

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

D32026
W/prt

_____AD3d_____

Submitted - June 17, 2011

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

2010-07372

DECISION & ORDER

In the Matter of James Nell, appellant,
v Elizabeth Nell, respondent.

(Docket Nos. V-2543-06, V-2544-06)

James Nell, Staten Island, N.Y., appellant pro se.

Jacobi, Sieghardt, Bousanti, Piazza & Fitzpatrick, P.C., Staten Island, N.Y. (George A. Sieghardt of counsel), for respondent.

Christopher J. Robles, Brooklyn, N.Y., attorney for the child Andrew Nell.

Mitchell P. Newman, Staten Island, N.Y., attorney for the child Julia Nell.

In related custody and visitation proceedings pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Richmond County (DiDomenico, J.), dated June 17, 2010, which, after a hearing, denied his petition to modify the custody and visitation provisions set forth in a stipulation of settlement dated October 13, 2004, which was incorporated but not merged into the parties' judgment of divorce entered July 15, 2005, so as to award him sole legal custody of the subject children, and granted the mother's cross petition to modify the custody and visitation provisions set forth in the stipulation of settlement so as to, in effect, award her sole legal and residential custody of the subject children, with visitation to him.

ORDERED that the order is modified, on the facts and in the exercise of discretion,
(1) by deleting the provision thereof granting that branch of the mother's cross petition which was,

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to modify the custody and visitation provisions set forth in the stipulation of settlement so as to, effect, award her sole residential custody of the subject children and substituting therefor a provision denying that branch of the cross petition, and (2) by deleting the provision thereof directing that the father have visitation with the subject children on Tuesdays and Thursdays of every week, from the time when the children are dismissed from school until 8:30 P.M. during the school year, and from 3:30 P.M. until 9 P.M. when school is not in session, and substituting therefor a provision directing that the father have overnight weekly visitation on Mondays and Tuesdays and that the mother have overnight weekly visitation on Wednesdays and Thursdays; as so modified, the order is affirmed, without costs or disbursements.

“Modification of an existing custody arrangement is permissible only upon a showing that there has been a change in circumstances such that a modification is necessary to ensure the continued best interests and welfare of the child” (*Matter of Buxenbaum v Fulmer*, 82 AD3d 1223, 1223 [internal quotation marks omitted]). The best interests of the children herein must be determined by a review of the totality of the circumstances (*see Matter of Skeete v Hamilton*, 78 AD3d 1187). “Since any custody determination depends to a great extent upon the hearing court’s assessment of the credibility of the witnesses and of the character, temperament, and sincerity of the parties, its findings are generally accorded great deference and will not be disturbed unless they lack a sound and substantial basis in the record” (*id.* at 1188).

A modification of the existing joint custody arrangement is necessary because the acrimony between the parties makes joint decision-making impossible (*see Matter of Gorniok v Zeledon-Mussio*, 82 AD3d 767, 768). Here, the Family Court’s determination that a change from joint legal custody to sole legal custody of the subject children to the mother is supported by a sound and substantial basis in the record.

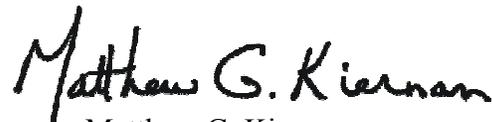
However, the Family Court improvidently exercised its discretion to the extent that it granted that branch of the mother’s cross petition which was, in effect, for an award of sole residential custody of the children and, accordingly, discontinued the father’s weekday overnight visitation. The children clearly expressed a desire to maintain the status quo with respect to the parents’ schedule. The children’s preference is entitled to some weight, as they were 14 and 12 years of age, respectively, at the time of the hearing on the petition and cross petition and were, thus, sufficiently mature to express that desire (*see generally Matter of Said v Said*, 61 AD3d 879, 880; *Matter of West v Turner*, 38 AD3d 673).

Furthermore, as noted by the father, the Family Court’s restriction of his overnight weekday visitation with the children, upon its award of sole residential custody to the mother, will actually cause more disruption in the children’s lives. There will be more travel back and forth between the parties’ homes under the visitation schedule imposed by the Family Court. In addition, there is no support in the record for the implied conclusion reached by the Family Court that the children would benefit from spending less time with the father, to wit, there are no reports that the children were in any danger when they spent time with the father, or a showing that the children have ever been deprived of their basic needs of daily living while with the father. On this record, the best

interests of the children would be served by continuing the joint residential custody arrangement and the weekday overnight visitation schedule to which the parties originally agreed, so as to preserve an equal division of parenting time.

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

ENTER:


Matthew G. Kiernan
Clerk of the Court