

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1570

CAF 10-01342

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF LISA KRAMER,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

KEN BERARDICURTI, RESPONDENT-RESPONDENT.

KATHLEEN P. REARDON, ROCHESTER, FOR PETITIONER-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

LORI ROBB MONAGHAN, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR GABRIELLA B. AND GIANNA B.

Appeal from an amended order of the Family Court, Monroe County (Thomas W. Polito, R.), entered June 25, 2009 in a proceeding pursuant to Family Court Act article 6. The amended order, insofar as appealed from, denied the petition for sole custody.

It is hereby ORDERED that the amended order insofar as appealed from is unanimously reversed on the law without costs, the petition seeking sole custody of the children is granted, and the sanction imposed upon petitioner is vacated.

Memorandum: We agree with petitioner mother that Family Court erred in denying her petition seeking to modify a prior order of custody and visitation by granting her sole custody of the parties' children. It is well settled that "modification of an existing joint custody [arrangement] is warranted where the relationship between joint custodial parents so deteriorates that they are wholly unable to cooperate in making decisions affecting their child[ren]" (*Matter of Lynch v Tambascio*, 1 AD3d 816, 817), and that is the case here. In addition, we agree with the mother that the court abused its discretion in sua sponte sanctioning her upon determining that she filed her petition frivolously, "inasmuch as the court failed to afford [her] a reasonable opportunity to be heard before doing so" (*Matter of Chapman v Tucker*, 74 AD3d 1905; see 22 NYCRR 130-1.1 [a], [d]; *Matter of Ariola v DeLaura*, 51 AD3d 1389, lv denied 11 NY3d 701). We note that the father did not take a cross appeal from the order, and we therefore do not address any issue concerning the sanction imposed upon him. We also note that we do not disturb the order

insofar as it sets forth a detailed visitation schedule.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court