917-

Attorney for Movant

Name Philip L. Ford Man

Address 420 Lexington Ave
New York NY 10170 Suite 2508

Tel. No. 212-686-6303

Appearing by Philip L. Ford Man

Attorney for Opposition

Grant & Apple Gram.
444 Madison Ave
New York NY 10022

212-308-2200

Patricia Ann Grant
Michael Apple Gram.

Lawyers For Children
110 Lafayette Street
New York NY 10013 - Lan Guardian

(Do not write below this line)

DISPOSITION

Interim stay denied without prejudice to renew on or after July 5 at which time it is likely the full opinion of the Family Court Judge (Goldberg, J.) will have been issued and the parties may then frame their arguments regarding a stay pending appeal.

Justice GDM

5/27/04
Date

Motion Date _____ Opposition _____ Reply _____

EXPEDITE _____ PHONE ATTORNEYS _____ DECISION BY _____

ALL PAPERS TO BE SERVED PERSONALLY.

EH
Court Attorney

"Revised 02/01"

SUMMARY STATEMENT ON APPLICATION FOR EXPEDITED SERVICE AND/OR INTERIM RELIEF

(SUBMITTED BY MOVING PARTY)

Date *May 27 2004*

Title of Matter *John Aylsworth petitioner-respondent* Index/Indict # *V01744/03*

Bridget Marks respondent-appellant

Appeal by *respondent* from order / judgment / decree of Supreme / Surrogate's / Family Court (order and Family circled)

County *New York*

Court entered on *May 21*, 20*04*

Name of Judge ______

Notice of Appeal filed on *May 25*, 20*04*

If from administrative determination, state agency ______

Nature of action or proceeding *petition to change custody*

Provisions of order / judgment / decree (order circled) appealed from *award of custody to petitioner, provision that respondent's visitation & telephone contact with the children be monitored and supervised and permitted petitioner 4 weeks vacation in California with the children*

This application by appellant / respondent (appellant circled) is for *a stay of the order*

If applying for a stay, state reason why requested *the transfer of the children will, as Judge Goldberg wrote, cause the children trauma and stress. The award of custody is not based on the unfitness of the mother but the court's belief that she failed to affirmatively foster the children's relationship with the father*

Has any undertaking been posted *No* If "yes", state amount and type ______

Has application been made to court below for this relief *No* If yes, state Disposition ______

Has there been any prior application herein in this court ______ If "yes", state dates and nature ______

Has adversary been advised of this application *yes* Does he/she consent *No*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT
----------x

JOHN AYLSWORTH,

Petitioner-Respondent,

-against-

BRIDGET MARKS,

Respondent-Appellant.

----------x

NOTICE OF MOTION FOR A STAY PENDING APPEAL

Docket No. VO1744/03

PLEASE TAKE NOTICE that upon the annexed affidavit of Bridget Marks, duly sworn to the day of May, 2004, upon the decision and order of the Hon. Arlene Goldberg of the Family Court of the State of New York, New York County dated May 21, 2004, and upon all of the pleadings and proceedings heretofore had herein, the Respondent-Appellant will move the court at the Appellate Division, First Department, Madison Avenue at 25th Street, New York, New York on the day of June, 2004 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order granting the following relief:

(a) staying enforcement of the Order of the Honorable Arlene Goldberg dated May 21, 2004 which awarded custody of the infant issue, Amber Lynn, born September 8, 1999 and Scarlett Lee, born September 8, 1999 and directed that the physical exchange of the children occur no later than June 1, 2004 at 12:00 P.M.; and

(b) staying enforcement of that portion of the Order dated May 21, 2004 which directed Respondent-Appellant's

telephone and visitation contact with the children be monitored and supervised; and

(c) staying enforcement of that portion of the Order dated May 21, 2004 which provided that the Petitioner-Appellant, as of June 1, 2004, may take the children to California or anywhere else for a consecutive four week period; and

(d) granting unto Respondent-Appellant such other and further relief as to the court may seem just and proper.

Dated: New York, New York
May 26, 2003

Yours, etc.,

PHILIP L. FRIEDMAN
Attorney for Respondent-
Appellant
420 Lexington Ave.-Suite 2808
New York, NY 10170
(212) 686-0303

TO: PATRICIA GRANT, ESQ.
Attorney for Petitioner
-Respondent
444 Madison Avenue
New York, NY 10022
(212) 308-2200

c:\f\Notices\Marks.525

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT
----------X

JOHN AYLSWORTH,

Petitioner-Respondent,

-against-

BRIDGET MARKS,

Respondent-Appellant.

----------X

AFFIDAVIT IN SUPPORT OF RESPONDENT'S APPLICATION FOR A STAY

Docket No. VO1744/03

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BRIDGET MARKS, being duly sworn, says

I am the Respondent-Appellant (hereinafter referred to as "Appellant") in the above-entitled action. I submit this affidavit in support of my instant application for a stay of enforcement of the Order and Decision of the Honorable Arlene Goldberg, dated May 21, 2004 (Exhibit "1"). A Notice of Appeal has been filed from that Order (Exhibit "2").

I had an affair with a much older, married man who lived in California, which resulted in the birth of now 4-year old twin girls. The girls have lived with me continuously since their birth. They have never stayed with Petitioner-Respondent (hereinafter referred to as the "Respondent") more than a week at a time, and, indeed, the father, by his own choice, has now not seen or asked to see the children for ten (10) weeks other than one twenty-four hour visitation.

As the facts will unfold before the court on the appeal itself, and as will be explained in more detail hereafter, the Respondent, together with his wife, basically presented a sham to the court. The court prevented me from showing that at the same time they presented themselves as a happy, close-knit family, there was actually a divorce proceeding on file between the two of them in California and, further, the Respondent is involved in yet another affair with a woman in St. Louis (where the Respondent runs a gambling casino) who lost her own children because of her drug addiction.

It should be noted as hereinafter set forth in more detail that there has been no application that I have been other than a good mother.

Unless the Order is stayed, there will be irreparable harm since my two girls will be shuffled back and forth, first to California, and then to his hypothetical New York home.

Accordingly, I am seeking an Order of this court staying enforcement of the Order dated May 21, 2004 pending the appeal from that Order.

PERTINENT BACKGROUND

The salient facts and circumstances surrounding this matter and mandating the granting of my instant application are hereinafter set forth.

The Respondent, age 54, while married, had an affair with me which resulted in the birth of twin children: Amber Lynn and Scarlett Lee, born September 8, 1999. We have never lived together

either prior to or after the birth of the children. The Respondent refused to sign an acknowledgment of paternity. Accordingly, the children have resided with me on a continuous basis since their birth four years ago although there was no formal custodial order to that effect.

Respondent, who resides in California, would sporadically visit with the children. At best, he has had a transient relationship with them. The children have never spent more than one week continuously in his care. Prior to the initiation of this action, there was no Order which fixed his right of visitation. Respondent continues to reside in California with his wife of approximately 34 years.

In or about October, 2002, three years after their birth, the Respondent, for the first time, sought to establish paternity and visitation rights with regard to the children. In July, 2003, Respondent changed his petition and sought an award of custody of the children. At the trial he focused exclusively on why he should be awarded custody and "assumed" because he lived in California, that the children should also live in California.

I vigorously opposed his application for custody.

However, on May 21, 2004, Judge Goldberg issued a Decision (see Exhibit "1") in which she found that custody be awarded to Respondent provided he establish a residence in New York.

This determination was not based on any finding that I was unfit as a mother. Indeed, Dr. Billick, the court appointed psychiatrist, testified that I was "a good enough mother".

The court predicated its decision solely upon its determination upon the erroneous conclusion that I had fabricated allegations of abuse against the Respondent and therefore, had failed in my affirmative duty to nurture the children's relationship with the Respondent.

The court made the award of custody to the Respondent, notwithstanding its determination the "the mother has been the custodial parent since the children were born and the change in custody will be a stressful and traumatic experience for the children".

It further made a direction that the award would be conditioned upon the Respondent living within 40 miles of the New York area, although there has been no testimony, (nor have I received information) that Respondent has established New York residence, other than maintaining a studio apartment in which he sporadically resides during visitations with the children. In fact, the Decision specifically states, " The petitioner testified he would be willing to move to New York to obtain custody." (emphasis added)

Finally, and I am advised, most unusually, the court's Decision is not complete since Judge Goldberg, in a footnote stated, "An expanded version of the decision, fully detailing the evidence, will be provided to the parties at a later date." It

appears that Judge Goldberg has issued a partial Decision, but nevertheless in this partial Decision directed, that custody be transferred without fully explaining her reasons and findings.

It is for these reasons that I am seeking a stay of the Order pending a determination upon appeal.

PHYSICAL EXCHANGE OF THE CHILDREN ON JUNE 1, 2004 WILL CAUSE THEM IRREPARABLE HARM

As previously stated, the court noted in its Decision that "the mother has been the custodial parent since the children were born and the change in custody will be a stressful and traumatic experience for the children" (emphasis added)

I have been the custodial parent for Amber and Scarlett since their birth and have provided the only home that they have ever known.

Conversely, the Respondent has only had intermittent contact in their life. He has spent only one week with the children, twice in their lives. Moreover, he has never disclosed to the court what arrangements he would make to take care of them in New York. His testimony as to custodial arrangements is limited as to what would happen if the children moved to California.

At this point, the only thing that is known about Petitioner's home is that it is a studio apartment in New York. He has actually resided in California for the past 20 years. He continues to work in St. Louis running a gambling casino. He never testified as to what arrangements, if any, he has made for the care of the children in New York. Where will they reside? Where will

they go to school? Will they have a separate bedroom? Who will take care of them when the Respondent is away at work in St. Louis?

Obviously, it is respectfully submitted that the abrupt shift in the custody of the children will cause them trauma and irreparable harm.

Under these circumstances, it is respectfully submitted that an application for a stay of this portion of the Order should be granted. If, on appeal, it is determined that the custody award was improvident, or alternatively, that further hearing is required as to what arrangements have been made and the suitability of those arrangements, then an unnecessary transfer of custody will have occurred because the children will concededly undergo a stressful and traumatic experience which will probably cause them irreparable harm.

I HAVE NEVER BEEN FOUND TO BE
A DANGER OR DETRIMENTAL TO THE CHILDREN

Dr. Billick, the independent forensic psychiatrist appointed by the court, testified that I was "a good enough mother". The determination to award custody is not predicated upon any unfitness on my part insofar as my engaging in acts which would be detrimental to the children. The award is predicated upon the court's belief that I falsely accused the Respondent of sexually abusing the children and, therefore, that I failed in my affirmative duty to protect and nurture Amber and Scarlett's relationship with the Petitioner.

Thus, if the children remain in my custody pending the determination of the appeal, they are not in any danger.

Significantly, the post-trial memoranda was submitted on February 9, 2004. Judge Goldberg did not render her decision until May 21, 2004. In this intervening period, Judge Goldberg made no attempt to modify my right of custody or to direct that my care of the children be supervised or monitored or to impose restrictions in any manner thereby tacitly conceding that I presented no danger to the children and indeed, was an appropriate parent.

Accordingly, it is respectfully submitted that there would be no harm done if the children remain in my custody, while there would be significant harm if an immediate transfer of custody occur before the appeal is heard.

THE DECISION ISSUED BY THE COURT IS NOT A FULL DECISION

In a footnote to the first page of the Decision, Judge Goldberg states, "An expanded version of the Decision, more fully detailing the evidence and the findings, will be provided to the parties on a later date". Accordingly, the Decision from which I am appealing which directs the transfer of custody is not the full Decision. Therefore, this court may not even have a full Decision to review which I am advised, in and of itself, is reversible error. Nevertheless, within the context of this vague Decision, the court has directed the physical transfer of custody should occur. I am advised that this, in and of itself, may constitute a reversal of the Decision. Judge Goldberg directs that my visitation and telephone contact with the children be monitored and supervised. However, there is no discussion within the Decision as to why this is necessary. If a stay is not granted, then the

transfer would have occurred, which would have caused harm to the children. This harm would have occurred on the basis of the Decision that does not fully set forth the reasons and evidence upon which it is based.

MY REQUEST FOR A STAY OF THE ORDER DATED MAY 25, 2004

Under the circumstances hereinbefore set forth, it is respectfully submitted that a stay be granted pending the hearing and determination of the appeal. In the event that Judge Goldberg's Order is reversed and a stay is not granted, the children will be irreparably prejudiced since a transfer of custody will have occurred from the only home which they have known since their birth. Moreover, the transfer will have occurred to a home which may or may not suitably provide for their needs since no testimony was elicited as to the physical arrangements regarding the Respondent's New York residence, nor what constitutes New York residence or what arrangements he would make for the care of these children.

Conversely, in the event that a stay is granted, Respondent will not be prejudiced. At worst, if the appeal is denied, he can then proceed to obtain physical custody and presumably some disclosure will have been made in the interim period concerning the arrangements, if any, have been made to take care of the children.

Accordingly, it is respectfully requested that a stay is fully appropriate pending the hearing and determination of the appeal.

No prior application for the relief requested herein has been made to this or any other court.

WHEREFORE, it is respectfully requested that an Order be granted staying the enforcement of the Order dated May 21, 2004 pending the hearing and determination of the appeal and for such other and further relief as may be just and equitable in the premises.

Bridget Marks

BRIDGET MARKS

Sworn to before me this
26th day of May, 2004

Dorothy Kreindler

DOROTHY KREINDLER
Notary Public, State of New York
No. 01KR6062638
Qualified in New York County
Commission Expires August 13, 2005

c:\f\Affidavit.24 Marks.525

Family Court of the State of New York
City of New York

60 LAFAYETTE STREET
NEW YORK, N.Y. 10013

FAX TRANSMITTAL

Date: May 21, 2004

To: Patricia Grant, Esq., Attorney for Petitioner,
Fax Number: 212- 3082223

Melina Sfakianaki, Esq. Attorney for Respondent
Fax Number: 212- 687- 3080

Molly Murphy, Law Guardian
Fax Number: 212- 966-0531

From: Chambers of Honorable Arlene D. Goldberg

Fax #: 212- 374- 2623

Phone #: Sharon Glazer, Court Attorney 646-386 -5124

Number of pages including cover sheet: 10

Message:

Attached please find a copy of the decision on Aylsworth v. Marks. You will also receive a copy via mail.

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK, COUNTY OF NEW YORK

In the Matter of a Proceeding under
Article 6 of the Family Court Act

DECISION AND ORDER

JOHN AYLSWORTH,

Docket No.: V-01744-5/03

Petitioner,

-against-

BRIDGET MARKS,

Respondent.

GOLDBERG, J.:

This Court conducted a lengthy evidentiary hearing over fourteen court dates concerning which party should be awarded custody of the parties' twin daughters. Written summations were subsequently submitted and the case has been pending decision by the Court. It must be noted that the parties were never married to each other and that the children are the product of an extramarital affair by the petitioner. Respondent was unmarried as of the last court appearance on May 5, 2004.

By order to show cause, respondent has sought to reopen the trial in this action, on a limited basis, requesting that the Court hear and consider newly discovered evidence of further infidelity by the petitioner, arguing it is relevant and material to the determination of custody. Petitioner opposed the motion to reopen, however, requested that if the Court did reopen the matter that petitioner be allowed to introduce evidence of respondent's posing in pornographic photographs and evidence of her bad judgment since the trial's conclusion, including creating a "media circus". The law guardian in the matter does not oppose the motion to reopen but asks that if the trial is reopened then the Court not limit the evidence to the petitioner's alleged adultery but also allow and consider evidence concerning respondent's communications with the

press and her judgement in seeking media involvement, arguing that both the acts of petitioner and respondent post-trial have bearing on the court's best interests determination.

Once a party has rested, the party generally does not have a legal right to reopen the case and introduce additional evidence. See Carmody-Wait 2d, New York Practice with Forms, § 59:32 (database updated April 2004). However, the Court has the power to permit a litigant to reopen the case under appropriate circumstances, though such discretion should be sparingly exercised. See, Barson v. Mulligan, 77 A.D. 192, 79 N.Y.S. 31. Further, a reopening of a trial may not be granted solely for impeaching the credibility of a witness, but instead the newly discovered evidence must go beyond mere impeachment and disclose a misstatement of fact on a material issue or have independent probative value on a material issue. See, In re Baruch's Estate, 131 N.Y.S.2d 84.

In the instant matter, Respondent seeks to offer evidence of Petitioner's newly discovered alleged affair arguing, in sum, "[t]he existence of this relationship is critical to the determination of custody and visitation and will establish that Petitioner is not a credible witness". See Respondent's Order to Show Cause ¶18. After reviewing the trial transcript, the Court does not find that this evidence is in direct conflict with any testimony by the Petitioner and therefore would only serve as an attempt to impeach the petitioner which is not a ground to reopen the trial.

Petitioner's request to reopen the hearing and allow testimony regarding the publication of pornographic photographs of the respondent is similarly not in direct conflict of any trial testimony but is supported by the testimony. The allegation that the photographs remain in circulation is of no moment. This is also deemed to solely be an attempt to discredit the petitioner and is similarly not found to be a basis to reopen this hearing.

Although the petitioner and the law guardian both ask that the Court reopen the hearing to hear evidence regarding Respondent's communications with the media and allowing the twins'

photograph to appear in the newspaper, the Court also finds this to be an insufficient basis to reopen. While respondent's communication with the media may have bearing on her capacity to make decisions that are in the best interests of the children, the court finds that the probative value of the proposed testimony is outweighed by the prejudicial effect of any further delay on the parties and most importantly on the children.

The motions to reopen are denied.

This constitutes the decision and order of the court.

Notify parties.

Dated: May 20, 2004
New York, NewYork

Arlene D. Goldberg
J.F.C.

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK, COUNTY OF NEW YORK

In the Matter of a Proceeding under
Article 6 of the Family Court Act

DECISION AND ORDER
ON CUSTODY

JOHN AYLSWORTH,

Docket No.: V-01744-5/03

Petitioner,

-against-

BRIDGET MARKS,

Respondent.

GOLDBERG, J.:

This Court conducted a lengthy evidentiary hearing concerning which party should be awarded custody of the parties' out-of-wedlock, four-year-old twin daughters, who have resided with their mother in New York City since they were born. Written summations were subsequently submitted and the case has been pending decision by the Court. During that time, additional litigation ensued by way of orders to show cause including a motion by petitioner for a gag order and a motion by respondent to reopen the custody trial. Both motions were denied, the latter motion through a written decision dated May 20, 2004.

The Court herein now sets forth its decision[1] and order on which parent shall have custody of the twins, AMBER LYNN AYLSWORTH, d.o.b. September 8, 1999, and SCARLETT LEE AYLSWORTH, d.o.b. September 8, 1999.

In making the custody decision the sole concern and focus of the Court has been, as it must be, determining what custodial arrangement will best serve the interests of these two young children and promote their welfare and happiness. Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S. 2d 658 (1982); Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893 (1982); DRL §70(a). To that end, the Court has conducted an exhaustive and painstaking review of all

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[1]An expanded version of the decision, more fully detailing the evidence and findings, will be provided to the parties on a later date.

of the evidence, the relevant case law and the competing claims and arguments raised by the parties and by the children's law guardian. The Court has also carefully considered the various factors that are relevant to the best interest analysis as developed by the case law. In making its determination the Court has weighed and given due consideration to the testimony and recommendations of Dr. Billick, the forensic evaluator assigned by the court, Lisa Lubell, a certified social worker with a specialty in child sex abuse, and Julie Dowling, a certified social worker, both of whom were called as witnesses by the children's law guardian. All three of those witnesses, for stated reasons, recommended that custody of the children be awarded to the petitioner father. Of course, the contrary opinions and recommendations of the mother's psychiatric and other mental health/social work expert witnesses have also been considered. However, none of them did a forensic evaluation of the father and mother or of the children. Indeed, these witnesses, all of whom were hired by the mother, essentially reached their conclusions solely on her one sided statement of circumstances and events. As such, these witnesses views on the custody and related issues are of little probative value and are consequently given little weight.

In this case, the mother alleged that the father sexually abused both children during court ordered supervised visitation. Dr. Billick and Ms. Lubell, testified to a reasonable degree of certainty, based on a variety of factors, that those allegations were untrue and that the children had been coached to say that the father had "touched their peepee." The Court credits the testimony of both Dr. Billick and Ms. Lubell. Furthermore, their conclusions are supported by other evidence in the case. What emerges from the credible evidence in the case is that the mother due to her anger over the father's failure to divorce his wife and marry her, either alone or together with Pam Soleimon, the mother's good friend, coached the children to make the allegations that they did. The evidence further shows that the charges were made to deny the

father access to the children. There was also abundant and credible evidence that the children made many negative statements about the father and aspects of his life during court ordered visitation and when the children were interviewed by psychiatrists and social workers during the pendency of the case. There was also convincing evidence that on many occasions the children attributed their thoughts and statements to things they had been told by their mommy or by Pam. The mother's denial that she never said anything negative to the children about their father was simply not credible. In fact, many aspects of the mother's testimony were not credible. In any event, the mother did admit to speaking to others in the house about the father and that the children may have overheard those conversations.

It is well settled that a custodial parent has an affirmative duty to protect and nurture the child's relationship with the other parent. This principle is of such importance that courts have concluded that a custodial parent's interference with the relationship between a child and a non-custodial parent is "an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [offending party] is unfit to act as a custodial parent". See Entwistle v. Entwistle, 61 A.D.2d 380, 380-84, 402 N.Y.S.2d 213, 216, *appeal dismissed by*, 44 N.Y.2d 851. Interference with the parent-child relationship can take many forms, but a more subtle and insidious form of interference which has the potential for greater and more permanent damage to the emotional psyche of a young child is the psychological poisoning of a young person's mind by turning him or her away from the non-custodial parent. See e.g., Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957. It is axiomatic that a parent is not acting in the child's best interest when he or she deliberately frustrates or interferes with visitation or makes false sexual abuse allegations. See David K. v. Iris K., 276 A.D.2d 421, 714 N.Y.S.2d 297.

It was the opinion of Dr. Billick, Ms. Lubell and Ms. Dowling that the petitioner, for stated reasons, is unable to foster a positive relationship between the twins and their father. The

evidence in the case supports that view. While the mother testified that she can foster the relationship and encourage visitation, her demeanor and tone indicated that she was not sincere in those assertions.

The respondent contends that even if the court found that the sex abuse charges were not bona fide, two instances of false allegations cannot justify a change in custody. However, at least one court has found that sufficient. See, Matter of Karen B. v. Clyde M., 151 Misc 2d 794, affd. sub. nom. Karen PP v.Clyde QQ, 197 AD2d 753 (3d Dept 1993). In that case, which involved a four-year old child, the mother made two reports of sex abuse by the father. A five-month period separated the two reports. Additionally, the experts, who had interviewed the child, rendered conflicting opinions on the validity of the child's allegations. The Family court concluded that "it is likely that the mother programmed her daughter to accuse the father of sexually abusing the child so that she could obtain sole custody and control or even preclude any contact that the father might have with his daughter." The evidence in this case supports a similar finding. The court in Karen B. also expressed the belief that "any parent that would denigrate the other by casting the false aspersion of child sex abuse and involving the child as an instrument to achieve his or her selfish purpose is not fit to continue in the role of parent." Moreover, in this case we are not solely dealing with fabricated sex abuse charges but with allowing an atmosphere to prevail at home in which the father is denigrated.

This Court is extremely mindful of the fact that the mother has been the custodial parent since the children were born and that the change in custody will be a stressful and traumatic experience for the children. However, the general rule that a court give preference to the initial custody arrangement, whether set by court order or by mutual agreement[2], is not absolute and is

[2]In this case there was no court order or expressed mutual agreement. The mother obtained de facto custody when the twins were born.

certainly not controlling when circumstances show that continuation of such custody arrangement would be adverse to the child's best interests. See e.g., Fanelli v. Fanelli, 215 A.D.2d 718, 627 N.Y.S.2d 425. Furthermore, that a change in custody may prove to be temporarily disruptive to the child is not determinative as all changes in custody are disruptive. See Matter of Nehra v. Uhlar, 43 N.Y.2d 242, 248, 401 N.Y.S.2d 168, 171; Vernon v. Vernon, 296 A.D.2d 186, 746 N.Y.S.2d 284. Moreover, according to Dr. Billick, the trauma of the event may be adequately addressed through therapy and the long term benefits of the change outweigh the potential harm.

The evidence in this case shows that the father is an experienced and caring parent, having four adult children, who unanimously gave him high marks as a father, as did petitioner's wife of 34 years. All persons who have seen him interact with the twins testified that he is a very good parent and that the twins love him and are happy when they are with him. The testimony establishes that he can foster the relationship between the mother and the children whereas the mother cannot.

While petitioner has had extramarital affairs, his failings impact on his ability to be a good husband, not a proper custodial parent, irrespective of whether his wife continues with the marriage. In contrast, the mother's failings, her unbridled anger toward the father and inability to foster the paternal parental relationship, make her ill suited to be the custodial parent for the children. To leave the children in her custody would expose them to further emotional damage and likely make a healthy and wholesome father/daughter relationship impossible.

In sum, the court finds that it is in the best interests of the children that the Petitioner be awarded custody, as supported by the children's law guardian and the forensic evaluator. However, as the mother has had such a strong presence in the children's lives and given their attachment to her, the court finds that a permanent move to California at this time would prove to be detrimental as it would deny the mother meaningful and regular visitation with the children.

The Petitioner testified that he would be willing to move to New York to obtain custody. Therefore, the court finds that the father's custody should be conditioned, as advocated by the law guardian, to living within forty (40) miles of the New York metropolitan area where the mother resides. The Court further finds and ORDERS that the mother's visitation and telephone contact with the children be monitored and supervised pending any further order of the court. The Court further finds and ORDERS that the mother is not to permit Pam Soleimon to have any contact with the children. It is further ORDERED that the physical exchange of the children shall not occur until June 1, 2004 at 12:00 p.m. so that the children may complete their school year unless the parties mutually agree to the exchange occurring on a different date. As of June 1, 2004, the father may take the children to California or anywhere else for summertime vacation for a consecutive four week period. The children shall then have supervised visitation time with the mother for a one-week period.

Counsel and the Law Guardian are to submit to the Court, proposed supervisors and additional visitation proposals. The mother is hereby ORDERED not to make any negative comments to the children about the father or this custody award.

It is so ordered

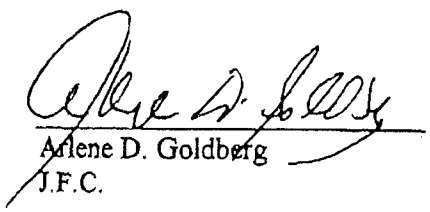
This constitutes the decision and order of the court.

The May 24, 2004 court control date is hereby vacated.

Notify parties and the children's law guardian.

ENTER

Dated: May 21, 2004
New York, NewYork



Arlene D. Goldberg
J.F.C.