

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

Decided and Entered: March 25, 2021

530946

GILBERT RR. ,

Appellant,

v

MEMORANDUM AND ORDER

YANIRY RR. ,

Respondent.

Calendar Date: February 5, 2021

Before: Garry, P.J., Lynch, Aarons, Pritzker and Reynolds
Fitzgerald, JJ.

Garufi Law PC, Binghamton (Alena E. Van Tull of counsel),
for appellant.

Legal Aid Society of Mid-New York, Inc., Cooperstown
(Alice D. Decker of counsel), for respondent.

Garry, P.J.

Appeal from an order of the Supreme Court (Coccoma, J.),
entered January 17, 2020 in Otsego County, which denied
plaintiff's motion to, among other things, direct the parties
and their child to submit to forensic psychological evaluations.

Plaintiff (hereinafter the father) and defendant
(hereinafter the mother) were married in 2017 and are the
parents of the subject child (born in 2017). After the parties
separated, they each filed custody and family offense petitions.
Pursuant to an agreement between the parties, Family Court
entered an October 2018 order that, among other things, granted

the parties joint legal custody and shared residential placement of the child. In 2019, the father commenced this divorce action in which he sought, among other things, custody of the child. The father moved for an order directing the parties and the child to submit to forensic psychological evaluations or, alternatively, a mental health evaluation of the mother, to assist Supreme Court in its determination regarding custody. Supreme Court denied the motion. The father appeals.

"A party seeking modification of a prior order of custody must demonstrate first, that there has been a change in circumstances since the prior order and, then, if such a change occurred, that the best interests of the child would be served by a modification of that order" (Matter of Aimee T. v Ryan U., 173 AD3d 1377, 1378 [2019] [internal quotation marks and citations omitted]). Although the father's request for a custody modification provides relevant context, Supreme Court did not rule on custody but only on the father's motion seeking, as relevant here, mental health evaluations.¹ "The decision whether to direct a psychological or social evaluation in a child custody dispute is within the sound discretion of the court" (Matter of Paul C. v Tracy C., 209 AD2d 955, 955 [1994] [citations omitted]; accord Matter of Salamone-Finchum v McDevitt, 28 AD3d 670, 671 [2006]; see Matter of Farnham v Farnham, 252 AD2d 675, 677 [1998]; Burgel v Burgel, 141 AD2d 215, 216 [1988]). Supreme Court noted that "all of the issues raised by [the father] in support of his request for a forensic evaluation were fully known to him at the time that this matter was settled" in Family Court, and that the father made no claims of any new occurrences that had arisen since the parties' separation. Although the mother had moved out of a protective shelter and into her own apartment, it was obvious at the time that the parties reached their agreement in Family Court that she would be moving because residence in such a shelter is necessarily temporary. Further, although the father filed for divorce after the Family Court order was entered, the deterioration in the parties' relationship was already apparent

¹ Supreme Court must ultimately make a custody determination in the final judgment of divorce (see Domestic Relations Law § 240 [1]).

based on their prior separation and each of them having filed custody and family offense petitions against the other. As the father had agreed to the Family Court order against this background, Supreme Court reasonably concluded that he would be unlikely to establish a change in circumstances since that prior order that would warrant a modification of the custody arrangement (compare Matter of Hayward v Campbell, 104 AD3d 1000, 1000-1001 [2013]). Accordingly, the court did not abuse its discretion in denying the father's request for forensic psychological evaluations of the family and, impliedly, the alternative request for a mental health examination of just the mother (see Matter of Judith DD. v Ahava DD., 172 AD3d 1488, 1489 [2019]; Matter of Salamone-Finchum v McDevitt, 28 AD3d at 671).

Lynch, Aarons, Pritzker and Reynolds Fitzgerald, JJ.,
concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court