

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

D33431
H/kmb

_____AD3d_____

Argued - November 30, 2011

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

2010-10716

DECISION & ORDER

In the Matter of Diane Dorsa, appellant,
v Andrew Dorsa, respondent.

(Docket Nos. V-06407-09, V-06408-09)

Ellen B. Holtzman, Nanuet, N.Y. (Meryl R. Neuren of counsel), for appellant.

The Penichet Firm, P.C., White Plains, N.Y. (Jeanna M. Alberga of counsel), for respondent.

Dana Forster-Navins, Irvington, N.Y., attorney for the children.

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Westchester County (Spitz, J.H.O.), entered September 16, 2010, which, after a hearing, denied her petition to modify the custody provisions set forth in a stipulation of settlement dated May 30, 2001, which was incorporated but not merged into the parties' judgment of divorce entered July 11, 2001, so as to, inter alia, award her sole physical custody of the parties' children.

ORDERED that the order is reversed, on the facts and in the exercise of discretion, with costs, the petition is granted, and the matter is remitted to the Family Court, Westchester County, for further proceedings to establish with all convenient speed an appropriate visitation schedule for the father.

“A modification of an existing custody arrangement should be allowed only upon a showing of a sufficient change in circumstances demonstrating a real need for a change of custody in order to insure the child's best interests” (*Matter of Nava v Kinsler*, 85 AD3d 1186, 1186, lv

December 27, 2011

Page 1.

MATTER OF DORSA v DORSA

denied 17 NY3d 714; see Family Ct Act § 652; *Matter of Said v Said*, 61 AD3d 879, 880; *Matter of Manfredo v Manfredo*, 53 AD3d 498, 499; cf. *Eschbach v Eschbach*, 56 NY2d 167, 171). In determining the best interest of the children, courts must view the “totality of [the] circumstances” (*Matter of Gallo v Gallo*, 81 AD3d 826, 827, quoting *Friederwitzer v Friederwitzer*, 55 NY2d 89, 96). Moreover, “while not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances” (*Matter of Burch v Willard*, 57 AD3d 1272, 1273).

Here, the Family Court determined that the mother failed to establish that there was a change in circumstances sufficient to require a change in custody and, therefore, denied her petition. We find, however, that under the particular circumstances of this case, including the strong preference of both children, who are now 13 and 15 years old, respectively, to reside with the mother (see *Matter of Nell v Nell*, 87 AD3d 541, 542; cf. *Matter of Englese v Strauss*, 83 AD3d 705, 706-707), and the mother’s greater sensitivity to the children’s particular emotional and psychological needs, the mother has demonstrated a sufficient change in circumstances to warrant modification of the custody arrangement (see *Matter of Oddy v Oddy*, 296 AD2d 616, 617). Consequently, the Family Court improvidently exercised its discretion in denying the mother’s petition (see *Matter of Sparacio v Fitzgerald*, 73 AD3d 790, 791). The case must be remitted, however, to the Family Court, Westchester County, to establish an appropriate visitation schedule for the father, who has played an important role in his children’s lives (see *Mathie v Mathie*, 65 AD3d 527, 532).

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

ENTER:



Aprilanne Agostino
Clerk of the Court