

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

D33240  
G/ct

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Submitted - November 18, 2011

ANITA R. FLORIO, J.P.  
RUTH C. BALKIN  
ARIEL E. BELEN  
CHERYL E. CHAMBERS, JJ.

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2010-10950  
2010-11215

DECISION & ORDER

In the Matter of Dawn L. Stefas, appellant, v Edwin  
Sierra, respondent.  
(Proceeding No. 1)

In the Matter of Edwin Sierra, respondent, v Dawn  
L. Stefas, appellant.  
(Proceeding No. 2)

(Docket Nos. V-2042/07, V-2043/07)

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Clara H. Lipinsky, Pine Island, N.Y., for appellant.

Geanine Towers, Brooklyn, N.Y., attorney for the children.

In two related custody and visitation proceedings pursuant to Family Court Act article 6, the mother appeals from (1) an order of the Family Court, Orange County (Currier-Woods, J.), entered September 28, 2010, which granted the father's motion to dismiss her petition to modify a prior order dated March 3, 2010, so as to award her sole custody of the parties' children, and (2) an order of the same court entered October 21, 2010, which granted the father's petition to modify the same prior order to the extent of directing that she have visitation only on every other Saturday and Sunday, from 9:00 A.M. to 4:00 P.M.

ORDERED that the orders entered September 28, 2010, and October 21, 2010, are affirmed, without costs or disbursements.

December 13, 2011

Page 1.

MATTER OF STEFAS v SIERRA  
MATTER OF SIERRA v STEFAS

The mother and the father are the parents of twins born in 1998. The mother has been diagnosed with depression, schizoaffective disorder, and most recently with bipolar disorder. A June 2009 order of the Family Court provided, inter alia, that the parties would have joint custody of the twins, the father would have primary physical custody, and the mother would have supervised overnight visitation with the children, with the visitation supervised by either her husband or her sister. The mother filed a petition on July 31, 2009, seeking, among other things, to modify the June 2009 order so as to award her unsupervised visitation. In an order dated March 3, 2010 (hereinafter the March 2010 order), after a hearing, the Family Court granted the mother's petition, based in part on the mother's testimony that she had a stable home with her husband and twin babies born in 2009.

On March 15, 2010—only 12 days after the Family Court had issued the March 2010 order removing the supervision requirement — the father filed a petition to modify the March 2010 order. His petition alleged that the mother had left her husband and was residing at a “safe homes location.” On March 30, 2010, the mother filed a petition to modify the March 2010 order so as to award her sole custody. In an order entered September 28, 2010, the Family Court granted the father's motion to dismiss the mother's petition without a hearing on the ground that it did not allege a change in circumstances.

The Family Court then held a hearing on the father's petition, at which the mother testified that she had been spending time living in the finished basement of a house owned by a man who was a complete stranger to the children. The court also conducted in camera interviews with the children. In an order dated October 21, 2010, the Family Court found that a change in circumstances had occurred, and granted the father's petition to modify the March 2010 order to the extent of directing that the mother have visitation only on every other Saturday and Sunday, from 9:00 A.M. to 4:00 P.M. The mother appeals from both orders. We affirm.

Modification of an existing custody or visitation 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 (*see* Family Ct Act § 652[a]; *Matter of Molinari v Tuthill*, 59 AD3d 722, 723). “A parent seeking to modify an existing order of visitation is not automatically entitled to a hearing, but must make some evidentiary showing sufficient to warrant a hearing” (*Matter of Varricchio v Varricchio*, 68 AD3d 774, 775). The Family Court properly granted the father's motion to dismiss the mother's petition for sole custody without a hearing, because her petition failed to allege that a change in circumstances had occurred.

Conversely, the father's petition to modify the March 2010 order did allege that a change in circumstances had occurred. The Family Court's determination in the March 2010 order awarding the mother unsupervised overnight visitation was based, in part, on the mother's testimony that she had established a stable home. The father's petition alleged that the mother's living situation was now unstable. At the hearing, the mother testified that she had moved out of that stable home, and that she had been living in the finished basement of a house owned by a man who was a complete stranger to the children. Based on this evidence and the in camera interviews with the children, the Family Court providently exercised its discretion in granting the father's petition and canceling the mother's overnight visitation.

In view of the foregoing, we do not address the subsequent events referred to by the attorney for the children in Part III of her brief, because those events are outside the record on appeal and there is no indication that the record before us is insufficient for determining the mother's fitness and right to custody (*see generally Matter of Michael B.*, 80 NY2d 299, 318; *cf. Matter of Gatke v Johnson*, 50 AD3d 798).

FLORIO, J.P., BALKIN, BELEN and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court