State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 17, 2020 528598

ELIZABETH B.,
Appellant-
Respondent,

v MEMORANDUM AND ORDER

SCOTT B.,
Respondent-
Appellant.

Calendar Date: October 21, 2020

Before: Egan Jr., J.P., Mulvey, Aarons, Pritzker and Colangelo, JJ.

Hug Law, PLLC, Albany (Matthew C. Hug of counsel), for appellant-respondent.

Gordon, Tepper & DeCoursey, LLP, Glenville (Jennifer P. Rutkey of counsel), for respondent-appellant.

Veronica Reed, Schenectady, attorney for the child.

Colangelo, J.

Cross appeals from a judgment of the Supreme Court (Burke, J.), entered February 19, 2019 in Schenectady County, granting, among other things, joint legal and physical custody of the parties' child, upon a decision of the court.

Plaintiff (hereinafter the mother) and defendant (hereinafter the father) are the parents of a son (born in

2015). The mother commenced this divorce action in October 2016. While the action was pending, the parties entered into a partial separation agreement that resolved the issues related to equitable distribution, spousal maintenance and counsel fees. The issues of custody, visitation and child support proceeded to trial. Following trial, Supreme Court issued a decision awarding the parties joint legal and physical custody of the child, with final decision-making to the father on medical and educational issues if, after extensive discussion and deliberation, the parties are unable to come to an agreement. With regard to child support, the court, applying the Child Support Standards Act (see Domestic Relations Law § 240 [1-b] [hereinafter CSSA]), found the father's basic child support obligation to be $1,336.25 a month, but, finding that award to be "inappropriate," deviated from said obligation and ordered the father to pay a reduced amount of $1,200 a month. The court also prorated the cost of health insurance premiums for the child, with the father to pay 69% and the mother to pay 31%. A judgment of divorce was entered in February 2019 that incorporated but did not merge the parties' separation agreement, the court's decision and the implementing custody order. The mother appeals and the father cross-appeals from the judgment.

In making an initial custody determination, Supreme Court's paramount consideration is the best interests of the child (see Eschbach v Eschbach, 56 NY2d 167, 171 [1982]; Matter of Damian R. v Lydia S., 182 AD3d 650, 651 [2020]; Matter of Samantha GG. v George HH., 177 AD3d 1139, 1140 [2019]). Relevant factors that must be considered in determining a child's best interests include "the quality of the parents' respective home environments, the need for stability in the child's life, each parent's willingness to promote a positive relationship between the child and the other parent and each parent's past performance, relative fitness and ability to provide for the child's intellectual and emotional development and overall well-being" (Matter of Shirreece AA. v Matthew BB., 166 AD3d 1419, 1421-1422 [2018]; accord Matter of Nicole TT. v David UU., 174 AD3d 1168, 1169 [2019]; Hassan v Barakat, 171 AD3d 1371, 1373 [2019]). "Inasmuch as [the trial] [c]ourt is in

a superior position to evaluate witness credibility, we defer to its factual findings and only assess whether its determination is supported by a sound and substantial basis in the record" (Matter of Patricia RR. v Daniel SS., 172 AD3d 1471, 1472 [2019] [citations omitted]; accord Matter of Damian R. v Lydia S., 182 AD3d at 651; see Matter of Ian G. v Crystal F., 174 AD3d 985, 987 [2019], lv denied 34 NY3d 903 [2019]).

Supreme Court heard testimony from both parents and received into evidence, among other things, numerous text messages between the parties and the forensic report prepared by psychologist Jerold Grodin. To the extent that both parents challenge the award of joint physical custody, we find that such award is supported by a sound and substantial basis in the record. Testimony established, among other things, that the parties had largely been following a shared access schedule established by orders in 2017, as well as, with one exception, an agreed-upon holiday parenting schedule. Additionally, although some concerns were raised about the father's parenting skills, Supreme Court found that the mother's perception of events was "somewhat exaggerated and distorted" and noted that a child protective investigation into the father's conduct that was alleged to cause an injury to the child, though initially found to be "indicated," was ultimately adjudicated as unfounded. The record further reflects that the father completed a parenting skills program and is willing to engage in coparenting counseling. As such, a sound and substantial basis in the record supports Supreme Court's conclusion that both parents have much to offer the child and that a shared physical custody arrangement is in the child's best interests.

We reach the same conclusion with regard to Supreme Court's award of joint legal custody. "Generally, joint legal custody is the preferred arrangement, unless the evidence demonstrates that the parties are unable to work together and communicate cooperatively" (Matter of Zaida DD. v Noel EE., 177 AD3d 1220, 1222 [2019] [citation omitted]; see Hassan v Barakat, 171 AD3d at 1373). Despite the mother's testimony as to the father's verbal abuse and threatening behavior toward her in front of the child, which had previously resulted in an order of

protection in her favor, the record evidence reflects that the parties have been able to communicate with one another, largely via text messages, in order to provide for the child's needs, and we defer to Supreme Court's implicit "assessment that their relationship is not so acrimonious as to render the award unworkable" (Matter of Patricia RR. v Daniel SS., 172 AD3d at 1472).

However, we reach a different conclusion regarding the award of final decision-making to the father on medical matters. The father testified that the mother's alienating behavior is related to medical decisions, but it appears that the parties were often able to agree on the need for medical care, and no similar concern was raised regarding decisions concerning the child's education. Further, although Supreme Court's express justification for awarding the father final decision-making was its "concern" that the mother would marginalize his participation in decision-making, it ignored the father's potential to exhibit the same conduct. The father took the child to see an allergist without first consulting the mother, for example, and failed to notify the mother on another occasion when the child's "cough" worsened and only contacted her when the child was at a hospital emergency room with a severe case of croup, had difficulty breathing and was vomiting. There were other instances in which the father was reluctant to provide the mother with basic information about the child until after the fact, such as placing the child on a vitamin regimen and failing to advise the mother of his address, after the marital home was sold, or the day-care facility that he had selected for the child. The father admitted that it would have been appropriate to advise the mother of these decisions.

By awarding the father final decision-making authority, Supreme Court effectively granted him sole legal custody. In making this award, the court paid little attention to Grodin's assessment that the father was "rigid," "unaware of child-focused play," "a poor candidate for tolerance of co-parenting where tolerance of differences is necessary" and likely to have "an inflexible approach at life," in contrast to the mother, who he found to be "quite child-focused," "flexible and hands on."

Although the court was not required to adopt Grodin's conclusions, we are troubled that it did not offer any explanation as to why it found them to be lacking in credibility or otherwise contradicted by the record (see Matter of Stephen G. v Lara H., 139 AD3d 1131, 1134 [2016], lv denied 27 NY3d 1187 [2016]). We therefore find that the award of final decision-making to the father on medical issues is unsupported by a sound and substantial basis in the record. Moreover, the record shows that it is the mother who has demonstrated the greater capacity to make appropriate and timely medical decisions for the child. For example, the mother testified that during an exchange, the father told her that the child had a "scratch" on his head that occurred at day care. However, the child's crying and screaming when she gently attempted to move his hair to look at it belied a "scratch" and revealed a bloody laceration. The mother notified the father that she was taking the child to Urgent Care, where an antibacterial ointment was prescribed for the wound. On another occasion, the mother alerted the father to an eczema/rash on the child's skin, discussed the condition with him and thereafter notified him of the medical appointment made to have the condition examined. We find that a sound and substantial basis in the record supports an award of final decision-making to the mother on medical issues if, after extensive discussion and deliberation, the parties are unable to come to an agreement on them (see Matter of Shirreece AA. v Matthew BB., 166 AD3d at 1422).

With regard to child support, Supreme Court appropriately deemed the father, the parent with greater income in an equally shared physical custody arrangement, to be the noncustodial parent for child support purposes (see Matter of Laskowsky v Laskowsky, 187 AD3d 1342, 1343 [2020]; Matter of Mitchell v Mitchell, 134 AD3d 1213, 1214 [2015]). "The CSSA provides a three-step method for calculating child support. The first step is to compute combined parental income. Second, the combined parental income is multiplied by a designated percentage based on the number of children to be supported. Finally, that amount is then allocated between the parents by applying each parent's respective portion to the total income" (Donna E. v Michael F., 185 AD3d 1179, 1180 [2020] [citation omitted]; see Domestic

Relations Law § 240 [1-b] [c]; Holterman v Holterman, 3 NY3d 1, 10-11 [2004]). "After completing the three-step formula, the statute allows the court to deviate from the basic child support obligation upon proof that the award would be 'unjust or inappropriate'" (Allen v Allen, 179 AD3d 1318, 1321 [2020], quoting Domestic Relations Law § 240 [1-b] [f] [citation omitted]; see Bast v Rossoff, 91 NY2d 723, 727 [1998]). The father contends that Supreme Court improperly calculated his basic child support obligation based upon a gross income of $102,000, the amount that he was earning at the time of trial as a result of a recent pay raise, as opposed to the lower income figure reported on the prior year's tax return. We disagree, since the provided documentation reflecting the pay raise "provide[d] a more accurate reflection of [the father's] actual income" (DeSouza v DeSouza, 163 AD3d 1185, 1187 [2018]; see Johnson v Johnson, 172 AD3d 1654, 1656 [2019]). We find no abuse of discretion in the court's downward deviation of the father's basic child support obligation. In finding the calculated annual obligation of $16,035 to be inappropriate, the court articulated that a deviation to $14,400 was warranted based upon the financial circumstances of the parties, the equally shared physical custody arrangement, and the nonmonetary contributions that the father will make toward the care and well-being of the child. To the extent that the father's remaining claims are properly before us, we have reviewed them and find them to be without merit.

Egan Jr. and Mulvey, JJ., concur.

Pritzker, J. (concurring in part and dissenting in part).

Although we agree with the majority in every other respect, including that Supreme Court erred in awarding final medical decision-making authority to defendant (hereinafter the father), we respectfully dissent because we do not agree that it is in the best interests of the child for plaintiff (hereinafter the mother) to be awarded same. To that end, the court's award of joint legal custody is supported by a sound and substantial basis in the record (see Matter of Patricia RR. v Daniel SS.,

172 AD3d 1471, 1472 [2019]), and, in support of that award, Supreme Court stated that it "believe[s] that co-parenting would benefit [the] parties, and encourages them to engage in the process."

The record does not reveal that the mother and the father have difficulty agreeing on most medical decisions; rather, the parties do not always disclose all relevant information to each other. Therefore, it is our opinion that awarding final decision-making authority to either parent is error, especially given Supreme Court's finding that the mother exaggerates the child's symptoms and exploits medical issues so as to marginalize the father's participation in parental duties. We reach this same conclusion as to the father, as the record also demonstrates that he failed to advise the mother of certain medical issues. Thus, in our view, providing either party with final decision-making authority on medical issues will weaponize the situation.[1] Moreover, while the record reveals instances where both parties withheld medical information from the other, there is no indication that, if the parties keep one another apprised of the relevant information, they cannot reach an accord as to medical decisions. Thus, it is our opinion that the best interests of the child are served with the mother and the father sharing joint legal custody, with neither party having final decision-making authority as to medical decisions. This will require that the mother and the father meaningfully communicate on these matters and that they keep one another apprised of not only medical issues, but any issue of importance relative to the child (see generally Matter of Burch v Willard, 57 AD3d 1272, 1273 [2008]).

Aarons, J., concurs.

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[1] We do not find that considerations raised in the report authored by Jerold Grodin, a licensed psychologist who did not testify, compel a different result.

ORDERED that the judgment is modified, on the law, without costs, by awarding plaintiff final decision-making authority with respect to medical matters, and, as so modified, affirmed.

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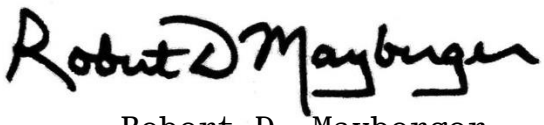

Robert D. Mayberger
Clerk of the Court