

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

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Submitted - October 2, 2012

REINALDO E. RIVERA, J.P.  
RUTH C. BALKIN  
JOHN M. LEVENTHAL  
CHERYL E. CHAMBERS, JJ.

2011-10502

DECISION & ORDER

In the Matter of Guadalupe Rodriguez, respondent, v  
Jenny Bello, appellant.

(Docket No. V-2759-09/10A)

Michael D. Meth, Chester, N.Y., for appellant.

Robert M. Rametta, Goshen, N.Y., for respondent.

John A. Pappalardo, White Plains, N.Y., attorney for the child.

In a child custody proceeding pursuant to Family Court Act article 6, the mother appeals, as limited by her brief, from so much of an order of the Family Court, Orange County (Currier-Woods, J.), dated September 29, 2011, as, after a hearing, granted the father's petition to modify a prior order of the same court dated September 8, 2009, awarding her primary physical custody of the parties' child, so as to award him primary physical custody of the child.

ORDERED that the order dated September 29, 2011, is affirmed insofar as appealed from, without costs or disbursements.

The Family Court erred in admitting into evidence the report of the Mental Health Assessment Team, since the report was not submitted under oath and the expert was not "present and available for cross-examination" (22 NYCRR 202.16[g][2]; *see Matter of D'Esposito v Kepler*, 14 AD3d 509, 510). Nevertheless, without consideration of the report, a sound and substantial basis exists in the record to support the Family Court's determination to award primary physical custody of the parties' child to the father. Accordingly, that determination should not be disturbed (*see Eschbach v Eschbach*, 56 NY2d 167, 171; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 95; *Matter*

*of Coyne v Coyne*, 150 AD2d 573, 574).

RIVERA, J.P., BALKIN, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court