

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

D22477
G/hu

_____AD3d_____

Argued - February 17, 2009

REINALDO E. RIVERA, J.P.
DAVID S. RITTER
HOWARD MILLER
CHERYL E. CHAMBERS, JJ.

2006-05863

DECISION & ORDER

Caroline Barry, respondent, v Kevin A. Barry,
appellant.

(Index No. 19268/98)

Heather G. Kress, Huntington, N.Y. (James J. Kelly of counsel), for appellant.

Cohen Hennessy Bienstock & Rabin P.C., New York, N.Y. (Patricia Hennessey of
counsel), for respondent.

In a matrimonial action in which the parties' marriage was annulled by a judgment entered November 16, 2000, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Blydenburgh, J.), dated May 3, 2006, as, upon the plaintiff's application, modified his visitation rights and, upon consent, assigned a portion of his disability and retirement pension to the plaintiff for the payment of child support.

ORDERED that the appeal is dismissed, with costs.

The defendant appeals from those portions of an order of the Supreme Court which assigned a portion of his disability and retirement pension to the plaintiff for the payment of child support, and modified his visitation rights. However, that portion of the order concerning the assignment was entered upon the defendant's consent, and no appeal lies from an order entered on consent (*see Bahr v Bahr*, 105 AD2d 725; *Baecher v Baecher*, 95 AD2d 841, 842). The modification of the defendant's visitation rights did not decide a motion made on notice, and no appeal lies as of right from such an order (*see CPLR 5701[a][2]*). Nor has leave to appeal been granted (*see CPLR 5701[c]*). To obtain appellate review, the defendant must move to vacate or

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modify the order, and appeal, if necessary, from the resulting order (*see Sholes v Meagher*, 100 NY2d 333; *Egwuonwu v Simpson*, 4 AD3d 500; *Koczen v VMR Corp.*, 300 AD2d 285).

RIVERA, J.P., RITTER, MILLER and CHAMBERS, JJ., concur.

2006-05863

DECISION & ORDER ON MOTION

Caroline Barry, respondent, v Kevin A. Barry,
appellant.

(Index No. 19268/98)

Motion by the plaintiff, on an appeal from an order of the Supreme Court, Suffolk County, dated May 3, 2006, inter alia, to dismiss the appeal on the ground that the order was entered upon the appellant's consent or, in the alternative, to strike pages 138 through 153 of the record on appeal on the ground that they contain or refer to material that is de hors the record. By decision and order on motion of this Court dated June 20, 2008, those branches of the motion were held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition and relation thereto, and upon the argument of the appeal, it is

ORDERED that those branches of the motion which were to dismiss the appeal or, in the alternative, to strike pages 138 through 153 of the record on appeal are denied as academic in light of our determination on the appeal from the order (*see Barry v Barry*, _____ AD3d _____ [decided herewith]).

RIVERA, J.P., RITTER, MILLER and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court

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