

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

D16009
W/hu

_____AD3d_____

Submitted - June 21, 2007

STEPHEN G. CRANE, J.P.
GLORIA GOLDSTEIN
MARK C. DILLON
EDWARD D. CARNI, JJ.

2006-08401
2006-09973

DECISION & ORDER

Susan Green, appellant, v James Green, respondent.

(Index No. 201035/03)

Potruch & Daab, LLC, Garden City, N.Y. (Michael C. Daab and Alexander Potruch of counsel), for appellant.

Kenneth J. Weinstein, Garden City, N.Y. (Michael J. Langer of counsel), for respondent.

Patricia Latzman, Port Washington, N.Y., Law Guardian for the children.

In an action for a divorce and ancillary relief, the plaintiff appeals (1), as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Diamond, J.), dated August 2, 2006, as, upon reargument, adhered to the determination in an order dated March 29, 2006, denying that branch of her motion which was to award her sole custody of the parties' children and (2) from so much of a judgment of the same court entered August 24, 2006, as awarded the parties joint legal custody of the subject children.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed insofar as appealed from; and it is further,

ORDERED that the defendant is awarded one bill of costs.

September 11, 2007

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The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

Where the parents have entered into an agreement concerning custody that may have been in the best interests of the children when made, the agreement will not be set aside unless there is a sufficient change in circumstances since the time of the agreement, and the modification of the custody agreement is in the best interests of the children (*see Pambianchi v Goldberg*, 35 AD3d 688, 689; *Smockiewicz v Smockiewicz*, 2 AD3d 705, 706; *Matter of Gaudette v Gaudette*, 262 AD2d 804, 805). A parent who seeks a change in custody is not automatically entitled to a hearing but must make some evidentiary showing sufficient to warrant one (*see Smockiewicz v Smockiewicz*, 2 AD3d 705, 706; *Teuschler v Teuschler*, 242 AD2d 289, 290). Here, the plaintiff failed to make a sufficient evidentiary showing to warrant a hearing (*see McNally v McNally*, 28 AD3d 526, 527; *Smockiewicz v Smockiewicz*, 2 AD3d 705, *supra*).

CRANE, J.P., GOLDSTEIN, DILLON and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court