

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

D36716  
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Submitted - November 19, 2012

REINALDO E. RIVERA, J.P.  
RUTH C. BALKIN  
JOHN M. LEVENTHAL  
SYLVIA HINDS-RADIX, JJ.

2012-00606  
2012-00897

DECISION & ORDER

In the Matter of Kenneth Baribault, appellant, v Kendra  
Sauvola, respondent.

(Index No. 26410/03)

Sari M. Freidman, P.C., Garden City, N.Y. (Katherine Ryan of counsel), for  
appellant.

Chas G. Cancellare, Hauppauge, N.Y. (Curtis R. Exum of counsel), for respondent.

Donna England, Centereach, N.Y., attorney for the child.

In a custody proceeding, in effect, pursuant to Domestic Relations Law § 240(1), the father appeals from (1) an order of the Supreme Court, Suffolk County (MacKenzie, J.), dated December 6, 2011, which granted the mother's motion for an award of an attorney's fee, and (2) an order of the same court dated December 21, 2011, which, after a hearing, inter alia, granted the mother's cross motion to modify a so-ordered stipulation of the same court (Bivona, J.) dated March 9, 2005, which awarded the parties joint legal custody of the parties' child, so as to award the mother sole legal and physical custody of the parties' child, and eliminated the father's mid-week overnight visitation with the child.

ORDERED that the orders are affirmed, with one bill of costs.

Where the initial custody determination is made by the adoption of an agreement by the parties, custody may be modified where it is shown that, viewing the totality of the

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circumstances, a change in custody is in the child's best interest (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 96). "Custody determinations turn in large part on assessments of the credibility, character, temperament, and sincerity of the parties, and where a full evidentiary hearing has been held on the child's best interests, the resultant findings will not be lightly set aside on appeal" unless they lack a sound and substantial basis in the record (*Matter of Roldan v Nieves*, 76 AD3d 634, 635; *see Eschbach v Eschbach*, 56 NY2d 167, 173-174; *Salvatore v Salvatore*, 68 AD3d 966, 966-967; *Matter of Berkham v Vessia*, 63 AD3d 1155, 1156). Under the circumstances of this case, the Supreme Court's determinations that joint legal custody was no longer feasible, to award sole custody to the mother, and to modify the father's visitation were all supported by evidence of changes in circumstances warranting those determinations in the child's best interest (*see Matter of Boggio v Boggio*, 96 AD3d 834, 835; *Matter of Crowder v Austin*, 90 AD3d 753, 754; *see also Matter of Mohabir v Singh*, 78 AD3d 1056, 1056-1057). Accordingly, those determinations have a sound and substantial basis in the record.

Contrary to the father's contention, the Supreme Court providently exercised its discretion in determining that he was incompetent to testify at the hearing based upon the testimony of his treating physician (*see People v Parks*, 41 NY2d 36, 46; *People v McGrady*, 45 AD3d 1395, 1395-1396; *see also Matter of Luz P.*, 189 AD2d 274, 277).

Further, the award of an attorney's fee to the mother was a provident exercise of discretion (*see Domestic Relations Law* § 237[b]; *Matter of Belle v DeMilia*, 19 AD3d 691, 692), "based on the financial circumstances of the parties and the circumstances of the case as a whole," including the relative merits of the parties' positions (*Matter of O'Neil v O'Neil*, 193 AD2d 16, 20; *see Matter of Dempsey v Dempsey*, 78 AD3d 1179; *Matter of Sullivan v Sullivan*, 40 AD3d 865, 867; *Matter of O'Shea v Parker*, 16 AD3d 510).

The father's remaining contentions are without merit.

RIVERA, J.P., BALKIN, LEVENTHAL and HINDS-RADIX, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court