

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

D32148
Y/prt

_____AD3d_____

Submitted - May 13, 2011

JOSEPH COVELLO, J.P.
RANDALL T. ENG
JOHN M. LEVENTHAL
JEFFREY A. COHEN, JJ.

2010-00122

DECISION & ORDER

In the Matter of Galina Ross, respondent,
v Eric Ross, appellant.

(Docket No. V-1017-01)

Eric Ross, Orangeburg, N.Y., appellant pro se.

Jacqueline Sands, New City, N.Y., for respondent.

In a child custody and visitation proceeding pursuant to Family Court Act article 6, the father appeals, as limited by his brief, from stated portions of an order of the Family Court, Rockland County (Christopher, J.), entered November 16, 2009, which, inter alia, after a hearing, granted that branch of the mother's petition which was to modify a prior order of custody and visitation dated December 3, 2002, awarding the parties joint legal and physical custody of their child, so as to award her sole legal and physical custody of the subject child and, in effect, granted that branch of the mother's petition which was to award him only supervised visitation, and denied that branch of his cross petition which was for an award of unsupervised visitation.

ORDERED that the order entered November 16, 2009, is modified, on the law, (1) by deleting the provision thereof, in effect, granting that branch of the mother's petition which was to award the father only supervised visitation, and substituting therefor a provision denying that branch of the mother's petition, and (2) by deleting the provision thereof denying that branch of the father's cross petition which was for an award of unsupervised visitation, and substituting therefor a provision granting that branch of the father's cross petition; as so modified, the order entered November 16, 2009, is affirmed insofar as appealed from, without costs and disbursements, and the matter is remitted to the Family Court, Rockland County, for the determination of a liberal, unsupervised visitation schedule for the father; and it is further,

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ORDERED that pending the determination of a liberal, unsupervised visitation schedule for the father, the father shall have unsupervised visitation with the child from 9:00 A.M. to 9:00 P.M. on Saturdays, and from 4:00 P.M. to 9:00 P.M. on Tuesdays, and shall pick up the child at, and return him to, the mother's residence for these unsupervised visitations, or the father shall enjoy such interim unsupervised visitation as the parties shall otherwise agree.

“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 Pignataro v Davis*, 8 AD3d 487, 488; see Family Ct Act § 652; *Buxenbaum v Fulmer*, 82 AD3d 1223; *Matter of Gallo v Gallo*, 81 AD3d 826). “The best interests of the child are determined by a review of the totality of the circumstances” (*Matter of Garcia v Fountain*, 82 AD3d 979, 979). “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” (*Matter of Tercjak v Tercjak*, 49 AD3d 772; see *Matter of Gilmartin v Abbas*, 60 AD3d 1058).

Here, the Family Court’s determination that there had been a change in circumstances since the issuance of a prior order of custody and visitation dated December 3, 2002, and that it was in the child’s best interests to award sole custody to the mother, is supported by a sound and substantial basis in the record (see Family Ct Act § 652; *Matter of Kramer v Berardicurti*, 79 AD3d 1794; *Matter of Slovak v Slovak*, 77 AD3d 1089; *Matter of Sinnott-Turner v Kolba*, 60 AD3d 775, 776).

However, the Family Court erred by, in effect, awarding the father only supervised visitation with the parties’ child (see *Matter of Laware v Baldwin*, 42 AD3d 696, 697; *Matter of Morash v Minucci*, 299 AD2d 486, 486-487; *Matter of Eric L. v Dorothy L.*, 130 AD2d 660, 661; see generally *Matter of Chebuske v Burnhard-Vogt*, 284 AD2d 456). Indeed, while the Family Court's credibility assessments are entitled to great weight, the Family Court improperly disregarded the unequivocal conclusions and recommendations of the court-appointed forensic examiner, and placed undue emphasis on the wishes of the child that visitation be supervised, especially in light of his maturity level and the clear potential for manipulation, as identified by the forensic examiner (see *Ekstra v Ekstra*, 78 AD3d 990; *Matter of Volpe v Volpe*, 61 AD3d 691, 692). Here, the record reflects that the father had liberal, unsupervised visitation with the subject child throughout most of the child’s life, and that the child wanted to see the father.

The remaining contentions of the parties and the attorney for the child are either without merit, unpreserved for appellate review, or not properly before this Court (see CPLR 5501; *Broser v Dworman*, 78 AD3d 979, 980).

Accordingly, the matter must be remitted to the Family Court, Rockland County, for the determination of a liberal, unsupervised visitation schedule for the father.

COVELLO, J.P., ENG, LEVENTHAL and COHEN, JJ., concur.

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DECISION & ORDER ON MOTION

In the Matter of Galina Ross, respondent,
v Eric Ross, appellant.

(Docket No. V-1017-01)

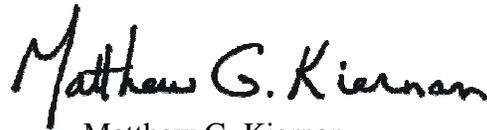
Motion by the attorney for the child, inter alia, in effect, to strike stated portions of the appellant's brief on an appeal from an order of the Family Court, Rockland County, entered November 16, 2009, on the ground that the appellant's brief contains matter dehors the record and contains personal and false attacks against the attorney for the child and the Family Court. By decision and order on motion of this Court dated December 28, 2010, that branch of the motion which is, in effect, to strike stated portions of the appellant's brief was 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 and the papers filed in opposition thereto, and upon the submission of the appeal, it is

ORDERED that the branch of the motion which is, in effect, to strike stated portions of the appellant's brief is denied.

COVELLO, J.P., ENG, LEVENTHAL and COHEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court