

136 A.D.3d 946

Supreme Court, Appellate Division,  
Second Department, New York.

ANONYMOUS 2011–1, respondent,

v.

ANONYMOUS 2011–2, appellant.

Feb. 24, 2016.

**Synopsis**

**Background:** In proceeding to modify joint **custody** provisions in underlying divorce judgment, following prior remand, 958 N.Y.S.2d 181, 102 A.D.3d 640, for hearing and new determination, the Supreme Court, Nassau County, Sondra K. Pardes, J., granted mother's motion to modify so as to award mother primary residential **custody** of parties' two **children** and denied father's motion to modify so as to award him sole decision-making authority with respect to **children**. Father appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] sound and substantial basis existed to award mother primary residential **custody**;

[2] court reasonably denied father's motion; and

[3] giving parties' daughter discretion with respect to mid-week visitation with father was appropriate.

Affirmed.

West Headnotes (7)

**[1] Child Custody**

🔑 Welfare and best interest of **child**

In determining whether a **custody** agreement that was incorporated into a judgment of divorce should be modified, the paramount issue before the court is whether, under the

totality of the circumstances, a modification of **custody** is in the best interests of the **child**.

[4 Cases that cite this headnote](#)

**[2] Child Custody**

🔑 Grounds and Factors

To determine whether modification of a **custody** arrangement is in the best interests of the **child**, the court must weigh several factors of varying degrees of importance, including, inter alia, (1) the original placement of the **child**, (2) the length of that placement, (3) the **child's** desires, (4) the relative fitness of the parents, (5) the quality of the home environment, (6) the parental guidance given to the **child**, (7) the parent's financial status, (8) his or her ability to provide for the **child's** emotional and intellectual development, and (9) the willingness of the parent to assure meaningful contact between the **child** and the other parent.

[3 Cases that cite this headnote](#)

**[3] Child Custody**

🔑 Credibility of witnesses

Weighing the factors relevant to any **custody** determination requires an evaluation of the credibility and sincerity of the parties involved, and thus the hearing court's credibility findings are accorded deference and its **custody** determinations will not be disturbed unless they lack a sound and substantial basis in the record, although the authority of an appellate court is as broad as that of the hearing court and the appellate court would be seriously remiss if, simply in deference to the hearing court's findings, it allowed a **custody** determination to stand where it lacked a sound and substantial basis in the record.

[2 Cases that cite this headnote](#)

**[4] Child Custody**

🔑 **Child's** preference

Sound and substantial basis existed for determining that it was in **children's** best interests for mother to be awarded primary residential **custody**, and thereby modifying joint **custody** provisions in underlying divorce judgment, in light of **children's** clearly stated preferences, especially considering their age and maturity, and quality of home environment provided by mother.

[Cases that cite this headnote](#)

**[5] Child Custody**

🔑 **Joint custody**

Court reasonably denied father's motion to modify joint **custody** provisions in underlying divorce judgment so as to award him sole decision-making authority with respect to **children**, and instead continued with existing provisions of divorce judgment, which called for joint legal **custody** and joint decision-making authority, even though father and mother were antagonistic toward one another, where father and mother had been able to agree on most decisions concerning **children**, if either parent were awarded sole decision-making authority there was danger that it would be used to exclude other parent from meaningful participation in **children's** lives, and court appointed parenting coordinator to assist father and mother in resolving disputes.

[Cases that cite this headnote](#)

**[6] Child Custody**

🔑 **Joint custody**

On cross-motions to modify joint **custody** provisions in underlying divorce judgment, giving parties' daughter discretion with respect to her mid-week visitation with father was appropriate, where court awarded father mid-week visitation with daughter in weeks before mother's weekends, with daughter having option to spend either Wednesday night or Thursday night, or both, at father's home, and this flexibility did not tend unnecessarily to defeat father's right of visitation.

[Cases that cite this headnote](#)

**[7] Child Custody**

🔑 **Child's preference**

Awarding visitation to a parent conditioned on the **child's** wishes is disfavored where it tends unnecessarily to defeat the right of visitation.

[Cases that cite this headnote](#)

**Attorneys and Law Firms**

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[WILLIAM F. MASTRO](#), J.P., [CHERYL E. CHAMBERS](#), [ROBERT J. MILLER](#), and [SYLVIA O. HINDS-RADIX](#), JJ.

**Opinion**

**\*946** Appeal from an order of the Supreme Court, Nassau County (Sondra K. Pardes, **\*\*205** J.), dated April 24, 2015. The order, after a hearing, granted the mother's motion to modify the joint **custody** provisions of a judgment of divorce dated September 6, 2011, so as to award her primary residential **custody** of the parties' **children**, and denied the father's motion to modify the judgment of divorce so as to award him sole decision-making authority with respect to the **children**.

**\*947** ORDERED that the order is affirmed, with costs.

The parties have two **children**, a daughter, born in March 1999, and a son, born in September 2003. In a **separation agreement** dated April 2, 2010, which was incorporated but not merged into the parties' judgment of divorce, the parties agreed to share residential **custody** of the **children** on alternating weeks. Shortly after the divorce was finalized, the mother moved to modify the joint

**custody** provisions of the judgment of divorce so as to award her sole **custody**, claiming that there had been a **change in circumstances**. The Supreme Court denied the motion without a hearing. On appeal, this Court found that the mother established that she was entitled to a hearing on her motion, and remitted the matter to the Supreme Court for the appointment of an attorney for the **children** and, thereafter, for a hearing and a new determination (*see Anonymous 2011-1 v. Anonymous 2011-2*, 102 A.D.3d 640, 958 N.Y.S.2d 181).

While the hearing was underway, both parties filed emergency orders to show cause based on circumstances that arose after the hearing had begun. In her motion, the mother sought, inter alia, an award of temporary residential **custody** of the **children**. In his motion, the father sought, inter alia, sole decision-making authority concerning the **children**. Both parties and the attorney for the **children** asked for a forensic evaluation to be performed.

On April 3, 2014, the Supreme Court ordered a forensic evaluation of the parties, the **children**, and any necessary third parties, scheduled an in camera conference with the **children**, and adjourned the hearing pending the conclusion of the forensic evaluation. The court also took note of the fact that both parties now alleged “a dramatic change in circumstance in their **children's** emotional and physical condition so as to warrant an immediate change of **custody**, and/or parental decision making.” Based on the parties' affidavits, the court held, in effect, “that there has been a sufficient change in circumstances to warrant a determination as to whether modifying the provisions of the agreement is in the best interests of the **children**.” Neither party challenges the Supreme Court's finding of changed circumstances.

After the hearing was concluded, in the order appealed from, the Supreme Court awarded the mother primary residential **custody** of the **children**. The court awarded the father visitation with the **children** on alternating weekends and, in the weeks preceding the mother's weekends, visitation with the son from Wednesday until Friday, and directed that the daughter would have “the option to spend either Wednesday \*948 night or Thursday night, or both, at the father's home.” The court further directed that the parties were to continue to have joint legal **custody** and joint decision-making authority. The father appeals, contending, inter alia, that the Supreme Court erred in

modifying the judgment of divorce so as to award the mother primary residential **custody**, and in denying his motion for an award of sole decision-making authority with respect to the **children**.

[1] In determining whether a **custody** agreement that was incorporated into a \*\*206 judgment of divorce should be modified, the paramount issue before the court is whether, under the totality of the circumstances, a modification of **custody** is in the best interests of the **child** (*see Matter of Honeywell v. Honeywell*, 39 A.D.3d 857, 858, 835 N.Y.S.2d 327; *Cuccurullo v. Cuccurullo*, 21 A.D.3d 983, 984, 801 N.Y.S.2d 360).

[2] To determine whether modification of a **custody** arrangement is in the best interests of the **child**, the court must weigh several factors of varying degrees of importance, including, inter alia, (1) the original placement of the **child**, (2) the length of that placement, (3) the **child's** desires, (4) the relative fitness of the parents, (5) the quality of the home environment, (6) the parental guidance given to the **child**, (7) the parent's financial status, (8) his or her ability to provide for the **child's** emotional and intellectual development, and (9) the willingness of the parent to assure meaningful contact between the **child** and the other parent (*see McAvoy v. Hannigan*, 107 A.D.3d 960, 962–963, 967 N.Y.S.2d 757; *Matter of Mingo v. Belgrave*, 69 A.D.3d 859, 859–860, 893 N.Y.S.2d 248; *Cuccurullo v. Cuccurullo*, 21 A.D.3d at 984, 801 N.Y.S.2d 360).

[3] Weighing the factors relevant to any **custody** determination requires an evaluation of the credibility and sincerity of the parties involved. Therefore, the hearing court's credibility findings are accorded deference and its **custody** determinations will not be disturbed unless they lack a sound and substantial basis in the record (*see Matter of Jackson v. Coleman*, 94 A.D.3d 762, 763, 941 N.Y.S.2d 273; *Matter of Buxenbaum v. Fulmer*, 82 A.D.3d 1223, 1224, 919 N.Y.S.2d 389). However, the authority of an appellate court is as broad as that of the trial court (*see Matter of Louise E.S. v. W. Stephen S.*, 64 N.Y.2d 946, 947, 488 N.Y.S.2d 637, 477 N.E.2d 1091; *Matter of Ellis v. Burke*, 108 A.D.3d 764, 970 N.Y.S.2d 251), and an appellate court would be seriously remiss if, simply in deference to the finding of a trial judge, it allowed a **custody** determination to stand where it lacked a sound and substantial basis in the record (*see Matter of Middleton v. Stringham*, 130 A.D.3d 627, 629, 13 N.Y.S.3d

223; *Matter of Cortez v. Cortez*, 111 A.D.3d 717, 974 N.Y.S.2d 791; *Matter of Iams v. Estate of Iams*, 106 A.D.3d 910, 911, 965 N.Y.S.2d 165).

[4] \*949 Here, viewing the totality of the circumstances, there is a sound and substantial basis for the Supreme Court's determination that it is in the best interests of the **children** for the mother to be awarded primary residential **custody**. Particularly relevant in this case are the clearly stated preferences of the **children**, especially considering their age and maturity, and the quality of the home environment provided by the mother (see *Matter of Manfredo v. Manfredo*, 53 A.D.3d 498, 500, 861 N.Y.S.2d 399; *Matter of O'Connor v. Dyer*, 18 A.D.3d 757, 795 N.Y.S.2d 686).

[5] Moreover, under the circumstances of this case, the Supreme Court did not err in denying the father's motion for an award of sole decision-making authority with respect to the **children**, and continuing instead the existing provisions of the judgment of divorce, which call for joint legal **custody** and joint decision-making authority. While ordinarily it is not appropriate to award joint legal **custody** and decision-making authority where the parties are antagonistic toward one another (see *Irizarry v. Irizarry*, 115 A.D.3d 913, 982 N.Y.S.2d 581), in this case, the record supports the court's finding that, despite their antagonism, the parties have been able to agree on most decisions concerning the **children** (see *Matter of Thorpe v. Homoet*, 116 A.D.3d 962, 963, 983 N.Y.S.2d 629). Moreover, the record supports the court's finding that if either parent were awarded sole decision-making authority, there would be a danger that it would be used

to exclude the other parent from meaningful participation in the **children's** lives. In addition, the court appointed a parenting coordinator, who can assist the parents in resolving any disputes they may have concerning decisions about the **children**.

[6] [7] We reject the father's contention that the Supreme Court erred in giving the daughter discretion with respect to her mid-week visitation with him. It is true that awarding visitation to a parent conditioned on the **child's** wishes is disfavored where it “tends unnecessarily to defeat the right of visitation” (*Mahler v. Mahler*, 72 A.D.2d 739, 739, 421 N.Y.S.2d 248; see *Matter of Kristine Z. v. Anthony C.*, 21 A.D.3d 1319, 1321, 803 N.Y.S.2d 331; *Pincus v. Pincus*, 138 A.D.2d 687, 688, 526 N.Y.S.2d 501). However, in this case, the Supreme Court awarded the father mid-week visitation with the daughter in the weeks before the mother's weekends, with the daughter to have “the option to spend either Wednesday night or Thursday night, or both, at the father's home.” Contrary to the father's contention, while the provision confers upon the daughter a limited measure of flexibility regarding the timing and duration of her mid-week visitation with the father, it does not tend unnecessarily to defeat the right of visitation.

\*950 The father's remaining contentions are without merit.

#### All Citations

136 A.D.3d 946, 26 N.Y.S.3d 203, 2016 N.Y. Slip Op. 01275