with the children to Tennessee. We affirm.

Initially, we conclude that the father "waived his challenge to the authority of the Court Attorney Referee to hear and determine the petition[] before him" (*Matter of Sturnick v Hobbs*, 191 AD3d 1375, 1375 [4th Dept 2021]).

Contrary to the further contention of the father, we conclude that the Referee properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) in determining that the mother met her burden of establishing by a preponderance of the evidence that the proposed relocation is in the children's best interests, and we further conclude that the Referee's determination has " 'a sound and substantial basis in the record' " (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]). Here, the mother testified at the hearing that she has been the primary caregiver of the children and that her health has been steadily declining. She further established that the maternal grandmother, who moved to Tennessee in 2021, has provided her with

extensive financial assistance, as well as assistance in caring for herself and the children, and that the maternal grandmother would continue to do so if the mother were to relocate closer to the maternal grandmother (*see Matter of Ramirez v Velazquez*, 74 AD3d 1756, 1757 [4th Dept 2010]). Further, the record establishes that the father has no "accustomed close involvement in the children's everyday life" (*Tropea*, 87 NY2d at 740), and thus we conclude that the need to "give appropriate weight to . . . the feasibility of preserving the relationship between the noncustodial parent and [the] child[ren] through suitable visitation arrangements" does not take precedence over the need to give appropriate weight to the necessity for the relocation (*id.* at 740-741).

We have considered the father's remaining contentions and conclude that none warrants modification or reversal of the order.

All concur except NOWAK, J., who dissents and votes to reverse in accordance with the following memorandum: I agree with the majority that respondent father waived his challenge to the authority of the Court Attorney Referee to hear and determine the petition at issue. Contrary to the majority's conclusion, however, I agree with the father that the Referee erred in determining that petitioner mother met her burden of establishing by a preponderance of the evidence that the proposed relocation is in the children's best interests, and thus, in my view, the Referee's determination lacks a sound and substantial basis in the record (*see Matter of Gasdik v Winiarz*, 188 AD3d 1760, 1760-1761 [4th Dept 2020]). I therefore respectfully dissent.

In *Matter of Tropea v Tropea* (87 NY2d 727 [1996]), the Court of Appeals set forth the factors that should be considered in determining an application to relocate and emphasized that "no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome" (*id.* at 738). The best interests of the children are the predominant concern and, in making that determination, consideration and appropriate weight must be given to all of the relevant factors (*see Matter of Fleisher v Fleisher*, 151 AD3d 1768, 1769 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]).

In his decision, the Referee recited the relevant *Tropea* factors, but erred in considering and applying those factors to the case at bar. In particular, the Referee gave disproportionate weight to certain factors and largely ignored the impact of the move on the children's future contact with the father despite that factor weighing heavily against relocation, given the distance between Clinton County, New York, where the father resides, and Tennessee (*see Matter of Barlow v Smith*, 94 AD3d 1437, 1438 [4th Dept 2012]; *Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]; *Matter of Jones v Tarnawa*, 26 AD3d 870, 871 [4th Dept 2006], *lv denied* 6 NY3d 714 [2006]). "[D]enying visitation to a natural parent is a drastic remedy and should only be done where there are compelling reasons" (*Parker v Ford*, 89 AD2d 806, 806-807 [4th Dept 1982]). "[A]n individual's undesirable personal characteristics and habits cannot be relied on to deny visitation, unless there is a specific finding that the parent's conduct will have a detrimental

impact on the child" (*id.* at 807). Here, the Referee made no such finding. Nevertheless, the Referee effectively eliminated the father's access by suspending his right to in-person visitation indefinitely.

Moreover, the mother did not establish that the children's lives will be enhanced economically, emotionally, or educationally by the move, even if the move would not diminish them (*see Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018]; *Matter of Seyler v Hasfurter*, 61 AD3d 1437, 1437 [4th Dept 2009]; *cf. Matter of Scialdo v Cook*, 53 AD3d 1090, 1092 [4th Dept 2008]). The mother offered no testimony that the children would receive a better education in Tennessee, and there was no testimony comparing schools in each location (*see generally Gasdik*, 188 AD3d at 1762-1763).

The mother also offered no explanation as to why she and the children would be better cared for in Tennessee by the maternal grandmother—who testified that she works approximately 45 to 50 hours per week at multiple jobs in addition to caring for her son's newborn child—than in New York by the certified caregiver the mother was approved for but has never utilized (*see generally Matter of Hirschman v McFadden*, 137 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016]), particularly in light of the mother's unrefuted testimony that her seven-year-old daughter "does most of the taking care of" herself and of her four-year-old brother. Finally, the mother failed to establish that the children's lives would be enhanced economically. Indeed, the mother testified that she would be reliant upon the maternal grandmother to support her financially regardless of whether she moved, and there was no testimony that the mother would be eligible for the same benefits in Tennessee that she is currently receiving through New York State. In light of the foregoing, I do not believe that the mother met her burden, and I would thus reverse the order and dismiss the petition.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court