

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: January 12, 2012

510907

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In the Matter of JEFFREY WAYNE  
GOLDEN,  
Respondent,  
v

CHRISTINA M. GOLDEN et al.,  
Respondents,  
and

MEMORANDUM AND ORDER

BRADLEY A. RICE,  
Appellant.

(And Two Other Related Proceedings.)

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Calendar Date: November 21, 2011

Before: Peters, J.P., Rose, McCarthy, Garry and Egan Jr., JJ.

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Randolph V. Kruman, Cortland, for appellant.

Natalie B. Miner, Homer, for Jeffrey Wayne Golden,  
respondent.

Abbie Goldbas, Utica, for Christina M. Golden and another,  
respondents.

Andrew J. Mooney, Ithaca, attorney for the children.

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Garry, J.

Appeal from an order of the Family Court of Cortland County  
(Campbell, J.), entered October 18, 2010, which, among other

things, granted petitioner's application, in three proceedings pursuant to Family Ct Act article 6, for custody of the children of respondents Christina M. Golden and Bradley A. Rice.

Respondent Christina M. Golden (hereinafter the mother) and respondent Bradley A. Rice (hereinafter the father) are the parents of two children (born in 2007 and 2009). After living together for several years, they separated in 2009, shortly before the youngest child was born. The mother and the children thereafter stayed with petitioner, the mother's father (hereinafter the grandfather), for several months before moving into an apartment of their own. In January 2010, respondent Cortland County Department of Social Services (hereinafter DSS) investigated several reports regarding the mother and her boyfriend and their inadequate guardianship of the children. As a result, the mother voluntarily entered into a "safety plan," thereby placing the children with the grandfather.<sup>1</sup> DSS informed the father of the investigation and this plan in March 2010, and he filed a petition for custody of the older child shortly thereafter. In May 2010, after an order of filiation was entered relative to the younger child, he filed a petition for her custody also. The grandfather also filed a custody petition for both children in May 2010.<sup>2</sup> Family Court ordered an investigation pursuant to Family Ct Act § 1034 in March 2010, awarded temporary custody of both children to the grandfather with supervised visitation to the father in May 2010, and conducted a fact-finding hearing in August 2010. At the close of the fact-finding hearing, the father moved to dismiss the grandfather's custody petition. Family Court denied this motion, dismissed the father's custody petitions, awarded sole custody of the children to the grandfather, and maintained the father's supervised visitation. The father appeals, contending that the

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<sup>1</sup> Immediately prior to implementation of this plan, the children were in the care of the mother's cousin for approximately one month.

<sup>2</sup> The grandfather's initial custody petition for the children, filed in March 2010, was dismissed for failure to allege extraordinary circumstances.

grandfather failed to prove extraordinary circumstances.

Absent a showing of "'surrender, abandonment, persistent neglect, unfitness, disruption of custody over an extended period of time or other extraordinary circumstances,'" a parent has a claim of custody to his or her child that is superior to all others (Matter of Ferguson v Skelly, 80 AD3d 903, 904 [2011], lv denied 16 NY3d 710 [2011], quoting Matter of Gray v Chambers, 222 AD2d 753, 753 [1995], lv denied 87 NY2d 811 [1996]). Persistent neglect is demonstrated by a failure "to maintain substantial, repeated and continuous contact with a child or to plan for the child's future" (Matter of Arlene Y. v Warren County Dept. of Social Servs., 76 AD3d 720, 721 [2010], lv denied 15 NY3d 713 [2010] [internal quotation marks and citations omitted]; see Social Services Law § 384-b [7] [a]; Matter of Bisignano v Walz, 164 AD2d 317, 319-320 [1990]). Additional factors to be considered in an extraordinary circumstances analysis include "'the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the biological parent allowed such custody to continue without trying to assume the primary parental role'" (Matter of Tennant v Philpot, 77 AD3d 1086, 1087 [2010], quoting Matter of Bevins v Witherbee, 20 AD3d 718, 719 [2005]; accord Matter of Ferguson v Skelly, 80 AD3d at 905). The burden of establishing extraordinary circumstances rests with the nonparent seeking custody (see Matter of Daphne OO. v Frederick QQ., 88 AD3d 1167, 1168 [2011]; Matter of Turner v Maiden, 70 AD3d 1214, 1215 [2010]). If this burden is met, custody is then determined based upon the best interests of the child (see Matter of Tennant v Philpot, 77 AD3d at 1087-1088; Matter of Lori MM. v Amanda NN., 75 AD3d 774, 775 [2010]).

Here, we initially note that the mother stipulated to extraordinary circumstances at the fact-finding hearing based upon her inability to provide for the children and unaddressed mental health issues. As to the father, according deference to Family Court's factual findings and credibility determinations, we find a sound and substantial basis in the record supporting the existence of extraordinary circumstances (see Matter of Ferguson v Skelly, 80 AD3d at 905; Matter of Magana v Santos, 70 AD3d 1208, 1209 [2010]).

The father testified at the fact-finding hearing that he had not used illegal drugs for many years and did not abuse alcohol. The mother, however, testified that while they were together, the father had grown a marihuana plant, smoked marihuana frequently – even in front of the older child – and often drank to the point of intoxication. A DSS caseworker who conducted an unannounced visit of the father's apartment in March 2010 testified that she found a 30-pack of beer in the father's refrigerator, a shelf displaying 10 to 15 empty whiskey bottles, and a glass marihuana pipe. She also observed numerous, unlocked pellet guns displayed on a shelf above the father's couch. Family Court was not satisfied by the father's explanations concerning these items "[b]ecause of his total lack of credibility." Although the father has been consistently employed, he has also frequently changed both jobs and apartments, posing issues as to the stability of his employment and living arrangements.

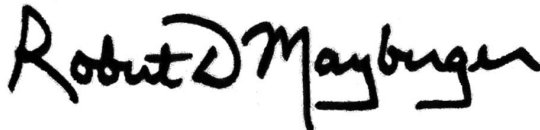
More troubling is the father's inconsistent involvement in the children's lives. The testimony revealed that when the older child was born, he rarely assisted with her care, preferring that someone else see to the child's needs. He initially questioned the paternity of the younger child, and has failed to provide any support, in the form of either supplies or money, to anyone caring for the children. The father did not visit with the children at all for several months following his separation from the mother, and only began to regularly see the children in May 2010, after filing for custody. Family Court then established a schedule of supervised visitation at the grandfather's home, but the father has remained inattentive to the children during these visits, and frequently ends them early. During his time with the children, he often uses his cell phone to call or text others. In addition, he has allowed the older child to engage in risky behavior, shows little interest in the younger child, and refuses to change diapers. Both the caseworker and the father's attorney recommended that the father attend classes to improve his parenting skills, but he has failed to do so. Considering all of the above, the evidence supports a finding of extraordinary circumstances (see Matter of Cumber v O'Leary, 56 AD3d 1067, 1070 [2008]; Matter of McDevitt v Stimpson, 1 AD3d 811, 813 [2003], lv denied 1 NY3d 509 [2004]).

Next, a sound and substantial basis in the record supports Family Court's best interests analysis and the award of custody to the grandfather (see Matter of Tennant v Philpot, 77 AD3d at 1089; Matter of Turner v Maiden, 70 AD3d at 1216-1217). The grandfather has worked as a farmhand and has maintained the same home for 28 years. His job allows him to come home several times per day to spend time with the children. His longtime, live-in girlfriend previously worked at a child-care center as both a cook and a toddler teacher; she has also worked as a nanny. The children have an established schedule, and the older child's behavior has greatly improved while under the grandfather's care. Accordingly, we find no reason to disturb Family Court's determination (see Matter of Cumber v O'Leary, 56 AD3d at 1070-1071).

Peters, J.P., Rose, McCarthy and Egan Jr., JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court