

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

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_____AD3d_____

Submitted - February 26, 2007

STEPHEN G. CRANE, J.P.
PETER B. SKELOS
JOSEPH COVELLO
THOMAS A. DICKERSON, JJ.

2006-01245

DECISION & ORDER

Erik Bjornson, respondent, v Elisabeth F.
Bjornson, appellant.

(Index No. 9159/02)

Robert E. Nicholson, Brooklyn, N.Y., for appellant.

The Edelsteins, Faegenburg & Brown, LLP, New York, N.Y. (Phil Brown of counsel), for respondent.

Elaine McKnight, Brooklyn, N.Y., Law Guardian for the child.

In a matrimonial action in which the parties were divorced by judgment dated April 24, 2002, the defendant appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Sunshine, J.), dated January 13, 2006, as, upon a decision of the same court dated December 6, 2005, made after a hearing, granted that branch of the plaintiff's motion which was to modify the judgment of divorce by awarding physical custody of the parties' infant child to him.

ORDERED that on the court's own motion, the notice of appeal from the decision is deemed a premature notice of appeal from the order (*see* CPLR 5520[c]); and it is further,

ORDERED that the order is affirmed insofar as appealed from, with costs.

The record in this case, reached after a full evidentiary hearing, provides a sound and substantial basis for the Supreme Court's determination (*see Eschbach v Eschbach*, 56 NY2d 167,

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173-174; *Matter of Bowe v Robinson*, 23 AD3d 555, 556; *Matter of Lynch v Acey*, 281 AD2d 483). Although both parties appear to be loving and capable parents, the defendant mother failed to meet her burden of establishing, by a preponderance of the evidence, that the best interests of the child warranted relocating him to Norway from New York (see *Matter of Tropea v Tropea*, 87 NY2d 727, 740-741; *Matter of Belbol v Stevenson*, 23 AD3d 555).

Further, the plaintiff father established that the totality of the circumstances warranted modifying the judgment of divorce to the extent of awarding him physical custody of the child (see *Eschbach v Eschbach*, *supra* at 174; cf. *Matter of Bowe v Robinson*, *supra* at 556-557).

CRANE, J.P., SKELOS, COVELLO and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court