

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

2017-01579

2017-01584

2017-06311

2017-08729

In the Matter of RENEE P.-F. (Anonymous),

Respondent

v.

FRANK G. (Anonymous),

Appellant

In the Matter of FRANK G., (Anonymous),

Appellant

v.

Renee P.-F., (Anonymous) et al.,

Respondents

In the Matter of JOSPEH P., (Anonymous),
Petitioner-Respondent

v.

FRANK G. (Anonymous),
Appellant

RENEE P.-F. (Anonymous), et al.,
Respondent-Respondent

Appeal from the Family Court, Orange County

(May 30, 2018)

Before REINALDO E. RIVERA, J.P., MARK C.
DILLON, VALERIE BRATHWAITE NELSON, and
LINDA CHRISTOPHER, JJ.

In related proceedings pursuant to Family Court Act article 6, Frank G. appeals from (1) a decision of the Family Court, Orange County (Lori Currier Woods, J.), dated February 14, 2017, made after a hearing, (2) an order of the same court, also dated February 14, 2017, (3) an order of the same court dated May 10, 2017, and (4) an order of the same court dated August 2, 2017. The order dated February 14, 2017, insofar as appealed from, upon the decision dated February 14, 2017, granted Joseph P.'s petition for custody of the subject children and denied Frank G.'s petition for custody of the subject children and for permission to relocate with the subject children to Florida. The order dated May 10, 2017, insofar as

appealed from, granted that branch of Joseph P.'s motion which was for an award of an attorney's fee to the extent of directing Frank G. to pay an attorney's fee in the sum of \$25,000, and granted that branch of Renee P.-F.'s motion which was for an award of an attorney's fee to the extent of directing Frank G. to pay an attorney's fee in the sum of \$15,000. The order dated August 2, 2017, dismissed, without a hearing, Frank G.'s petition to modify the order dated February 14, 2017, so as to, inter alia, award him custody of the subject children or, in the alternative, to increase his physical access time with the subject children.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (see *Schicchi v. J.A. Green Constr. Corp.*, 100 A.D.2d 509); and it is further,

ORDERED that the orders dated February 14, 2017, and May 10, 2017, are affirmed insofar as appealed from; and it is further,

ORDERED that the order dated August 2, 2017, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to Joseph P.

Joseph P. (hereinafter Joseph) and Frank G. (hereinafter Frank) were domestic partners who began living together in 2009. As they desired to have children genetically related to both of them, they asked Joseph's sister, Renee P.-F. (hereinafter Renee), to act as a surrogate. Renee had previously promised her brother that she would carry a child for him after he met his life partner. Renee executed a surrogacy

contract in which she agreed to be impregnated with Frank's sperm and to terminate her parental rights in order for Joseph to adopt the child or children. In _____ 2010, Renee gave birth to fraternal twins, Giavonna and Lucciano (hereinafter together the children).

During the first four years of the children's lives, Joseph and Frank equally shared the rights and responsibilities of parenthood, although Joseph did not legally adopt the children. The children regarded both Joseph and Frank as their parents. During that period, Renee frequently saw the children. In early 2014, Joseph and Frank separated, and the children continued to reside with Frank. Even so, Joseph, acting in a parental role, visited and cared for the children on a daily basis. However, in May 2014, Frank suddenly refused to allow Joseph or Renee to have any access to the children. In December 2014, Frank moved to Florida with the children without informing Joseph or Renee, or commencing a proceeding for custody of the children.

Thereafter, Renee petitioned for custody of the children, and Joseph petitioned to be appointed guardian of the children. In March 2015, Frank petitioned for custody of the children and for permission to relocate with the children to Florida. In an order dated April 8, 2015, the Family Court denied that branch of Frank's motion which was for permission to relocate with the children to Florida. In June 2015, Joseph withdrew his guardianship petition and filed a petition for custody of the children. Frank then moved, in effect, to dismiss Joseph's custody petition on the ground, inter alia, that Joseph lacked standing under Domestic Relations Law § 70.

In an order dated August 21, 2015, the court, after a hearing, denied Frank's motion to dismiss and determined that Joseph had standing to seek custody of or physical access with the children. Frank appealed from the orders dated April 8, 2015, and August 21, 2015.

While Frank's appeals were pending before this Court, the Court of Appeals, in *Matter of Brooke S.B. v. Elizabeth A.C.C.* (28 N.Y.3d 1), overruled *Matter of Alison D. v. Virginia M.* (77 N.Y.2d 651). In *Matter of Brooke S.B.*, the Court of Appeals held that, where a partner to a biological parent "shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70" (*Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d at 13). Based upon the evidence adduced at the hearing before the Family Court and in light of *Matter of Brooke S.B.*, this Court determined that Joseph established standing to seek custody or physical access and remitted the matter to the Family Court, Orange County, for a full hearing on the custody petitions (see *Matter of Giavonna F.P.-G.* [Frank G.—Renee P.-F.], 142 A.D.3d 931; *Matter of Frank G. v. Renee P.-F.*, 142 A.D.3d 928).

On remittitur, the Family Court, after a hearing, issued an order dated February 14, 2017, upon a decision also dated February 14, 2017, inter alia, granting Joseph's petition for custody of the children and denying Frank's petition for custody of the children and for permission to relocate with the children to Florida. In an order dated May 10, 2017, the court granted that branch of Joseph's motion

which was for an award of an attorney's fee to the extent of directing Frank to pay an attorney's fee in the sum of \$25,000, and granted that branch of Renee's motion which was for an award of an attorney's fee to the extent of directing Frank to pay an attorney's fee in the sum of \$15,000. In an order dated August 2, 2017, the court dismissed, without a hearing, Frank's petition to modify the order dated February 14, 2017, so as to, inter alia, award him custody of the children. Frank appeals from the decision and the orders.

Frank argues that the Family Court improperly determined that Joseph had standing to seek custody of the children pursuant to *Matter of Brooke S.B.* (28 N.Y.3d 1). However, as stated above, on Frank's prior appeal from the order dated August 21, 2015, this Court determined that Joseph established standing to seek custody or physical access pursuant to the standard set forth in *Matter of Brooke S.B.* and remitted the matter to the Family Court, Orange County, for a full hearing on Joseph's petition for custody or visitation with the children (see *Matter of Frank G. v. Renee P.-F.*, 142 A.D.3d at 930-931). "The law of the case doctrine forecloses re-examination of issues decided on a prior appeal in the same action, absent a showing of new evidence or a change in the law" (*New York Cent. Lines, LLC v. State of New York*, 141 A.D.3d 703, 705; see *Clinkscale v. Sampson*, 104 A.D.3d 722, 723; *Wells Fargo Bank Minn., N.A. v. Perez*, 70 A.D.3d 817, 817). Here, Frank had a full and fair opportunity before the Family Court and on the prior appeal to contest the issue of Joseph's standing. Frank has neither presented new evidence that would change the determination in the prior appeal nor

demonstrated that there has been a subsequent change in the law. Under these circumstances, Frank is barred from raising the same argument again on these appeals.

“The paramount concern in any custody or visitation determination is the best interests of the child, under the totality of the circumstances” (*Matter of Boggio v. Boggio*, 96 A.D.3d 834, 835; see *Matter of Wilson v. McGlinchey*, 2 N.Y.3d 375, 380-381; *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171). As this matter concerns an initial custody determination, the strict application of the factors relevant to relocation petitions (see *Matter of Tropea v. Tropea*, 87 N.Y.2d 727, 741) is not required (see *Matter of McDonald v. Thomas*, 154 A.D.3d 763, 764; *Matter of Wood v. Rago*, 135 A.D.3d 949, 950). Frank’s relocation to Florida was one factor for the Family Court to consider in determining what was in the children’s best interests (see *Matter of Wood v. Rago*, 135 A.D.3d at 950; *Matter of Santano v. Cezair*, 106 A.D.3d 1097, 1098). “[O]ne of the primary responsibilities of a custodial parent is to assure meaningful contact between the children and the noncustodial parent, and the willingness of a parent to assure such meaningful contact between the children and the other parent is a factor to be considered in making a custody determination” (*Matter of Vasquez v. Ortiz*, 77 A.D.3d 962, 962; see *Matter of Dezil v. Garlick*, 114 A.D.3d 773, 773-774; *Matter of Honeywell v. Honeywell*, 39 A.D.3d 857, 858).

Here, the Family Court’s determination that the best interests of the children would be served by an award of custody to Joseph has a sound and substantial basis in the record and will not be

disturbed. Frank's refusal to allow Joseph any contact with the children as of May 2014 and relocation with the children to Florida, without informing Joseph, constitutes willful interference with the relationship between the children and Joseph. Such conduct "is so inconsistent with the best interests of the children as to, per se, raise a strong probability that the offending party is unfit to act as a custodial parent" (*Matter of Khan-Soleil v. Rashad*, 111 A.D.3d 728, 730, quoting *Matter of Ross v. Ross*, 68 A.D.3d 878, 878; see *Matter of Lawlor v. Eder*, 106 A.D.3d 739, 740; *Matter of Purse v. Crocker*, 95 A.D.3d 1216, 1217). Although Frank attempted to excuse his conduct based upon his allegations that Joseph was engaging in risky sexual behavior, thereby endangering the children, the court concluded that Frank's allegations were not supported by credible evidence. As a result, the court properly discounted that explanation (see *Matter of Khan-Soleil v. Rashad*, 111 A.D.3d at 730; *Matter of Jones v. Pagan*, 96 A.D.3d 1058, 1058). In contrast, the record supported the court's finding that Joseph was willing to assure meaningful contact between the children and Frank.

Contrary to Frank's contentions, the awards of an attorney's fee to Joseph and Renee were not an improvident exercise of discretion in light of the parties' financial circumstances and the circumstances of this case (see *Matter of Zaydenverg v. Zaydenverg*, 151 A.D.3d 871, 872; *Matter of Feng Lucy Luo v. Yang*, 104 A.D.3d 852, 852; *Matter of Tuglu v. Crowley*, 96 A.D.3d 862, 863).

Moreover, Frank's petition to modify the custody order was properly dismissed without a hearing. A parent seeking a change of custody is not

automatically entitled to a hearing, but must make an evidentiary showing of a change in circumstances demonstrating a need for a change in custody in order to protect the child's best interests (*see Matter of Scott v. Powell*, 146 A.D.3d 964, 965; *Matter of Paulino v. Thompson*, 145 A.D.3d 726, 726-727; *Matter of Ali v. Hines*, 125 A.D.3d 851, 851; *Magee v. Magee*, 119 A.D.3d 658, 659). Here, Frank failed to make an evidentiary showing that there had been a sufficient change of circumstances between the issuance of the custody order dated February 14, 2017, and the filing of the modification petition. The unsubstantiated and conclusory allegations in his modification petition were insufficient to warrant a hearing (*see Matter of Paulino v. Thompson*, 145 A.D.3d at 726-727; *Matter of Ali v. Hines*, 125 A.D.3d at 851).

RIVERA, J.P., DILLON, BRATHWAITE NELSON
and CHRISTOPHER, JJ., concur.