



NYS Kinship Navigator

RECENT CASES

Bevins v. Witherbee, , Third Dept, July 14, 2005.

Child placed voluntarily with grandmother, where child lived from seven months to four years. Parent took child on a camping trip and refused to return the child. He also denied visitation to the grandparent. Eleven months later the grandmother regained custody via a Essex County Family Court order of temporary custody. Subsequently, the Family Court found “extraordinary circumstances” and awarded sole custody to the grandmother.

Child had resided with her grandmother for “approximately 53 of the first 74 weeks of her life at respondent’s initial request and with his continued acquiescence.” This constituted an extraordinary circumstance. But the trial court declined to invoke Domestic Relations Law Section 72(2)(b) because the statute describes a continuous period of 24 months and the father disputed the fact that the child continually resided with her grandmother.

The father failed to demonstrate any insight into the child’s special needs and acted inappropriately in her presence. In contrast the grandmother is conscientious and the child has “thrived” in her care. Order of custody to the grandmother is affirmed.

Tolbert v. Scott, 2nd Dept., February 14, 2005.

Without a hearing, Family Court, Queens County, determined that “extraordinary circumstances” existed and proceeded to a fact finding hearing in order to determine the best interests of the child. Reversed on the law along with the award of physical custody to grandmother with joint custody with parent. But pending an evidentiary hearing, the second department awarded temporary physical custody to the grandmother. The trial court failed to hold required evidentiary hearing.

Amendments to Domestic Relations law were applied retroactively. The proceedings were pending when the amendments became effective. However since the amendments are “remedial” in nature, retroactive application is permissible.

The court also found that the new amendments “do not significantly alter the pre-existing law pursuant to the Matter of Bennett v. Jeffreys (40 NY 2nd 543). Remitted for an evidentiary hearing to determine the existence of “extraordinary circumstances.”

Guinta v. Doxtator, Fourth Dept. April 29, 2005.

Onandaga Family Court reconsidered its initial finding of “extraordinary circumstance” in a subsequent proceeding for custody between a parent and a paternal aunt and uncle. Reversed. Subsequent to an order of custody based on a finding of an extraordinary circumstance, the sole consideration for trial is whether either party established a “change of circumstances which reflects a real need for change to ensure the best interests of the child.” Prior to the instant proceeding, the trial court had found that the parent had not seen child for a period of one year, which constituted an abdication of parental responsibility.

But in the proceeding on appeal, the court did not consider the best interests of the child. Instead, it awarded custody to the parent based on a finding that the extraordinary circumstance no longer existed.

Once an extraordinary circumstance exists, in subsequent proceedings the parent has no preferred status. However, when the parent voluntarily agrees to the custody of a non-parent, the parental preference is not extinguished. Reversed and remitted.

Matter of Adoption of Brittany S. 4th Dept. Dec. 22, 2005.

Grandmother petitioned to adopt. Oneida County Family Court determined that because parent had abandoned the child, the parent’s consent was not required in order for the child to be adopted. Mother failed to visit her children for eleven months. Her only contact was to send a birthday gift to one child and sporadic communications with both children. See Domestic Relations Law Section 111(2)(a). “Insubstantial and infrequent contact is insufficient to preclude a finding of abandonment.”

Matter of GB and SM, 801 NYS 2d 233 (Monroe County Family Court May 3, 2005).

Petition by Monroe County Department of Social Services to terminate parental rights due to permanent neglect pursuant to Social Services Law Section 384-b. Mother consented to a finding of permanent neglect. Dispositional hearing was lengthy due to relatives contesting with county.

Family Court Act Section 614(1)(e) states that one of the elements in determining the disposition is that “the best interests of the child require that the guardianship and custody of the child be committed to the authorized agency or to a foster parent authorized to originate this proceeding...” Family Court dismissed termination proceeding. Finding that it was in the best interests of the two children to be placed with their extended family.

The court found that the contest was actually between placement with relatives or with the state. A grandmother and a paternal aunt had come forward via Article Six custody petitions to become caregivers. Their petitions need not claim an extraordinary circumstance because the children are in the care and custody of the state not the parents.

Court noted in dicta that a claim of a constitutionally protected family substantive due process right to raise children over non-relatives had not yet come before the court and that the court would have welcomed the opportunity to consider the existence of a fundamental family right.

Moreover the statutory scheme supports placement with relatives whenever possible. It is the department's duty to locate relatives not the relatives' duty to locate children. In this instance, the county failed to adequately search for relatives. Citing *Smith v. Organization of Foster Parents*, 431 U.S. 816, the court also found that foster parents should not be placed on an equal footing with family (relatives).

Debra VV. v. Johnson, February 26, 2006, 2nd Dept.

CPLR Article 78 proceeding to review the decision of the Office of Children and Family Services denying an aunt's application for kinship foster care payments. Caseworker informed aunt that "there was no such thing" as kinship foster care benefits. Petitioner then filed for custody and county withdrew its application for the removal of the children. Family Court awarded custody to the aunt. The aunt then sought benefits. OCFS ruled that since the child was not placed in foster care, payments were not warranted.

In this instance, the parent had identified the aunt as a resource and sought to have the children placed in foster care with the aunt, pursuant to Social Services Law 384-a(2)(h)(ii), wherein there is a statutory duty to assist the relative to become a foster parent. Despite affirmative duty, the department in a Family Court hearing declared, "Albany County has never recognized kinship foster care."

Appellate Court found that successfully placing a child with a relative does not relieve the state of its affirmative duty to provide foster placement." Annulled and remitted.



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