Matter of Tina X. v John X.

Supreme Court of New York, Appellate Division, Third Department

April 14, 2016; April 14, 2016, Entered

519252

Reporter
138 A.D.3d 1258 *; 32 N.Y.S.3d 332 **; 2016 N.Y. App. Div. LEXIS 2746 ***; 2016 NY Slip Op 02874 ****

[**1]** In the Matter of ***Tina X.***, Appellant, v ***John X.***, Respondent. Scott Bielicki, Respondent. (And Two Other Related Proceedings.)

Subsequent History: Decision reached on appeal by Matter of ***Tina X.*** v. ***John X.***, 2017 N.Y. App. Div. LEXIS 8954 (N.Y. App. Div. 3d Dep't, Dec. 21, 2017)

Prior History: Matter of ***Tina X.*** v. ***John X.***, 132 A.D.3d 1173, 19 N.Y.S.3d 598, 2015 N.Y. App. Div. LEXIS 7935 (Oct. 29, 2015)

Core Terms

custody

Case Summary

Overview
HOLDINGS: [1]-22 NYCRR 835.3 (c) did not bar counsel from serving as the attorney for the children in the custody proceedings; [2]-While counsel's assignment as attorney for the children was contrary to the standards set forth in N.Y. R. Prof. Conduct 1.11(c) (22 NYCRR 1200.0), and, for that reason, the family court should not have permitted counsel to serve in that capacity, such error, without more, did not warrant vacatur of the stipulation and order regarding custody of the children; [3]-The mother's claim that counsel engaged in an ex parte communication with the family, in violation of the Rules of Professional Conduct, was unavailing because the challenged communication occurred prior to counsel's appointment as attorney for the children and, moreover, did not address the "merits of the matter."

Outcome
Order affirmed.

LexisNexis® Headnotes

Legal Ethics > Client Relations > Conflicts of Interest

HN1[] **Client Relations, Conflicts of Interest**

See N.Y. R. Prof. Conduct 1.11(c) (22 NYCRR 1200.0).

Legal Ethics > Client Relations > Conflicts of Interest

HN2[] **Client Relations, Conflicts of Interest**

N.Y. R. Prof. Conduct 1.11(c) (22 NYCRR 1200.0) defines confidential governmental information as information that has been obtained under governmental authority and that, at the time the Rule is applied, the

government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

Headnotes/Summary

Headnotes

Attorney and Client—Conflicts of Interest

Stipulations—Stipulation of Settlement—Vacatur

Counsel: **[***1]** Beth A. Lockhart, Canastota, for appellant.

Costello, Cooney & Fearon, PLLC, Syracuse (Paul G. Ferrara of counsel), for Scott Bielicki, respondent.

Donna Chin, Ithaca, attorney for the child.

Margaret McCarthy, Ithaca, attorney for the child.

Judges: Before: Peters, P.J., Lahtinen, McCarthy and Lynch, JJ. Lahtinen, McCarthy and Lynch, JJ., concur.

Opinion by: Peters

Opinion

[*1258] **[**333]** Peters, P.J. Appeal from an order of the Family Court of Madison County (Revoir, J.), entered April 3, 2014, which, in three proceedings pursuant to Family Ct Act article 6, partially denied petitioner's motion to, among other things, vacate a stipulation and order.

Pursuant to a June 2007 stipulated order, petitioner (hereinafter the mother) and respondent (hereinafter the father) shared joint legal custody of their three children (born in 1997, 2000 and 2007), with the mother having primary physical custody and the father receiving parenting time. In 2012, the mother filed petitions seeking to enforce and modify the visitation provisions of that order. When Family Court (McDermott, J.) notified Scott Bielicki that it intended to assign him to represent the children in these proceedings, Bielicki disclosed to the court that he had previously been involved **[***2]** in prosecuting the mother on a charge of endangering the welfare of a child in his capacity as a part-time Assistant District Attorney in Madison County. Notwithstanding this disclosure, Family Court concluded that there was no conflict that **[****2]** would disqualify Bielicki from representing the children in this matter and appointed him as the attorney for the children.

Thereafter, the father petitioned for sole legal and primary physical custody of the children, and an order was subsequently entered granting him temporary custody. Following a settlement **[*1259]** conference with the Family Court Judge's court attorney in September 2013, the parties agreed to resolve the pending petitions and stipulated to an order providing for joint legal custody, with primary physical custody to the father and parenting time to the mother. The following month, after obtaining new counsel, the mother moved to disqualify Bielicki and vacate the stipulation and order on the grounds that Bielicki suffered from a conflict of interest and had coerced her into entering into the stipulation by "fraud, duress and/or undue influence." Following oral argument and written submissions on the conflict issue, Family Court (Revoir, **[***3]** J.) found that no conflict of interest existed precluding Bielicki from serving as the attorney for the children and partially denied the mother's motion.[1] The mother appealed.

Although Bielicki's representation of the children

[1] A hearing was subsequently held on the mother's claim that the stipulation and order were procured by fraud, duress and/or undue influence on the part of Bielicki. In a detailed decision and order entered on March 15, 2016, Family Court found the mother's allegations to be "false, fabricated, frivolous" and contrary to the "credible recollection" of the events as testified to by the father's witnesses. Accordingly, the court denied that branch of the mother's motion, concluded that she had engaged in frivolous conduct and imposed sanctions against her pursuant to 22 NYCRR 130-1.1.

continued on this appeal (*see* Family Ct Act § 1120 [b]), he did not file a brief on the children's behalf. Instead, Bielicki retained private counsel who, in turn, submitted a brief on his behalf solely addressing the accusations of unethical behavior and conflict of interest. For that reason, we withheld decision and ordered the appointment of a new attorney for the children (132 AD3d 1173, 19 NYS3d 598 **[**334]** [2015]). New appellate counsel was thereafter assigned **[***4]** for each of the two younger children,[2] who now appear on their behalf.

Relying on a rule of this Court and various Rules of Professional Conduct, the mother contends that Bielicki's prior involvement in prosecuting her on the child endangerment charge created a per se conflict of interest that precluded him from serving as the attorney for the children in this matter and warrants vacatur of the stipulation and order. 22 NYCRR 835.3 (c) provides, in pertinent part, that "[a]n attorney who serves as district attorney, county attorney, or municipal corporation counsel, or as an assistant in . . . such office, shall not be assigned or accept assignment in any court as an attorney **[*1260]** for the child in the county where the attorney so serves *in any type of proceeding in which such office could represent a party*" (Rules of App Div, 3d Dept [22 NYCRR] § 835.3 [c] [emphasis added]). As Family Court noted, this provision is inapplicable here inasmuch as there is no circumstance under which a District Attorney's **[***5]** office **[****3]** could represent a party in a custody proceeding. District Attorneys prosecute crimes and offenses occurring in the county where elected and, even in that capacity, act not on behalf of any particular person, but on behalf of the State of New York (*see* County Law § 700, 927; *Della Pietra v State of New York*, 71 NY2d 792, 796, 526 NE2d 1, 530 NYS2d 510 [1988]; *Matter of Matthew FF.*, 179 AD2d 928, 928-929, 579 NYS2d 178 [1992]). In short, the subject portion of this Court's rule was meant to prevent a governmental attorney from serving as an attorney for the child in a Family Court proceeding in which his or her office could appear on behalf of a party—such as in a juvenile delinquency or Family Ct Act article 10 neglect or abuse proceeding (*see* Family Ct Act §§ 254, 254-a, 301.2 [12]; 1032)—a situation that plainly does not exist here. Thus, 22 NYCRR 835.3 (c) did not bar Bielicki from serving as the attorney for the children in these proceedings.

The mother also argues that Bielicki's representation of the children violated Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.11 (c), which provides that ***HN1***[] "a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." ***HN2***[] The **[***6]** rule defines confidential governmental information as "information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.11 [c]).

It is undisputed that Bielicki, in his capacity as Assistant District Attorney, was personally involved in the prosecution of the child endangerment charge against the mother,[3] that such **[*1261]** charge was deemed **[**335]** dismissed as a result of an adjournment in contemplation of dismissal (*see* CPL 170.55) and, therefore, the records of that criminal prosecution were sealed (*see* CPL 160.50 [1], [3] [b]). It is also evident that such confidential governmental information obtained by Bielicki in his capacity as Assistant District Attorney could be used to the disadvantage of the mother in this custody proceeding. That said, the mere appearance of impropriety, standing alone, is insufficient to warrant vacatur of the underlying stipulation and order (*see Matter of Lovitch v Lovitch*, 64 AD3d 710, 711, 884 NYS2d 430 [2009]; *Christensen v Christensen*, 55 AD3d 1453, 1455, 867 NYS2d 580 [2008]; *see also Schwartzberg v Kingsbridge Hgts. Care Ctr., Inc.*, 28 AD3d 465, 466, 813 NYS2d 191 [2006]). Rather, the mother was required to show actual prejudice or a substantial risk of an abused confidence

[2] The parties' oldest child, having reached the age of 18 during the pendency of this appeal, is no longer subject to the custody order (*see* Family Ct Act §§ 119 [c]; 651). Accordingly, any issue of custody or visitation with respect to him has been rendered moot (*see Helm v Helm*, 92 AD3d 1164, 1164 n 1, 939 NYS2d 592 [2012]; *Matter of Carnese v Wiegert*, 273 AD2d 554, 556, 710 NYS2d 130 [2000]).

[3] The record reflects that Bielicki completed a pretrial notice form and prepared a document offering the mother a six-month adjournment in contemplation of dismissal. According to the mother, a different Madison County Assistant District Attorney appeared in court when her case was called, and she did not become aware of Bielicki's involvement until after she had signed the custody stipulation and order at issue here.

(*see People v Herr*, 86 NY2d 638, 642, 658 NE2d 1032, 635 NYS2d 159 [1995]; *Matter of Lovitch v Lovitch*, 64 AD3d at 711; *Christensen v Christensen*, 55 AD3d at 1455 **[***7]** ; *Matter of Stephanie **X***., 6 AD3d 778, 779-780, 773 NYS2d 766 [2004]).

Here, there is nothing in the record to indicate that Bielicki used any information obtained during the prior criminal action to gain an unfair advantage in this custody proceeding (*see Matter of Richard UU.*, 56 AD3d 973, 978, 870 NYS2d 472 [2008]; *Matter of Matthew FF.*, 179 AD2d at 928-929; *see also Matter of Aaron W. v Shannon W.*, 96 AD3d 960, 962, 946 NYS2d 648 [2012]). Indeed, it was the father who disclosed the existence of the child endangerment charge, as well as the facts **[****4]** underlying such charge, in both his petition to modify custody and subsequent order to show cause. Nor is there anything in the record suggesting that Bielicki was biased in representing the children based upon his knowledge of the facts surrounding the mother's prosecution (*see Matter of Hurlburt v Behr*, 70 AD3d 1266, 1266-1267, 897 NYS2d 271 [2010], *lv dismissed* 15 NY3d 943, 940 NE2d 919, 915 NYS2d 214 [2010]; *Matter of Lovitch v Lovitch*, 64 AD3d at 712; *compare Davis v Davis*, 269 AD2d 82, 85-86, 711 NYS2d 663 [2000]).[4] Thus, while Bielicki's assignment as attorney for the children in this matter was contrary to the standards set forth in Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.11 (c)—and, **[***8]** for that reason, Family Court (McDermott, J.) should not have permitted Bielicki to serve in that capacity—such error, without more, does not warrant vacatur of the stipulation and order.

[*1262] The mother's claim that Bielicki engaged in an ex parte communication with Family Court, in violation of the Rules of Professional Conduct, is similarly unavailing. The challenged communication occurred prior to Bielicki's appointment as attorney for the children and, moreover, did not address the "merits of the matter" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.5 [a] [2]; *see Costalas v Amalfitano*, 23 AD3d 303, 304, 808 NYS2d 24 [2005]). Nor could any purported **[**336]** violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.9 serve as a basis for disqualifying Bielicki or vacating the stipulation and order, as that rule concerns an attorney's duties to a former client, which the mother is not. The mother's remaining contentions, to the extent that they are properly **[***9]** before us, have been reviewed and found to be lacking in merit.

Lahtinen, McCarthy and Lynch, JJ., concur. Ordered that the order is affirmed, without costs.

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[4] While Bielicki's knowledge of the facts and circumstances surrounding the mother's child endangerment prosecution might be relevant to her claims of duress, coercion and undue influence, we reiterate that those distinct claims were bifurcated from the conflict issue and addressed by Family Court in a separate hearing (*see* n 1, *supra*).

Matter of Tina X. v John X.

Supreme Court of New York, Appellate Division, Third Department

December 21, 2017, Decided ; December 21, 2017, Entered

523443

Reporter
156 A.D.3d 1152 *; 67 N.Y.S.3d 695 **; 2017 N.Y. App. Div. LEXIS 8954 ***; 2017 NY Slip Op 08914 ****

[**1]** In the Matter of ***Tina X.***, Appellant, v ***John X.***, Respondent. (And Three Other Related Proceedings.)

Prior History: *Matter of **Tina X.** v **John X.***, 138 AD3d 1258, 32 NYS3d 332, 2016 N.Y. App. Div. LEXIS 2746, 2016 NY Slip Op 2874 (Apr. 14, 2016)

Core Terms

settlement, frivolous, disqualify, controverted, modification, modified, coerced, custody, vacate

Case Summary

Overview
HOLDINGS: [1]-In a Family Ct Act art. 6 matter, the trial court did not abuse its discretion in awarding sanctions against the mother because the mother's testimony that she had been threatened and cajoled into accepting the custody settlement and that she was visibly upset when the stipulation was presented and executed on the record was completely false.

Outcome
Order affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

HN1[] **Standards of Review, Abuse of Discretion**

A court, in its discretion, may impose financial sanctions upon a party or an attorney who engages in frivolous conduct within the meaning of 22 NYCRR 130-1.1. To that end, conduct is deemed frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Sanctions may be imposed only after the party to be sanctioned is afforded a reasonable opportunity to be heard and upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate. Further, an award of sanctions will not be disturbed absent an abuse of discretion.

Headnotes/Summary

Headnotes

Attorney and Client—Frivolous Conduct—False Factual Statements in Family Court Custody Proceeding

Counsel: **[***1]** ***John*** J. Raspante, Utica, for appellant.

Donna C. ***Chin***, Ithaca, attorney for the children.

Judges: Before: Peters, P.J., Egan Jr., Lynch, Clark and Rumsey, JJ. Peters, P.J., Egan Jr., Lynch and Clark, JJ., concur.

Opinion by: Rumsey

Opinion

[696]** **[*1152]** Rumsey, J. Appeal from an order of the Family Court of Madison County (Revoir, J.), entered March 15, 2016, which, in three proceedings pursuant to Family Ct Act article 6, among other things, sanctioned petitioner.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of three children (born in 1997, 2000 and 2007). In March 2012, the mother filed petitions seeking to enforce and modify the provisions of a June 2007 stipulated order governing custody and visitation of the children. In November 2012, the father filed a petition seeking modification of the June 2007 order. In September **[**697]** 2013, a settlement conference was conducted by Family Court (McDermott, J.) that resulted in the parties entering into a stipulation, which was ultimately reduced to an order, that modified the 2007 order by providing for joint legal custody, primary physical placement with the father and visitation for the mother. In October 2013, after obtaining new counsel, the mother **[***2]** moved to disqualify Scott Bielicki, the attorney for the children, on the basis of a conflict of interest, and to vacate the September 2013 stipulated order due to the alleged conflict of interest and on the further ground that she had been coerced to enter into the stipulation by fraud, duress or undue influence. The father and Bielicki opposed the motion and sought sanctions against the mother pursuant to 22 NYCRR 130-1.1. By order entered in March 2014, Family Court (Revoir, J.) found that there was no conflict of interest precluding Bielicki from serving as the attorney for the children and denied the mother's motion to the extent that it **[****2]** sought vacatur on that basis. This Court affirmed (138 AD3d 1258, 32 NYS3d 332 [2016]). After a hearing on the remaining issues, including whether the mother had been coerced into signing the stipulation, Family Court found that the mother's motion was based on material statements of fact that were false, denied her motion in all respects and imposed sanctions against her, pursuant to 22 NYCRR 130-1.1 (c) (3), in the total amount of $3,500. The mother now appeals.

[*1153] The mother's sole argument on appeal is that Family Court erred in imposing sanctions on her on the basis that her conduct was frivolous. ***HN1***[] "A court, in its discretion, **[***3]** may impose financial sanctions upon a party or an attorney who engages in frivolous conduct within the meaning of 22 NYCRR 130-1.1. To that end, conduct is deemed frivolous if '(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false' " (*Matter of Flanigan v Smyth*, 148 AD3d 1249, 1250, 50 NYS3d 572 [2017], quoting 22 NYCRR 130-1.1 [c], *lv dismissed and denied* 29 NY3d 1046, 56 NYS3d 507, 78 NE3d 1192 [2017]). Sanctions may be imposed only after the party to be sanctioned is afforded a reasonable opportunity to be heard (*see Matter of Flanigan v Smyth*, 148 AD3d at 1250) and upon a written decision " 'setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate' " (*id.* at 1251, quoting 22 NYCRR 130-1.2). Further, an award of sanctions will not be disturbed absent an abuse of discretion (*see id.* at 1251).

Here, the mother had the opportunity to address the request for sanctions at the evidentiary hearing held by Family Court. She now contends that there was no basis for imposing sanctions pursuant **[***4]** to 22 NYCRR 130-1.1 (c) (1), because her motion to

disqualify Bielicki raised meritorious issues, or pursuant to 22 NYCRR 130-1.1 (c) (2), because there is no evidence in the record that she brought the motion for an improper purpose. Although she admitted that her testimony regarding the conduct of the settlement conference was controverted, the mother further contends that sanctions were also not warranted pursuant to 22 NYCRR 130-1.1 (c) (3), because there is no evidence that she made material factual statements that were false **[**698]** regarding the issue of Bielicki's appointment as attorney for the children.

The mother's argument—which focuses primarily on the portion of her motion that sought to disqualify Bielicki and vacate the September 2013 stipulated order on that basis—evinces a fundamental misunderstanding of Family Court's order. The court considered the merits of the mother's motion seeking disqualification of Bielicki and did not characterize that aspect of her motion as frivolous. The sole reason that the court imposed sanctions on the mother was its determination that **[*1154]** her testimony regarding the settlement conference was completely false. In a thorough written decision, the court engaged in an extensive review of the testimony adduced at the **[***5]** hearing regarding conduct of the settlement conference and concluded that the mother's testimony that she had been threatened and cajoled into accepting the settlement and that she was visibly upset when the stipulation was presented and executed on the record was completely false. The court specifically found that the mother's testimony was controverted by the mother's own testimony on cross-examination and, further, by the testimony of numerous other individuals who had been present at, and presented consistent accounts of, the settlement conference. Thus, we find no abuse of discretion in the award of sanctions against the mother.[*]

Peters, P.J., Egan Jr., Lynch and Clark, JJ., concur. Ordered that the order is affirmed, without costs.

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[*] The mother abandoned any argument with respect to the amount of the sanctions imposed by not addressing that issue in her appellate brief (*see McConnell v Wright*, 151 AD3d 1525, 1526, 57 NYS3d 748 n [2017]; *Miller v Genoa AG Ctr., Inc.,* 124 AD3d 1113, 1114, 2 NYS3d 650 n [2015]).