

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

D32007
Y/kmb

_____AD3d_____

Argued - June 17, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2010-08972
2010-11921

DECISION & ORDER

In the Matter of Michael K. Lyons, respondent,
v Audrey Lyons, appellant.

(Index No. 30764/08)

Schlissel Ostrow Karabatos, PLLC, Garden City, N.Y. (Stephen W. Schlissel of counsel), and Collier, Halpern, Newburg, Nolletti & Bock, LLP, White Plains, N.Y. (Neil S. Cohen of counsel), for appellant (one brief filed).

Horn & Horn, Huntington, N.Y. (Jeffrey S. Horn of counsel), for respondent.

Elizabeth A. Pfister, Center Moriches, N.Y., attorney for the children.

In a proceeding pursuant to Domestic Relations Law § 240 to modify the custody provisions of a judgment of divorce entered September 27, 2006, in Dade County, State of Florida, Audrey Lyons appeals (1) as limited by her brief, from so much of an order of the Supreme Court, Suffolk County (Martin, J.), dated August 9, 2010, as denied those branches of her motion which were to preclude the testimony of a court-appointed forensic evaluator at a hearing to be held on the issue of custody and to preclude the use of that evaluator's report at the hearing, for awards of interim counsel and expert fees, and, inter alia, to reinstate, without a hearing, the custody arrangement provided for in the parties' 2006 marital settlement agreement, which was incorporated into the judgment of divorce, and (2) from an order of the same court dated November 15, 2010, which granted the motion of Michael K. Lyons to direct the forensic evaluator to conduct an updated evaluation of the parties and the children and denied her cross motion to direct a different forensic evaluator to conduct an updated evaluation and to reinstate the custody arrangement as provided in the parties' 2006 marital settlement agreement and judgment of divorce.

ORDERED that the appeal from so much of the order dated August 9, 2010, as

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denied those branches of the motion of Audrey Lyons which were to preclude the testimony of a court-appointed forensic evaluator at a hearing to be held on the issue of custody and to preclude the use of that evaluator's report at the hearing is dismissed; and it is further,

ORDERED that the order dated August 9, 2010, is affirmed insofar as reviewed; and it is further,

ORDERED that the order dated November 15, 2010, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to Michael K. Lyons.

The appeal from so much of the order dated August 9, 2010, as denied those branches of the motion of Audrey Lyons which were to preclude the testimony of a court-appointed forensic evaluator at a hearing to be held on the issue of custody and to preclude the use of that evaluator's report at the hearing must be dismissed because it concerns an evidentiary ruling, which, even when made in advance of a hearing or trial on motion papers, is not appealable as of right or by permission (*see also Leftow v Leftow*, 104 AD2d 590, 590-591; *Cortez v Northeast Realty Holdings, LLC*, 78 AD3d 754, 757; *Barnes v Paulin*, 52 AD3d 754, 754-755; *Cotgreave v Public Adm'r of Imperial County [Cal.]*, 91 AD2d 600, 601, *cf. Scalp & Blade v Advest, Inc.*, 309 AD2d 219; *Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 810-811). Although we must dismiss this portion of the appeal, this should not be construed as an indication that there is no merit to the contentions of Audrey Lyons which cannot be reviewed at this point in the proceedings.

The Supreme Court did not improvidently exercise its discretion in denying those branches of the motion of Audrey Lyons which were for awards of interim counsel and expert fees under the circumstances presented here (*see Avello v Avello*, 72 AD3d 850, 852; *cf. Monosson v Monosson*, 78 AD3d 912, 913; *Prichep v Prichep*, 52 AD3d 61, 65).

The Supreme Court properly denied that branch of the motion of Audrey Lyons and that branch of her subsequent cross motion which were to reinstate, without first holding a hearing, the custody arrangement provided for in the parties' 2006 marital settlement agreement and judgment of divorce. The parties had modified that custody arrangement by stipulation, and the Supreme Court correctly determined that a hearing was necessary to determine whether reinstatement of the original custody arrangement was appropriate (*see Cieri v Cieri*, 56 AD3d 409, 410; *Biagi v Biagi*, 124 AD2d 770, 771; *Matter of Hudgins v Goodley*, 301 AD2d 524).

The remaining contention of Audrey Lyons is without merit.

SKELOS, J.P., BALKIN, LEVENTHAL and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court