

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

Decided and Entered: January 12, 2012

511138

In the Matter of ARLENE TRACEY
OWENS,

Appellant,

v

MEMORANDUM AND ORDER

MICHAEL EMMETT THOMAS O'BRIEN,
Respondent.

Calendar Date: November 22, 2011

Before: Spain, J.P., Malone Jr., Stein, McCarthy and
Egan Jr., JJ.

A.L. Beth O'Connor, Cortland, for appellant.

Ronald T. Walsh, Cortland, for respondent.

Natalie B. Miner, Homer, attorney for the child.

Stein, J.

Appeal from an order of the Family Court of Cortland County (Campbell, J.), entered November 19, 2010, which dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

The parties are the parents of a son (born in 2005). In October 2009, Family Court entered an order, on consent of the parties, awarding them joint custody, with respondent (hereinafter the father) having physical placement of the child and petitioner (hereinafter the mother) having liberal visitation as the parties could agree. Soon thereafter, the mother sought to modify the order on the basis that the father was acting

uncivilly towards her and she raised concerns about the father's alleged drug use. In June 2010, Family Court entered an order, again on consent of the parties, which continued the parties' shared legal custody and the father's primary physical custody of the child, but specified the mother's parenting time.

In July 2010, the mother commenced this proceeding, alleging that the father had violated the terms of his probation¹ by failing a drug test and that he was entering an inpatient rehabilitation program. She subsequently filed an amended petition seeking modification of the prior custody order, which contained additional allegations regarding the child's absences from school. After a fact-finding hearing, Family Court dismissed the mother's amended petition. The mother now appeals and we affirm.

In order to warrant modification of the existing order of custody, the mother was required to demonstrate "a change in circumstances reflecting a real need for change in order to insure the continued best interest of the child" (Matter of Joseph A. v Jaimy B., 81 AD3d 1219, 1220 [2011] [internal quotation marks and citations omitted]). Not until a change in circumstances has been established is Family Court permitted to proceed to a best interest analysis (see id. at 1221). The mother's sole contention on appeal is that Family Court erred in finding that the father's drug use, alone, was not a sufficient change in circumstances to warrant modification of the prior custody order. We disagree.

The father's probation officer, Benjamin Wheaton, testified that the father – who is subject to random drug testing by the Probation Department and family counseling services – last tested positive for drugs in March 2010, prior to the June 2010 order. Wheaton further testified that the father is in compliance with the terms and conditions of his probation, participates in various drug abuse outpatient treatment programs and voluntarily completed a short-term rehabilitation program in July 2010.

¹ Apparently, this was the result of a conviction for trespass.

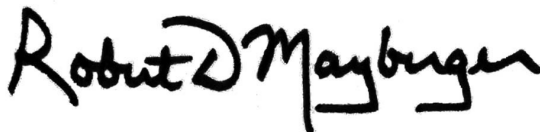
Wheaton believed that the father was no longer using drugs. In addition, Wheaton, a former child protective investigator, testified that he had no concerns about the father's parenting abilities.

According to great deference to Family Court's credibility determinations (see Matter of Lewis v Tomeo, 81 AD3d 1193, 1195 [2011]; Matter of Robert SS. v Ashley TT., 75 AD3d 780, 782 [2010]), we find a sound and substantial basis in the record to support Family Court's determination that the mother failed to demonstrate a change in circumstances since entry of the prior order. The mother had raised concerns about the father's drug use prior to the entry of the existing custody order, to which the mother consented. In addition, we find no fault with Family Court's finding that the father was no longer abusing drugs. Accordingly, Family Court properly dismissed the mother's petition. Although by no means determinative, we note that this conclusion is consistent with the position advanced by the attorney for the child (see Matter of Siler v Wright, 64 AD3d 926, 929 [2009]).

Spain, J.P., Malone Jr., McCarthy and Egan Jr., JJ.,
concur.

ORDERED that the order is affirmed, without costs.

ENTER:



Robert D. Mayberger
Clerk of the Court