

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

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_____AD3d_____

Submitted - February 5, 2008

ROBERT A. LIFSON, J.P.
DAVID S. RITTER
ANITA R. FLORIO
EDWARD D. CARNI, JJ.

2007-01421

DECISION & ORDER

In the Matter of Andrzej Tercjak, respondent,
v Jadwiga Tercjak, appellant.

(Docket No. V-09027-05)

Peter C. Lomtevas, Ozone Park, N.Y., for appellant.

Alomar & Associates, P.C., Ridgewood, N.Y. (Karina E. Alomar of counsel), for respondent.

Lewis S. Calderon, Jamaica, N.Y., Law Guardian for the children.

In a child custody proceeding pursuant to Family Court Act article 6, the mother appeals from so much of an order of the Family Court, Queens County (Rood, R.), dated January 23, 2007, as granted the father's motion for a change in custody of the parties' two children.

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

An agreement between parents concerning custody will not be set aside unless there is a sufficient change in circumstances since the time of the agreement and unless the modification of the custody agreement is in the best interests of the child (*see Pambianchi v Goldberg*, 35 AD3d 688, 689). As a custody determination depends to a great extent upon an assessment of the character and credibility of the parties and witnesses, the findings of the Family Court will not be disturbed unless they lack a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 174; *Matter of Honeywell v Honeywell*, 39 AD3d 857, 858; *Kuncman v Kuncman*, 188 AD2d 517, 518). Here, there is a sound and substantial basis in the record for the Family Court's award of sole physical

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and legal custody to the father (*see Eschbach v Eschbach*, 56 NY2d 167, 172; *Vinciguerra v Vinciguerra*, 294 AD2d 565, 566).

Although the Family Court improvidently exercised its discretion in admitting into evidence the report of the neutral forensic psychologist, since the report was not submitted under oath (*see* 22 NYCRR 202.16[g][2]) and relied on information other than that upon which an expert may properly base an opinion (*see Matter of D'Esposito v Kepler*, 14 AD3d 509), the error in admitting the report was harmless. There is a sound and substantial basis in the record for the Family Court's determination without consideration of the improperly admitted report (*see Matter of D'Esposito v Kepler*, 14 AD3d 509).

The mother's remaining contentions are without merit.

LIFSON, J.P., RITTER, FLORIO and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court