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United States District Court, E.D. New York.

In re Sharwline NICHOLSON, et al.

No. 00-2229, 00-5155, 00-6885.
|
Oct. 25, 2001.

MEMORANDUM AND ORDER

WEINSTEIN, Senior District J.

***1** In preparation for the hearing on November 14, 2001, on the form of the preliminary injunction, if any, the court circulates the attached rough draft (Appendix A) to be used to help focus the discussion.

Attention should be given to the definition of “mother” since fathers, grandparents and other kin may have custody and joint custody is not uncommon; it may be desirable to use the term “custodian” or “person having custody of the child.” Attention should also be given to the definition of “abusers” and “abuse.” The statutory definitions may prove useful. Other definitional issues need to be addressed.

The court is concerned about fixing the minimum amount of fees for 18B attorneys. There will have to be a hearing on this subject. The parties should at least present evidence on cost-of-living increases since the fee amounts were fixed by the legislature and expert testimony. The matter involves federalism and comity issues delicate in nature.

The definition of subclasses may need revision in view of the specificity required in the injunction and the need for parallelism.

The draft is quite complex. It may become even more complex as the discussion develops. Specificity is required because a violation may result in serious charges of contempt and possible punishment.

SO ORDERED.

APPENDIX A

PRELIMINARY MEMORANDUM AND PRELIMINARY INJUNCTION

This is a class action brought primarily on behalf of women who are abused and who, without fault on their part, have their children removed by the Administration for Children’s Services (ACS), and on behalf of children so removed. *See Nicholson v. Scoppetta*, 2001 WL 951716 (E.D.N.Y. Aug. 16 2001) (memorandum and order certifying class action and dividing class into a subclass A for mothers and a subclass B for children). Plaintiffs have moved for a preliminary injunction. Extensive evidentiary hearings have been completed on the question of whether a preliminary injunction should be granted and, if so, its form. Because of the serious and imminent danger to plaintiffs a preliminary injunction is now issued. An extensive memorandum in support will be issued as soon as other work permits.

Two subclasses have been certified. Subclass A consists of:

All persons subject to domestic violence or its threat who are custodians of children, legally or de facto, if:

1. the children reside or resided in a home where battering was said to have occurred, but where the children themselves have not been physically harmed or threatened with harm, or neglected by the non-battering custodian, and where protection of the children and their best interests can be accomplished by separation of the alleged batterer from the custodian and children or by other appropriate measures without removal of the children from the non-battering custodian; and if,
2. the children are sought to be removed or were removed by the New York City Administration for Children’s Services (ACS) or other governmental agency without court order (even if removal is

ultimately approved by a court), in whole or in part because the children reside in a home where battering of the custodian was said to have occurred; or

*2 3. the custodian is named as a respondent by ACS in child protective proceedings by ACS under Article 10 of the New York Family Court Act in which removal may be sought (even if removal is ultimately approved by a court), in whole or in part because the children reside in a home where battering of the custodian was said to have occurred; or

4. the custodian is denied adequate counsel;

a) in proceedings required by law before ACS which may confirm or lead to removal of a child or failure to promptly return a removed child; or

b) in court proceedings which may confirm or lead to removal of a child or failure to promptly return a removed child.

Subclass B consists of:

All children who are or were in the custody of a custodian in subclass A:

1. who have been or are likely to be removed by ACS or other governmental agency since December 16, 2000; or

2. who were removed prior to December 16, 2000 and continue to be in removed status after December 16, 2000; or

3. who have not been returned to the custodian as soon as possible after December 16, 2000 pursuant to a court order, where;

a) ACS has no discretion to delay the child's return; or

b) ACS has discretion to delay or condition the child's return, but delay or conditions are not necessary for the protection of the child.

The provisions of this injunction apply only to these classes. The fact that a child is not within subclass B shall not deprive the custodian of her rights as a member of subclass A. Although Subclass A may include male members, most members of subclass A are female. The definition of subclass B is designed to take into account the order of *Marisol A. v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y.1999) (approving settlement).

The court has repeatedly indicated during the hearings why a preliminary injunction is required. ACS has

engaged in a practice of removing children of battered mothers for the reason that mothers "engaged in" domestic violence by being victims of such violence and that the children had been witnesses. Following removal, a mother had to overcome judicial and bureaucratic delays, difficulties in obtaining effective counsel, and a lack of assistance from ACS, the police, or other organizations in obtaining effective protection against the batterers before the children were returned to the mother. In many cases the mother was extremely vulnerable, lacking independent economic resources, social and psychological support systems, and the capacity to utilize administrative and judicial systems effectively for self-protection of her rights and those of her children. In many cases, even after the children were returned, ACS pursued neglect actions against the mothers in Family Court for punitive purposes or out of inefficiency.

These practices of ACS and other governmental bodies and personnel, as well as their failure to act when action was required, violate the constitutional rights of both mothers and children. Parents have a well-recognized interest in the "care, custody, and control of their children [that] is perhaps the oldest of fundamental liberty interests...." *Troxel v. Granville*, 530 U.S. 57, 62 (2000). The interest of children in preserving family integrity are constitutionally protected. *See Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir.1977). Substantively, parents and children have a constitutional right not to be separated by the government unless the parent is unfit to care for the child. Procedurally, parents and children have a constitutional right to due process of law before they are separated. The defendants have regularly violated these constitutional rights.

*3 After this suit was commenced, and largely as a result of the suit, ACS began to take appropriate action to remedy the grave deprivations and threats of deprivations of plaintiffs' constitutional rights. In a statement made while the Commissioner of ACS was on the witness stand, the court suggested that it might be appropriate to provide defendants with a six month stay. This delay would permit implementation of changes by ACS to secure and protect plaintiff's constitutional rights without unnecessary interference by the court.

As already noted, a full memorandum of facts and law will be issued providing the factual and legal bases for the court's decision on the preliminary injunction. Exigencies of the case require a preliminary injunction now. Children and parent-child relationships are particularly vulnerable to delays in repairing custodial rifts; the bonding and necessary experience of learning how to relate and of loving affection during critical growth years may be adversely affected even by relatively short separations.

For the purposes of this preliminary memorandum, it is enough to find that 1) there is a clear and substantial likelihood that plaintiffs will succeed on the merits, *see Zonell v. Giuliani*, 230 F.3d 543 (2d Cir.2000), and 2) defendants will suffer irreparable harm if relief is not granted. *See Otokoyama Co. v. Wine Import of Japan, Inc.*, 175 F.3d 266, 270 (2d Cir.1999). These findings are made based upon the evidence.

The court recognizes that the State of New York, its courts, its administrative agencies and its municipal governments have the primary responsibility for protecting mothers and children. No part of the court's order or memorandum is designed to interfere in the slightest with the jurisdiction of New York's Family Court or of any other court of New York. Full comity with all state institutions must be preserved.

The following preliminary injunctive relief is granted for the purpose of ensuring that 1) battered mothers who are fit to retain custody of their children do not face prosecution or removal of their children solely because the mothers are battered and 2) the children's rights are protected.

It is ordered:

1. For the purposes of this order, the following definitions shall apply:

A) "Abuse" means any conduct that

(i) inflicts or allows to be inflicted upon an individual physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to an individual by other than accidental means which would be likely to cause a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

*4 (iii) commits, or allows to be committed, a sex offense as defined in the New York Penal Code, or

(iv) would constitute a violation of New York Penal Law, including, but not limited to acts constituting

disorderly conduct, harassment, menacing, reckless endangerment, kidnapping, assault, attempted assault, or attempted murder. (*See Family Court Act § 1012(e)*, N.Y. Jud. Ct. Acts Law (McKinney 1999); Domestic Violence Protection Act § 459-a (1), N.Y. Soc. Serv. Law (McKinney 1999))

B) "Abuser" means any person who commits or threatens to commit abuse against a "family or household member" of the abuser.

C) "Child" means any individual under eighteen years of age living with a person who has custody of the child.

D) "Domestic Violence" means abuse against "a family or household member" by another "family or household member."

E) "Family or household members" means a person as defined by the Domestic Violence Protection Act § 459-a (2), N.Y. Soc. Serv. Law (McKinney 1999).

F) "Mother" means any individual, male or female, who has custody of a child, alone or shared, temporary or permanent, legal or de facto.

G) "Victim of Domestic Violence" means any person who is the victim of domestic violence and has custody of a child.

2. The Administration for Children's Services (ACS) shall review, with the intent to move to withdraw all pending petitions filed under Article Ten of the New York Family Court Act that include as their sole allegation that the mother has been a victim of domestic violence or that the mother has "engaged" in domestic violence where the sole basis for that allegation is that the mother has been the victim of domestic violence.

3. ACS shall move to amend all pending petitions filed under Article Ten of the New York Family Court Act that include multiple allegations, to omit any allegation that the mother has been a victim of domestic violence or that the mother has "engaged" in domestic violence where the sole basis for that allegation is that the mother has been the victim of domestic violence.

4. ACS shall in any petition it files under Article Ten of the New York Family Court Act, refrain from alleging as a grounds for a finding of neglect that the mother has been a victim of domestic violence or that the mother has "engaged" in domestic violence where the sole basis for that allegation is that the

mother has been the victim of domestic violence.

5. ACS shall take appropriate steps to obtain the return to any mother of any child removed on the basis of a petition filed under Article Ten of the New York Family Court Act that included as its sole allegation that the mother had been a victim of domestic violence or that the mother had “engaged” in domestic violence where the sole basis for that allegation is that the mother has been the victim of domestic violence.

6. ACS shall indicate that there is no fault in the mother when, in “marking or determining reports” of suspected child abuse as “indicated” with the New York State Central Register of Child Abuse and Maltreatment where the sole or primary basis is that the mother has been a victim of domestic violence or that the mother is a victim of domestic violence or because the mother has “engaged” in domestic violence where the sole or primary basis for that allegation is that the mother has been the victim of domestic violence.

***5** 7. ACS shall not remove a child from the custody of the mother without a court order solely because the mother is the victim of domestic violence except in cases where the child is in such immediate danger of harm that he or she must be removed and there is no time to obtain a court order. When such emergency conditions exist and ACS removes a child before obtaining a court order, ACS shall file an Article 10 petition in family court within 24 business hours.

8. Where the abuser threatens to harm or abuse a child in connection with the abuse of the mother, every reasonable effort shall be made to separate the abuser from the child and the mother and to provide reasonably adequate protection against continuation of such abuse or its threat through safe quarters for the mother and child, or a protective order, or prosecution of the abuser, or otherwise, to the end that the mother and the child not be separated if that is at all reasonably possible. Subject to an order of a court, separation of mother and child shall be the alternative of last resort.

9. Subject to an order of a court, where separation of the mother and child takes place because no other alternative is available to protect the child from the abuser, physical custody shall be returned to the mother as soon as a non-removal alternative that adequately protects the child becomes available.

10. Where ACS separates a mother and child, a child safety conference shall be held by ACS within five days of the removal. The mother, as well as other members of the mother’s or child’s family and community (when requested by the mother, the child, or ACS) shall be invited to meet with ACS staff and service providers to discuss appropriate action for ensuring the safety of the child.

11. ACS shall promptly implement a training and supervision program orally and by written materials that will inform all employees involved with child removal of the requirements imposed by this injunction, prepare those employees to implement these requirements, and ensure that these requirements are implemented in practice.

12. ACS shall include at least one domestic violence specialist in each of its clinical consultant teams.

13. A mother who is prosecuted in the Family Court by ACS seeking removal of a child, or approval for action in removal of a child without court order, shall be afforded the right to counsel. If she cannot afford counsel, counsel shall be appointed and paid an amount that permits ethical and effective representation of the mother. Subject to order of a court, and limits on expenditure per case by a court, this compensation shall be no less than \$75 an hour for both in-court and out-of-court time. Representation shall include advice to the mother on any administrative proceedings related to court proceedings, including conferences with ACS personnel or other personnel. This order does not mandate that counsel has the right to be present at conferences between or among social workers or other officials and the mother, child, or abuser. The mother shall have the right to consult with counsel during conferences with ACS personnel or other personnel as in the Federal Grand Jury proceedings.

***6** 14. Before taking any action to separate mother and child on the basis of abuse of the mother, the ACS shall inform the mother of her rights and those of her child. A pamphlet written in simple language shall explain those rights and contain relevant addresses and phone numbers. It shall be made available at least in English and Spanish.

15. This order is stayed for six months to permit ACS and defendants to effectuate appropriate changes without the court’s supervision. ACS shall report on the first day of each month beginning November 1, 2001 on progress to date. Any party may apply for a lifting of this stay or for other relief.

SO ORDERED.

Not Reported in F.Supp.2d, 2001 WL 1338834

All Citations
