

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, SECOND DEPARTMENT**

Conway v. Gartmond

108 A.D.3d 667, 969 N.Y.S.2d 525 (2d Dep't 2013) · Decided July 17, 2013

SUMMARY

The court affirmed the denial of the father's request to modify an existing custody arrangement and award him sole legal and physical custody, finding no sufficient change in circumstances. It modified the visitation schedule to provide alternate-weekend visitation from Friday evening through Monday evening and weekly visitation from Wednesday evening through Friday evening.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Balkin, J.P.; Leventhal, J.; Sgroi, J.; Miller, J.
JURISDICTION	New York
DECIDED	July 17, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	The father appealed from the portion of a Family Court order that denied his request for sole legal and physical custody and granted him expanded visitation on an alternative basis.
STANDARD OF REVIEW	A custody determination will not be disturbed when supported by a sound and substantial basis in the record. Modification of visitation is reviewed for an improvident exercise of discretion.
PRECEDENTIAL VALUE	published and precedential New York Appellate Division decision
PARTIES	Conway v. Gartmond

TOPICS

child custody visitation family law procedure appellate procedure standard of review

PRACTICE AREAS

family law child custody visitation appellate procedure

QUESTIONS PRESENTED

1. Whether the father established a subsequent change in circumstances sufficient to warrant modifying the existing custody arrangement and awarding him sole legal and physical custody.
2. Whether the Family Court properly exercised its discretion in setting the father's expanded visitation schedule.

HOLDINGS

1. The father failed to establish a change in circumstances sufficient to warrant changing custody, and the child should remain in the mother's sole physical custody.
2. The Family Court improvidently exercised its discretion by limiting the father's weekly overnight visitation to Thursday at 8:30 p.m.; the visitation order was modified to extend the weekly visitation through Friday at 6:00 p.m.

KEY QUOTATIONS

“In order to modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances so that modification is required to protect the best interests of the child” (668)

“Priority in custody disputes should usually be given to the parent who was first awarded custody . . . because this policy assures stability in the child's life” (668)

“When . . . there is no indication that a change of custody will result in significantly enhancing the child's welfare, it is generally considered in the child's best interests not to disrupt his [or her] life” (669)

FACTUAL BACKGROUND

A prior 2006 order awarded the mother sole physical custody of the parties' child and granted the father specified visitation. The father sought modification to obtain sole legal and physical custody, or alternatively expanded visitation. The mother had been the child's primary caregiver since birth, and the child was doing well in her care.

PROCEDURAL HISTORY

In related child custody and visitation proceedings under Family Court Act article 6, the Family Court, Westchester County, after a hearing, denied the father's request to modify a 2006 custody order to award him sole legal and physical custody. The court granted expanded visitation to a limited extent. The Appellate Division affirmed the custody determination but modified the visitation schedule to provide weekly overnight visitation from Wednesday at 6:00 p.m. until Friday at 6:00 p.m.

DISPOSITION

affirmed

CASES CITED

- Matter of Anwar v. Sani, 78 A.D.3d 827, 827 (2010)
- Matter of Fallarino v. Ayala, 41 A.D.3d 714, 714 (2007)
- Matter of Rosen v. Goldhaber, 73 A.D.3d 1184, 1185 (2010)
- Eschbach v. Eschbach, 56 N.Y.2d 167, 171 (1982)
- Matter of Wilson v. McGlinchey, 2 N.Y.3d 375, 381 (2004)
- Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 94-95 (1982)
- Matter of Nikolic v. Ingrassia, 47 A.D.3d 819, 821 (2008)
- Matter of Kozlowski v. Mangialino, 36 A.D.3d 916, 917 (2007)
- Matter of Ross v. Ross, 96 A.D.3d 856, 857-858 (2012)
- Matter of Salvati v. Salvati, 221 A.D.2d 541, 542-543 (1995)
- White v. Mazzella-White, 84 A.D.3d 1068, 1069 (2011)
- Matter of Russell v. Russell, 72 A.D.3d 973, 974 (2010)
- Matter of Chery v. Richardson, 88 A.D.3d 788, 789 (2011)
- Matter of Solovay v. Solovay, 94 A.D.3d 898, 900 (2012)
- Matter of Nell v. Nell, 87 A.D.3d 541, 542 (2011)
- Matter of Heuthe v. McLaren, 296 A.D.2d 500, 501 (2002)
- Dagher v. Dagher, 82 A.D.2d 191, 193 (1981), aff'd, 56 N.Y.2d 938 (1982)