

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

D35550
O/ct

_____AD3d_____

Argued - June 8, 2012

RUTH C. BALKIN, J.P.
L. PRISCILLA HALL
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2010-09947
2010-10464

DECISION & ORDER

In the Matter of Susan M. Brown, respondent, v
John J. Brown, appellant.
(Proceeding No. 1)

In the Matter of John J. Brown, appellant, v
Susan M. Brown, respondent.
(Proceeding No. 2)

(Docket Nos. V-7877-08, V-7878-08, O-3103-09,
O-7751-08, V-8023-08, and V-8024-08)

Alexander Potruch, LLC, Garden City, N.Y., for appellant.

Susan M. Brown, Williston Park, N.Y., respondent pro se.

Thomas E. Draycott, Brightwaters, N.Y., attorney for the child.

In related child custody and family offense proceedings pursuant to Family Court Act articles 6 and 8, the father appeals (1), as limited by his brief, from so much of an order of the Family Court, Nassau County (Singer, J.), dated August 9, 2010, as, after a hearing, granted the mother's petition for sole legal and physical custody of the subject children, reduced his visitation with the children by eliminating his previously scheduled visitation with the children on Mondays from the conclusion of school until 8:00 P.M. and awarding him visitation with the children only on Wednesdays from the conclusion of school until 8:00 P.M. and on alternate weekends from one hour after the conclusion of school on Friday until 8:00 P.M. on Sunday, granted the mother's family offense petition dated July 31, 2008, to the extent of finding that on August 8, 2007, and February 15, 2008, he committed acts against the mother constituting harassment in the second degree and disorderly conduct within the meaning of Family Court Act § 812, and denied his cross petition for

July 11, 2012

Page 1.

MATTER OF BROWN v BROWN

custody of the children, and (2) from an order of the same court dated September 29, 2010, which denied his motion pursuant to CPLR 4404(b) to set aside so much of the order dated August 9, 2010, as reduced his visitation with the subject children by eliminating his previously scheduled visitation with the children on Mondays from the conclusion of school until 8:00 P.M. and awarding him visitation with the children only on Wednesdays from the conclusion of school until 8:00 P.M. and alternate weekends from one hour after the conclusion of school on Friday until 8:00 P.M. on Sunday.

ORDERED that the order dated August 9, 2010, is modified, on the law, on the facts, and in the exercise of discretion, (1) by deleting the provision thereof granting the mother's family offense petition dated July 31, 2008, to the extent of finding that on August 8, 2007, and February 15, 2008, the father committed acts against the mother constituting harassment in the second degree and disorderly conduct within the meaning of Family Court Act § 812, and substituting therefor a provision denying the mother's family offense petition dated July 31, 2008, and (2) by adding to the provision thereof awarding the father visitation with the subject children on Wednesdays from the conclusion of school until 8:00 P.M. and alternate weekends from one hour after the conclusion of school on Friday until 8:00 P.M. on Sunday, a provision awarding him visitation with the subject children on Mondays from the conclusion of school until 8:00 P.M.; as so modified, the order dated August 9, 2010, is affirmed insofar as appealed from, without costs or disbursements, and it is further,

ORDERED that the appeal from the order dated September 29, 2010, is dismissed as academic, without costs or disbursements.

The Family Court erred in granting the mother's family offense petition dated July 31, 2008, to the extent of finding that on August 8, 2007, and February 15, 2008, the father committed acts against the mother constituting harassment in the second degree and disorderly conduct within the meaning of Family Court Act § 812. The record does not support a determination that the father committed family offenses on those dates (*see* Family Ct Act § 812[1]; § 832; *Matter of Taylor v Taylor*, 62 AD3d 1015, 1016; *Matter of Cavanaugh v Madden*, 298 AD2d 390, 392).

"The essential consideration in any custody controversy is the best interests of the child" (*Matter of McDonough v McDonough*, 73 AD3d 1067, 1068 [internal quotation marks omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 171). Here, contrary to the father's contention, the Family Court's determination that an award of sole legal and physical custody to the mother was in the best interests of the subject children had a sound and substantial basis in the record (*see Matter of McDonough v McDonough*, 73 AD3d at 1068). Joint custody was not feasible, since the parties failed to communicate and work together in parenting the children (*see Matter of Chery v Richardson*, 88 AD3d 788, 789).

The Family Court must determine in its discretion what visitation will be in the child's best interests (*see Matter of Franklin v Richey*, 57 AD3d 663, 664). Some form of visitation with the noncustodial parent will always be appropriate, absent exceptional circumstances (*id.*; *see Matter of Mera v Rodriguez*, 73 AD3d 1069). The Family Court's determination will not be set aside unless it lacks a substantial basis in the record (*see Matter of Wispe v Leandry*, 63 AD3d 853; *Matter of Franklin v Richey*, 57 AD3d at 664). We agree with the father that the Family Court's

elimination of his previously scheduled visitation with the children after school on Mondays is unsupported by the record. Consequently, we add a provision to the order dated August 9, 2010, awarding the father visitation with the children on Mondays from the conclusion of school until 8:00 P.M. (*see Matter of Solovay v Solovay*, 94 AD3d 898, 900, *lv denied* ____NY3d____, 2012 NY Slip Op 77488[U] [2012] [table; text at 2012 WL 2429241, 2012 NY LEXIS 1879 (Ct App 2012)]; *Matter of Nell v Nell*, 87 AD3d 541, 542-543).

The father's appeal from the order dated September 29, 2010, has been rendered academic in light of our determination to add visitation on Mondays to the father's visitation schedule set forth in the order dated August 9, 2010 (*see Matter of Harris v Magee*, 77 AD3d 944).

The father's remaining contentions are either without merit or not properly before this Court.

BALKIN, J.P., HALL, LOTT and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court