

2016 WL 4034617

Unreported Disposition

NOTE: THIS OPINION WILL NOT APPEAR IN A
PRINTED VOLUME. THE DISPOSITION WILL
APPEAR IN THE REPORTER.

Family Court, Bronx County, New York.

In the Matter of a Support Proceeding, J.M.,
Petitioner,

v.

R.M., Respondent.

No. 66906.

|
July 18, 2016.

Attorneys and Law Firms

[William J. Rita](#), Esq., New York, attorney for respondent.

The Children's Law Center (Deborah Gould, Esq. and
[Sarah McCarthy](#), Esq.), Bronx, attorneys for petitioner.

Opinion

LISA S. HEADLEY, J.

*1 Respondent, R.M. (hereinafter, "Respondent"), through and by her attorney, timely objected to an Order of Support entered by Support Magistrate Jodi E. Hirschman, dated April 15, 2016. Petitioner, J.M. (hereinafter, "Petitioner"), through and by his attorney, timely filed a rebuttal. This Court, after a review of the court file, including the audio recording, written findings and evidence presented finds the objection to be without merit; therefore, the objection is denied.

Procedural History

Petitioner, on September 4, 2014, filed a petition for support against Respondent, his adoptive mother. On November 21, 2014, Petitioner, who was twenty years old at the time, appeared with his attorneys, the Children Law Center.¹ Respondent appeared telephonically and waived counsel.² Respondent stated to the court that Petitioner left her Maryland home in February 2014 after a verbal dispute and she had been unaware of his whereabouts. Petitioner alleged that he was no longer allowed in Respondent's home. When the Support Magistrate asked

Respondent whether she would consent to paying child support, Respondent refused unless Petitioner returned to her home. The Support Magistrate issued a temporary order of support in the amount of \$400.00 per month and adjourned the matter to January 9, 2015 for a hearing to determine whether or not Petitioner voluntarily left the home and constructively emancipated himself, and if necessary, to determine whether the Petitioner was entitled to child support.

On January 9, 2015, the emancipation hearing commenced. Petitioner testified that Respondent received an adoption subsidy for Petitioner in the amount of approximately \$800.00 per month and the subsidy was terminated in September 2014.³ Petitioner also testified that he was excluded from the home at some point in 2013, thereafter returned, and in February 2014 left the home after an argument with Respondent.⁴ Petitioner subsequently stayed with a friend for a short period of time, slept in a laundry room for a couple of days, and ultimately traveled from Maryland to New York. Petitioner testified that there was a history of verbal and physical abuse, and he was malnourished when he lived with Respondent. Petitioner also testified that he regularly communicated with Respondent after February 2014, and Respondent informed Petitioner that he would be allowed to return home if he paid Respondent \$500.00 per month. In addition, Petitioner testified that he works at Checkers and earns \$190.00 per week (before taxes) and he was recently hired by MetroPCS to supplement his income. Petitioner also testified that he applied for food stamps and that Respondent had not provided him with financial support after February 2014. In his Financial Disclosure Affidavit, Petitioner states that his monthly basic living expenses amount to \$814.00.

Respondent testified and also presented Petitioner's then eighteen year-old brother, M.M. as a witness. Respondent testified that Petitioner left the home on his own after she approached him about sexually violating his brother, M.M. Respondent also testified that she did not do anything after Petitioner left.⁵ Petitioner's brother, M.M., testified that Petitioner was upset because no one helped him clean the snow and that when Petitioner was confronted by their mother about touching him, Petitioner left. The court requested that Respondent submit evidence in support of the sexual abuse allegations towards M.M.⁶ The matter was adjourned to April 14, 2015 at 9:30 a.m. for continuation of the hearing.

*2 On April 14, 2015, only Petitioner's counsel and witnesses were ready to proceed in a timely manner at 9:30 a.m. Respondent appeared in court at 2:00 p.m. and

informed the court that she wanted representation of counsel. The court noted that when the hearing was commenced on the prior court date Respondent had knowingly waived counsel. The court within its discretion denied Respondent's application to adjourn the case in order to seek counsel to avoid further delaying the proceedings.

The court continued with the hearing and Petitioner presented his witness, Ms. D. Ms. D testified that she met Petitioner at church in 2011, and she observed that Petitioner had poor hygiene and appeared to be "frail" and "disheveled." Ms. D also testified that Petitioner told her that he was malnourished, beaten and punished when he resided with Respondent. Ms. D further testified that she allowed Petitioner to stay at her home for a period of time, providing him with food, and helping him gain employment doing janitorial work and carpentry for her church. In addition, Ms. D testified that she communicated with Respondent, who had possession of all Petitioner's documents, and Respondent agreed to give Ms. D Petitioner's school documentation to assist Petitioner with enrolling in a GED program. However, Ms. D testified she never received the requested documents from Respondent.

At the conclusion of the hearing, the court requested that Respondent complete and submit a Financial Disclosure Affidavit. In response to this request, Respondent stated that she was a student at a Maryland community college and was not gainfully employed. Respondent claimed that she supports herself with public assistance, and receives adoption subsidies for her other adoptive children and public assistance for her granddaughter.⁷ Further, Respondent testified that she has never filed income taxes. The court concluded the hearing on April 14, 2015 and directed the parties to submit written summations by May 11, 2015.

On May 12, 2015, upon receipt of a written summation from only the Petitioner, the court reserved its decision and administratively adjourned the matter to July 1, 2015. On July 1, 2015, the court determined that additional evidence was required and adjourned the matter to December 11, 2015.

On December 11, 2015, Petitioner and his attorneys appeared, and Respondent was present with her attorney who appeared for the first time. The parties engaged in extensive, but unsuccessful settlement discussions off the record. At that time, the Support Magistrate stated that "she did not believe she had the authority to finally resolve the matter and if they were unable to reach a settlement, the matter had to be referred to a Judge for a

final determination of the issues." Subsequently, the court reserved its decision and again administratively adjourned the matter to January 7, 2016. In her decision, the Support Magistrate concluded that "upon further review of the case law and the evidence ... that it has sufficient evidence as well as the legal authority to issue a final order[.]"⁸

*3 On April 15, 2016, the Support Magistrate issued her decision and the Order of Support was filed at the clerk's office. The clerk mailed copies of the order to Petitioner and Respondent on April 19, 2016.

Order of Support and Findings of Fact

Based on the evidence, as well as the credibility of the witnesses, the Support Magistrate found that Petitioner was not emancipated and was entitled to support by the Respondent. Further, the court held that Respondent "has caused or, at least, contributed to the breakdown in the relationship with Jaquan and failed to make even minimal efforts to contact him or encourage his return home." The Support Magistrate then determined the proper amount of support based on CSSA guidelines obligations pursuant to [FCA § 413\(1\)](#). Specifically, the court relied on the fact that the Respondent is a student and does not work. As such, her income is \$0.00 and based on the CSSA guidelines, Respondent's child support obligation would be \$25.00 per month. However, the court determined that a support order of a mere \$25.00 per month would be "unjust and inappropriate" under these circumstances.

Pursuant to [FCA § 413\(1\)\(k\)](#), when the court makes a determination that the minimum obligation would be unjust or inappropriate, the court could deviate from the guidelines and consider the child's needs or standard of living. See, *Matter of Saladin v. Vicari*, 23 AD3d 215 (1st Dep't 2005). Here, Respondent testified that she does not work and she does not file tax returns. However, Respondent testified that her monthly rent is \$1,800.00, but could not explain to the court how she pays her monthly expenses with the \$125.00 in public assistance and \$54.00 in food stamps she receives for herself per month. Respondent also testified that she received \$2,400.00 monthly, but later acknowledged receiving \$2,760.00 per month for her adoptive children, K.M. and M.M. Also, Respondent testified that she continued to receive the adoption subsidy on behalf of the Petitioner through September 2014, although it is undisputed that Petitioner did not live with Respondent since February 2014. Petitioner's Financial Disclosure Affidavit listed his basic living expenses as \$814.00 per month. Accordingly, the court found it appropriate to issue an order of \$814.00 per month, "which it deemed the amount required to ensure that J.M.'s needs were met." The court ordered

that Respondent was responsible for retroactive support in the amount of \$6,568.00 for the period September 4, 2014 to April 2, 2016, and arrears in the amount of \$2,400.00 as of April 2, 2016.

Respondent's Objection

On May 19, 2016, Respondent submitted a written Objection to the Support Magistrate's Order of Support dated April 15, 2016. Specifically, Respondent's counsel asserts when he appeared for the first time in this proceeding on December 11, 2015,⁹ the parties were involved in settlement discussions and "only \$500.00 separated the parties." Respondent argues, *inter alia*, that she was not served with the Order of Support and was taken by surprise when the court issued an Order after the Support Magistrate "said the case would be reassigned and the parties would be notified of a new court date." Lastly, Respondent claims that she has an "undeniable right to retain counsel" and that "there has been a denial of due process." Therefore, Respondent requests that "this matter be reassigned to a different part and to a Family Court Judge[.]"

Petitioner's Rebuttal

*4 Petitioner's rebuttal asserts, *inter alia*, that the child support obligation is fair and just because Respondent failed to prove that he was self-emancipated and thus, Respondent was responsible to pay child support. Petitioner argues that Respondent did not take responsibility for the breakdown of their relationship, she "washed her hands" of him, and she left him homeless and dependent on others. Petitioner also contends that Respondent and her witness lacked credibility and their testimonies were inconsistent and contradictory regarding the circumstances that caused Petitioner to leave the home. Moreover, Petitioner insists that the Support Magistrate had the authority to resolve this case because Support Magistrates routinely adjudicate disputes involving emancipation claims. Petitioner further argues that Respondent was not denied due process because she had waived her right to counsel after being advised by the court of her right to retain counsel at the outset of the proceedings. Petitioner concluded with a public policy argument that Respondent repeatedly misused public funds and collected Petitioner's adoption subsidy after Petitioner left the home and collected "approximately \$5,600 and \$8,800 ... at the taxpayers' expense."¹⁰

DISCUSSION

I. Support Magistrates have the authority to preside over child support matters

This Court's review of child support orders is a narrow one. It is the support magistrate, rather than the reviewing judge, who is present at the evidentiary hearing and is uniquely able to evaluate both the evidence and the credibility of the witness prior to making an order. *Minerva R. v. Jorge L.A.*, 59 AD3d 243, 244 (1st Dep't 2009); *Matter of Sosa v. Sosa*, 13 AD3d 638 (2d Dep't 2004). "The greatest deference should be given to the factual findings of a Support Magistrate who is in the best position to assess the credibility of the witnesses and the evidence proffered." *Kent v. Kent*, 7 Misc.3d 1031(A) (Bronx Co. Family Ct.2005); See also, *Mahoney v. Goggins*, 24 AD3d 668 (2d Dep't 2005); *Columbia Co. Dep't of Social Services o/b/o William O. v. Richard O.*, 262 A.D.2d 913 (3rd Dep't 1999); *Matter of Niagara Co. DSS v. Randy M.*, 206 A.D.2d 878 (4th Dep't 1994). Therefore, as a general rule, the support magistrate's findings of fact should not be rejected unless they are contrary to the weight of the credible evidence or in error as a matter of law. *Kent*, supra; *Matter of Weiner v. Weiner*, 97 Misc.2d 920 (Monroe Co. Family Ct.1979).

In her objection, Respondent requests that this matter be reassigned to a different part and to a Family Court Judge. This request is hereby denied. In Family Court, support proceedings are tried before Support Magistrates. See, 22 N.Y.C.R.R. § 205.34(a). The Family Court Act requires Support Magistrates to determine a support matter by making findings of fact and issuing a final order of support. FCA § 439(e).

*5 Respondent's attorney also contends that Respondent did not receive the Final Order. However, this Court's review of the file indicates that the Support Magistrate issued her decision and filed the Order of Support at the clerk's office on April 15, 2016. The file also indicates that the clerk mailed copies of the order to Petitioner and Respondent on April 19, 2016.

II. The Court did not deprive Respondent of Due Process

A person has a statutory right to the assistance of counsel when he/she first appears in court, and therefore, the judge must advise litigants before proceeding that they have the right to be represented by counsel, and also have a right to request an adjournment to seek counsel. FCA § 262(a). A waiver of the statutory right to counsel must be explicit and informed, and as such the record must show a sufficient awareness of the relevant circumstances and probable consequences of the waiver. *Alexander v. Maharaj*, 299 A.D.2d 354, 750 N.Y.S.2d 100 (2d Dep't 2002); *Brainard v. Brainard*, 88 A.D.2d 996, 451

N.Y.S.2d 832 (2d Dep't 1982); *Kissel v. Kissel*, 59 A.D.2d 1036, 399 N.Y.S.2d 781 (4th Dep't 1977).

On November 21, 2014, the Support Magistrate informed Respondent of her right to counsel and Respondent replied to the court, "I would like to represent myself, but if I need one, I'll come back for an adjournment."¹¹ Subsequently, this matter was scheduled for hearing on January 9, 2015 and April 14, 2015. On January 9, 2015, Respondent proceeded with the trial and did not request an attorney. On April 14, 2015, Respondent appeared late in court at 2:00 p.m. for a scheduled morning hearing and requested an adjournment to retain counsel, and that request was denied by the court. The court within its discretion denied Respondent's application to adjourn the case in order to seek counsel to avoid further delaying the proceedings. See, *People v. Rodriguez*, 6 AD3d 814, 776 N.Y.S.2d 105 (3d Dep't 2004) [The decision to grant or deny an adjournment ordinarily lies within the sound discretion of the trial court [..]]; *Bombard v. Bombard*, 254 A.D.2d 529, 678 N.Y.S. 2D 691 (3d Dep't 1998); See also, *People v. Rodriguez*, 95 N.Y.2d 497, 719 N.Y.S.2d 208 (2000) ["A defendant who elects to exercise the right to self-representation is not guaranteed the assistance of standby counsel during trial"].

Contrary to Respondent's assertion, the Support Magistrate did not deprive Respondent of due process because she expressly and knowingly waived counsel and proceeded with the hearing without legal representation. In *Lada v. Lada*, 231 A.D.2d 521, 647 N.Y.S.2d 265 (2d Dep't 1996), the Appellate Court held that the due process violations raised by the father were factually and legally unpersuasive because the father was aware of his right to retain an attorney, but initiated the litigation as a *pro se* petitioner and elected to represent himself. Similarly, in this case, Respondent initiated the proceedings as a *pro se* litigant and knowingly waived counsel. It is clear from the record that the court advised Respondent of her right to retain an attorney, and Respondent decided to represent herself. Further, the Support Magistrate noted that when the hearing was commenced, Respondent had knowingly waived counsel. See, *In re Mitchell WW.*, 74 AD3d 1409, 903 N.Y.S.2d 553 (3d Dep't 2010) [The father's decision to proceed *pro se* was an informed and voluntary one made with full awareness of the risks inherent in representing himself]. In fact, during the trial, Respondent presented her own witness in support of her position, and cross-examined Petitioner and his witness. Nonetheless, on December 11, 2015, well over a year after the first court appearance and after the trial had concluded, Respondent appeared in court for the first time with counsel and now argues that she was "denied right to counsel." Respondent's due process argument is factually

and legally unpersuasive based on this Court's review of the record. Therefore, this Court finds that the Support Magistrate did not deny due process to the Respondent.

III. The Support Magistrate properly found that Petitioner was not emancipated and is entitled to support from Respondent

*6 Pursuant to DRL § 110 and DRL § 117(1)(a), adoptive parents are liable for support of their adopted children and the natural parents are relieved of all responsibility for support. See also, *Harvey-Cook v. Neill*, 118 A.D.2d 109, 504 N.Y.S.2d 434 (2d Dep't 1986). The Family Court Act sets forth the "fundamental public policy in New York" that parents of minor children are responsible for their children's support until age twenty-one. See, FCA § 413(1)(a). In the instant case, Petitioner is the adoptive son and Respondent is the adoptive mother. Respondent, as the adoptive mother, is legally responsible to support Petitioner until he turns twenty-one years old.

During the emancipation hearing, the Support Magistrate weighed the credibility of the parties, their witnesses and the testimony of all present at the hearing. Moreover, a child may be emancipated "where the child voluntarily and without sufficient cause leaves the parent's home and withdraws from parental control and guidance." *Matter of Alice C. v. Bernard G.C.*, 193 A.D.2d 97, 602 N.Y.S.2d 623 (2d Dep't 1993). The burden of proving emancipation is upon the person asserting that the child has abandoned the parent. See, *Matter of Oneida County Dept. of Social Servs. v. Christman*, 125 AD3d 1409, 3 N.Y.S.3d 222 (4th Dep't 2015); *Gold v. Fisher*, 59 AD3d 443, 873 N.Y.S.2d 139 (2d Dep't 2009); *Schneider v. Schneider*, 116 A.D.2d 714, 498 N.Y.S.2d 23 (2d Dep't 1986).

The Support Magistrate found that Petitioner had not lived with Respondent since February 2014, and it is undisputed that Respondent continued to receive the adoption subsidy intended for Petitioner long after he left Respondent's home.¹² The Support Magistrate appropriately determined, based on the testimony and evidence presented, that Respondent's "evidence regarding the circumstances of Jaquan leaving her home have been inconsistent" and "not credible." Further, the Support Magistrate determined that Respondent had not met her burden of proof that Petitioner was emancipated and found that Respondent had contributed to the breakdown in the communication and failed to make serious efforts to repair their relationship. See, *Jaffee v. Jaffee*, 202 A.D.2d 264 (1st Dep't 1994). The Support Magistrate also found that the Respondent lacked credibility based on her testimony that she would support Petitioner only if he moves back into her home, after she

alleged that Petitioner had sexually assaulted his brother, who also resides in the same home.

On appeal, Support Magistrates must be given great deference to the credibility determination. *Matter of Creem v. Creem*, 121 A.D.2d 676, 677, 504 N.Y.S.2d 444, 445 (2d Dep't 1986). This Court finds the Support Magistrate's credibility determination is supported by the facts and evidence, and will not disturb the findings that Petitioner was not emancipated and thus, Petitioner was entitled to support until he reached the age of twenty-one (21).

*7 Furthermore, this Court will not disturb the Support Magistrate's findings and Order because the record does not demonstrate any abuse of discretion, nor mistake of

fact or law, on behalf of the Support Magistrate.

WHEREFORE, it is hereby ORDERED, that Respondent's objection is denied.

Clerk to notify the parties, Support Magistrate and Collection Unit.

All Citations

Slip Copy, 2016 WL 4034617 (Table), 2016 N.Y. Slip Op. 51136(U)

Footnotes

- 1 Petitioner, J.M., turned twenty-one (21) in September 2015.
- 2 See, Transcript dated 11/21/14 at page 9, Lines 9–11.
- 3 Petitioner testified that Respondent received an adoption subsidy in the amount of \$26.20 per day, which is approximately \$797.00 per month. The last subsidy check was dated October 1, 2014.
- 4 See, Petitioner's Rebuttal at page 9.
- 5 On November 21, 2014, R.M. testified "I got J.M. a job, and he just went haywire. So, what am I supposed to do? I have other children. I cannot run behind J.M. like that." See, Transcript dated 11/21/14 page 10, lines 12–14.
- 6 Respondent never submitted documentation to support the alleged sexual abuse. See, Findings of Fact, dated 4/14/16 at page 4.
- 7 Respondent testified that she receives approximately \$2,400.00 per month for her adoptive children, K.M. and M.M., although Respondent later acknowledged receipt of \$2,760.00 per month. Respondent also testified that she receives \$250.00 per month in public assistance for her granddaughter who lives in her household. See, Findings of Fact, dated 4/14/16 at page 4.
- 8 See, Findings of Fact, dated 4/14/16 at page 2.
- 9 The hearing was conducted on January 9, 2015 and April 14, 2015 after Respondent knowingly, waived counsel and Respondent's counsel appeared for the first time on December 11, 2015.
- 10 See, Petitioner's Rebuttal at page 30.
- 11 See, Transcript dated 11/21/14 at Page 9, Lines 9–11.
- 12 The last adoption subsidy check was dated October 1, 2014.

