Court Orders $60,000 Bond To Ensure Visitation Rights

Andrew Harris
08-09-2005

MINEOLA — A Suffolk Supreme Court justice has ruled that a Huntington woman may move to Toronto with her 11-year-old son from her first marriage, but only if she puts $60,000 in escrow as a hedge against her cutting off court-ordered visitation with the boy's father.

Matrimonial law experts are calling the decision a practical solution to a difficult problem, but also one that is almost unheard of in this context.

Justice John C. Bivona, who decided the case, cited to only one other ruling — a 1997 Manhattan Supreme Court decision — as precedent for his order. His ruling came after an intermittent 28-day hearing during which the court heard testimony from both litigants, as well as the woman's second husband, a court-appointed forensic psychologist and others.

Sari M. Friedman, a Garden City matrimonial lawyer who represents plaintiff-mother, called the escrow requirement "unwarranted."

Ms. Friedman also said that her client is "grateful" for the right to relocate. But, the attorney added, the judge never made a judicial finding that previous court-ordered visitation with the boy's father, defendant John R. Andrade, had been denied.

"It seems to me that to order somebody to post a bond when there's been no showing of non-compliance is something that is not warranted," Ms. Friedman said.

Robert A. Cohen of West Islip, who represents Mr. Andrade, countered that money in the bank does not begin to assuage his client's disappointment with losing day-to-day contact with his son.

"It's all about the child," said Mr. Cohen. "It's always been about the child."

Both lawyers also said they are uncertain whether the court's July 29 order in Tortomas v. Andrade, 003519-2003, required an actual cash deposit or a collateralized bond, and that further clarification is needed.

The decision appears on page 19 of the print edition of today's Law Journal.

According to the court, plaintiff-mother married Mr. Andrade in December 1993, one month before the birth of their son who, like his father, is named [omitted].

By 1997, the couple had formally separated and they divorced in 2004.

Plaintiff-mother then married Toronto real estate developer [name omitted]. They have two children.

The new couple lived in a rented house in Huntington with their children as well as with plaintiff-mother’s son who is now 11.

The child also spent generous amounts of time with his father, Mr. Andrade, who the court credited with being "an affectionate parent who spends substantial time with his son on a weekly basis," attending karate lessons, sporting events and parent-teacher conferences.

What Mr. Andrade lacked, Justice Bivona noted, was the demonstrable wherewithal to give his son the same opportunities afforded him by the step-father and his family in Toronto.

"During his testimony, the defendant appeared quite ignorant and evasive as to his finances and income, which leads the court to question the defendant's veracity and his ability to adequately provide for the needs of the child," the judge wrote.

Justice Bivona did not care for the testimony of plaintiff-mother either, describing it as "self-promoting, manipulative and lacking in credibility."

He added that "under extensive and probing cross-examination, it became evident that plaintiff considered that visitation was within her purview to control and that visitation was merely a 'privilege' for the defendant, which he sometimes 'abused.' Such an attitude is grossly repugnant to the court and demonstrates an egotistical, narcissistic personality."

But Justice Bivona found the step-father's testimony highly credible. The judge also noted that the step father had an annual income in excess of $120,000, a "spacious and luxurious" six-bedroom house in Canada, and that the step-father's mother was willing to pay plaintiff-mother $75,000 per year to work in an art gallery.

Justice Bivona concluded that these elements, combined with the childs's ability to receive good schooling and his developing bonds with his step-siblings dictated that the proposed relocation would be in his best interests.

The Order Citing plaintiff-mother's testimony, Justice Bivona said he was concerned about her willingness to abide by his visitation order.

"Visitation with a parent is not the privilege of the parent but the right of a child," he emphasized. To ensure compliance, the judge directed plaintiff-mother to post a $60,000 bond but — sowing confusion over whether he called for cash or not — said the funds should be deposited into the escrow account of Mr. Andrade's lawyer, Mr. Cohen, and held there until the young child reaches 18.

Justice Bivona also granted Mr. Cohen the right to withdraw $50 per month to defray the costs of administering the account.

The judge did not say under what conditions the undertaking may be forfeited, only that a further application must be made to the court before funds over and above Mr. Cohen's stipend can be distributed.

As an additional condition of the move, Justice Bivona ruled that plaintiff-mother must submit to the court's continuing jurisdiction. He also set forth a generous visitation schedule for Mr. Andrade and his son, with weekends together on Long Island and in Toronto at least once a month, with special provisions for the summer months, Christmas and Easter.

All travel expenses are to be paid by plaintiff-mother — including Mr. Andrade's travel costs to Toronto and up to $500 a night for a hotel there.

Plaintiff-mother's attorney, Ms. Friedman, said the ruling allowing her client to relocate limited the mother's ability to be upset by its monetary component, and added that plaintiff-mother will have little difficulty posting the funds.

But, the lawyer said, the prospect of tying up $60,000 cash in escrow for eight years is "outrageous." That ruling, she added, appeared to be virtually without precedent.

Saudi Arabia Case The one case Justice Bivona relied on was Lazarevic v. Fogelquist, 175 Misc.2d 343, a 1997 ruling that was not appealed. In that case, Manhattan Supreme Court Justice Eileen Bransten ordered a mother who wanted to relocate with her child and second husband to Saudi Arabia to post an $80,000 undertaking to ensure fidelity to her visitation order.

Ms. Friedman and others noted that unlike Canada, Saudi Arabia is not a signatory to the Hague Convention, an international protocol that allows parents to petition the World Court for return of a child who has been abducted.

In an interview, Barbara E. Handschu, president of the National Academy of Matrimonial Lawyers, questioned the need for a bond in a situation where the mother was moving to a country that observed the Hague protocols.

"Saudi Arabia I understand," said Ms. Handschu, special counsel to Mayerson Stutman in Manhattan, "but this is Canada."

Ms. Handschu also said she has been involved in cases where bonds were posted to ensure a parent's return with a child, but only in the case of international trips of short duration, never for a permanent move.

Veteran East Meadow matrimonial lawyer Russell I. Marnell called the ruling "a difficult decision," but added that Justice Bivona apparently wanted to give plaintiff-mother "some financial incentive to make sure that she complied with visitation directed by the court."

In that context, said Mr. Marnell, a past chair of the Nassau County Bar Association's child custody committee, the required undertaking was "a good approach" that ensured meaningful contact between father and son.

But Mr. Cohen, Mr. Andrade's lawyer, had a different take.

"Hotel visitation isn't exactly warm and fuzzy," said Mr. Cohen, a member of Tabat, Cohen & Blum, which exclusively practices matrimonial and family law.

Mr. Cohen said that in his 26 years of practice he has never seen such a ruling and that he plans to appeal.

The financial assurance, he added, is "little solace to my client who fought a very long and difficult and expensive fight to keep his boy here."

Expressing her sympathies for the father, Ms. Friedman said, "There's no question that the lack of daily contact is one of the concerns that absence isn't going to be healed by the posting of a bond. It's unfortunate, but it has to be."

**Names have been omitted to protect the child and our client’s privacy.