2018 WL 6519725
Supreme Court, Monroe County, New York.

Connie SCHOENL, Plaintiff,
v.
Kevin SCHOENL, Defendant.

2013/06421
|
Decided on November 5, 2018

Synopsis

Background: In post-divorce proceeding, father petitioned for modification of existing **child** visitation schedule, and mother cross-moved to dismiss the petition, claiming an absence of a substantial change in circumstances.

Holdings: The Supreme Court, Richard A. Dollinger, J., held that:

[1] mere fact that father had new house closer to **children's** primary residence was not change in circumstances sufficient to warrant modification of existing **child custody** and visitation order, and

[2] fact that mother no longer worked exclusively at home did not constitute a "substantial" or "sufficient" change in circumstances needed to warrant modification of existing **child custody** and visitation order.

Father's petition denied; mother's motion granted.

West Headnotes (3)

[1] **Child Custody**

Mere fact that father had a new house closer to **children's** primary residence was not change in circumstances sufficient to warrant modification of existing **child custody** and visitation order. N.Y. Family Court Act §§ 467(a), 467(b)(ii).

Cases that cite this headnote

[2] **Child Custody**

The test for the trial court in determining whether a change of circumstances exists to warrant modification of a **child custody agreement** and conducting of "**best interests**" analysis is not whether the parents have changed circumstances, but whether a parent's fitness has changed or the **children's** lives have been or would be changed. N.Y. Family Court Act §§ 467(a), 467(b)(ii).

Cases that cite this headnote

[3] **Child Custody**

Fact that mother, who had primary **custody** of **children**, no longer worked exclusively at home did not constitute a "substantial" or "sufficient" change in circumstances needed to warrant modification of existing **child custody** and visitation order; mother detailed that she worked outside the home occasionally at time original stipulation of **settlement** was entered such that circumstances, as general matter, remained unchanged. N.Y. Family Court Act §§ 467(a), 467(b)(ii).

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

Richard A. Dollinger, J.

***1** Subsequent? Sufficient? Substantial? Unanticipated?

In this matter, the court addresses a common question in family law: what type of change of circumstances causes

a court to reconsider the **best interests** of the **children** in changing an agreed **custody** or residency plan?

The parents in this matter have two **children**. In their separation **agreement** which was incorporated, but not merged in the judgment of divorce, the parties provided that they would have joint **custody** of their **children** with primary residence with the mother. The father had residential time on Mondays and Wednesdays through the afternoon into the early evenings and alternate weekends Friday evening to Sunday evening. The schedule was subsequently modified and the court order expanded the **children's** time with the father. The expanded time only included one **child** and was expanded to provide an additional overnight every other week. Furthermore, the modification order provided that the weekend visits with one of the two **children** was expanded to Monday morning. Despite the expansion of the time with his **children**, the mother alleges that the father did not avail himself of the additional time with the older **child**.

Subsequently, the father brought the pending motion for modification of the visitation/residency schedule. The father alleges two changes of circumstances. The first change is that he now owns a house less than one mile from the mother's home. Previously, the father owned a home in the same town which was four miles further away from the mother's home than his current home. The second asserted change is that the mother previously worked from home and now is employed away from the home which, the father alleges, reduces the time that the mother can care for the **children**. The father argues that he does not work and can therefore have both **children** at home with him when the mother is working during the day after school. The mother, in opposition to the modification petition, alleges that the fact that the father now owns a home closer to the mother's residence is not a sufficient change in circumstance to justify any modification. She also asserts that she works a combination of time in her office and in her home to accommodate her **children**. She asserts that she has always worked and balanced her working time and caring for the **children** even though the father has not worked. The mother cross-moved to dismiss the petition, arguing that the alleged change in circumstances was not "substantial" and did not constitute a beneficial change that impacted the **children**.

[1] The test in this instance is whether the father has made a showing of a change in circumstance that reflects a real need for change in the residency to ensure the **best interest** of the **children**. *Matter of Nevin H. (Stephanie H.)*, 164 A.D.3d 1090, 83 N.Y.S.3d 390 (4th Dept. 2018); *Matter of Smith v. Lopez*, 163 A.D.3d 1406, 80 N.Y.S.3d 836 (4th Dept. 2018). In examining this issue in detail, this court is struck by a lack of exacting terminology in dealing with changes of circumstances in this cluttered corner of New York's family law. First, the Family Court Act permits this court to modify a custodial arrangement upon a showing that there has been a *subsequent* change of circumstances and modification is required. NY FAM. CT. ACT § 467 (a) & (b) (ii). [1] The statute uses the word "subsequent" as an adjective to describe the "change in circumstances" that would trigger an analysis of whether "modification is required." The modification analysis, linked to the **best interests** of the **children** involved, is, under a strict reading of the statute, permitted if there is simply a "subsequent" change, or, read literally, if *any* change occurs *after* the date of the prior court order. Thus, under this analysis, any change, provided it occurs *after* the prior order, would permit this court, to leap into the **best interests** analysis, which would further require a contemporaneous re-balancing of the parental access to the **children** and an independent determination, by the court, of their welfare. Significantly, the Legislature, in dealing with modification orders in other contexts, has utilized other adjectives to describe the circumstances that justify judicial intrusion into prior **agreements** or orders. For example, in Section 451 of the Family Court Act, the legislature authorized courts to modify **child** support orders "upon a showing of a substantial change in circumstances." NY FAM. CT ACT § 451(3)(a). *Matter of Foster-Fisher v. Foster-Fisher*, 160 A.D.3d 951, 72 N.Y.S.3d 485 (2nd Dept. 2018). The Legislature appears to have required a higher degree of proof to justify a change in a **child** support order than is required to merit an adjustment of a parenting order.

***2** Although the statute seems to invoke a purely temporal consideration for courts in evaluating applications to modify parenting **agreements**, the New York courts have adopted a more restrictive test before permitting trial courts to modify **agreements** or orders and conduct a "**best interests**" analysis. The courts have substituted another adjective — the word "substantial" — to describe the necessary showing before a court can consider a **best interests** analysis. *Matter of Lupo v. Rainsford*, 162 A.D.3d 1032, 80 N.Y.S.3d 140 (2nd Dept. 2018). In *Matter of Allen v. Boswell*, 149 A.D.3d 1528, 53 N.Y.S.3d 432 (4th Dept. 2017), the court described the

test for modification as involving a "substantial change in circumstances." *See also Matter of Cramer v. Cramer*, 143 A.D.3d 1264, 38 N.Y.S.3d 867 (4th Dept. 2016); *Matter of Smith v. O'Donnell*, 107 A.D.3d 1311, 968 N.Y.S.2d 227 (3rd Dept. 2013) (the proof established a substantial change in circumstances rendering joint **custody** inappropriate); *Matter of D.T. v. V.T.*, 2015 N.Y. Misc. LEXIS 2948 (Fam. Ct. Onondaga Cty. 2015)(reciting the test as "a substantial change in circumstances"); *Matter of Juelle G. v. William C.*, 96 A.D.3d 538, 949 N.Y.S.2d 13 (1st Dept. 2012) (no change in **custody** because no proof of a substantial change in circumstances).

In other contexts, both the Second and the First Departments have used the "sufficient change" language to describe the burden assumed by a party seeking to modify **custody** or visitation. *Matter of Renee P.-F. v. Frank G.*, 161 A.D.3d 1163, 1167, 79 N.Y.S.3d 45 (2nd Dept. 2018); *McGinnis v. McGinnis*, 159 A.D.3d 475, 71 N.Y.S.3d 488 (1st Dept. 2018). *M.B. v. J.B.*, 53 Misc.3d 1209(A), 2016 WL 6130475, 2016 N.Y.L.J. LEXIS 3681 (Sup. Ct. Kings Cty. 2016). The Fourth Department has also chosen the "sufficient" adjective to describe the necessary change of circumstances. *Matter of Mathewson v. Sessler*, 94 A.D.3d 1487, 943 N.Y.S.2d 326 (4th Dept. 2012). In one First Department case, the court cited both standards: in referring to a rejected petition from one parent, the court found that the petition failed to prove "a change in circumstances to warrant a hearing" and then, two sentences later, rejected a petition from the opposing party because it failed to establish a "substantial change in circumstances." *Matter of Benjamin Sze-Bin W. v. Kerry S.W.*, 122 A.D.3d 473, 996 N.Y.S.2d 39 (1st Dept. 2014). The same interchangeability of the adjective to describe the necessary change in circumstances is present in *Matter of Starkey v. Ferguson*, 80 A.D.3d 799, 915 N.Y.S.2d 664 (3rd Dept. 2011), in which the court determined the lower court had found a "substantial" change in circumstances, but held the law simply required a "sufficient change in circumstances reflecting a real need for change in order to insure the continued **best interest** of the **child**." *Id.* at 800, 915 N.Y.S.2d 664; *see also Matter of Rue v. Carpenter*, 69 A.D.3d 1238, 893 N.Y.S.2d 696 (3rd Dept. 2010); *Ortiz v. Ortiz*, 2 A.D.3d 1236, 768 N.Y.S.2d 858 (3rd Dept. 2003). The Fourth Department in *Matter of Smith v. Lopez*, 163 A.D.3d 1406, 80 N.Y.S.3d 836 (4th Dept. 2018) seemingly mixed all three versions of the appropriate standard. In discussing the trial court determination, the court stated that the trail court "failed to expressly determine whether there had been a sufficient change in circumstances to warrant an inquiry into the **best interests** of the **child**." *Id.* at 1407, 80 N.Y.S.3d 836. The appellate court then held that the record demonstrated "a significant change in circumstance." *Id.* The court concluded by citing its prior holdings that did not provide any adjective before the critical phrase, concluding a party merely needed to prove a "change in circumstances [that] reflects a real need for change to ensure the **best interest**[s] of the **child**." *Id.* [2]

***3** In one other context, the Second Department made reference to an "unanticipated" change of circumstances, as a possible basis to modify the **custody**/residency provisions of an **agreement**. *Zaratzian v Abadir*, 128 A.D.3d 953, 12 N.Y.S.3d 104 (2d Dept. 2015). But, the adjective "unanticipated" is most often reference by courts when considering applications simply to modify **child** support obligations under Section 451 of the Family Court Act. NY FAM. CT ACT § 451(3)(a). *Matter of Gallagher v. Gallagher*, 109 A.D.3d 1176, 971 N.Y.S.2d 767 (4th Dept. 2013). *See also Evans v. Oliveira*, 2018 WL 5259591, 2018 N.Y. App. Div. LEXIS 7004 (1st Dept. 2018)((failure to find employment commensurate with wife's training and expertise does not constitute an unanticipated change in circumstances); *Matter of Brady v. White*, 158 A.D.3d 748, 72 N.Y.S.3d 114 (2d Dept. 2018)(father failed to satisfy his burden of establishing a substantial and unanticipated change in circumstances so as to warrant a downward modification). [3]

[2] This court has previously wrestled with the varying standards for reviewing prior **custody**/visitation **agreements** and modification proposals. *M.B.E. v. R.E.*, 39 Misc. 3d 1220(A), 2013 WL 1831801 (Sup. Ct. Monroe Cty. 2013) (Dollinger, J.). However, in this court's view, the judicial use of the words "substantial" or "sufficient" to describe the types of circumstances suggests that not just any change in the parent's lives justifies a modification. It must be a change that significantly improves the lives of the **children** or, as the Second Department intoned, "implicates the fitness of the custodial parent, or affects the nature and quality of the relationship between the **children** and the noncustodial parent." *Matter of Miedema v Miedema*, 125 A.D.3d 971, 972, 4 N.Y.S.3d 291 (2nd Dept. 2015), In short, when the change occurs is nowhere near as important as its impact on the lives of the **children** involved. The test for this court is not whether the parents have changed circumstances,

but whether a parent's fitness has changed or the **children's** lives have been or would be changed.

Here, the father moved closer to his former wife's residence, a move that made transitions somewhat easier between the households. However, there is no evidence that other than the proximity of the father's residence, any aspect of the **children's** lives has changed or would be changed. There is no allegation that the mother is unfit to be the primary residential parent. The mere fact that the father has a new house "closer" to the **children's** primary residence does not constitute a basis to leap to some "**best interests**" analysis. The Fourth Department held that the purchases of a house closer to the residential parent or obtaining new employment that freed more time for a parent to interact with **children** were not "sufficient" changes. *Matter of Mathewson v. Sessler*, 94 A.D.3d 1487, 943 N.Y.S.2d 326 (4th Dept. 2012). Furthermore, the fact that the father is not working and present in his home does not alone suggest that a modification of the visitation arrangements are in his **children's best interests**. While these circumstances give him some opportunity for greater access to his **children**, there is no evidence that any extra time with their father would result in any beneficial change for the **children**. The change in residence does not meet the test, regardless of whether the court invokes the "substantial" or "sufficient" language or even a combination of the two.

[3] Finally, the fact that the mother no longer works exclusively at home also does not constitute a "substantial" or "sufficient" change in circumstances that impacts the **children**. The mother details that she worked outside the home occasionally at the time the original stipulation of **settlement** was entered and hence, the circumstances, as a general matter, remain unchanged. The fact that she works outside the home does not equate with any lack of fitness on her part and there is no evidence to suggest otherwise. The mother made arrangements for the **children** to be watched by the grandparents, an arrangement that existed when the stipulation was entered and there is no evidence that the grandparents' involvement is a new or changed circumstance in the **children's** lives.

***4** In short, this court cannot find any allegation which, even if true, would constitute a "substantial" or "sufficient" or even "unanticipated" change in the circumstances of this case that would "establish a real need" for change in the visitation or **custody** of these **children**. The father's circumstances have changed: the **children's** have not. The parents, in their stipulation and subsequent modification **agreements**, decided the **children's best interests** and the facts alleged by the father do not justify modifying that agreed residence and visitation plan.

The father's application to modify the residency and visitation is denied and the mother's application to dismiss the petition is granted.

SUBMIT ORDER ON NOTICE. 22 NYCRR 202.48.

All Citations

--- N.Y.S.3d ----, 2018 WL 6519725, 2018 N.Y. Slip Op. 28387

Footnotes

1 Section 240(1) of the Domestic Relations Law gives Supreme Court general jurisdiction over **custody** and support proceedings but there is no specific provision in that statute governing the modification of **custody**/visitation/residency orders. NY DRL § 240(1).

2 One reason for this court's analysis of these different adjectives is that the court is seeking some consistent standard for evaluating the form or degree of the necessary change of circumstances before triggering the "**best interests**" analysis. The court hopes to avoid an amorphous "I'll know it when I read it" standard that, occasionally in other contexts, has cropped up in judicial decision-making. *See e.g., Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring).

3 Section 451 of the Family Court Act, which authorizes modifications of **child** support, utilizes the word "substantial" as the adjective preceding "change of circumstances" but that section of the statute does not contain the word "unanticipated." NY FAM CT Act § 451.