

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

Decided and Entered: July 3, 2014

516413

In the Matter of SWAN WINDOM,
Appellant,

v

MEMORANDUM AND ORDER

KELLY PEMBERTON,
Respondent.

(And Another Related Proceeding.)

Calendar Date: May 27, 2014

Before: Lahtinen, J.P., McCarthy, Garry, Lynch and Clark, JJ.

Jessica C. Eggleston, Saratoga Springs, for appellant.

Michelle I. Rosien, Philmont, for respondent.

Eleanor K. Mullaney, Saratoga Springs, attorney for the child.

Lahtinen, J.P.

Appeal from an order of the Family Court of Warren County (Breen, J.), entered February 5, 2013, which, among other things, granted respondent's application, in two proceedings pursuant to Family Ct Act article 6, for custody of the parties' child.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the unmarried parents of a son (born in 2005). The child was born in Florida and spent several years there, during which time he resided almost exclusively with the mother. The mother and the child permanently relocated to Warren County in May 2010. While the father was visiting in December

2011, he and the maternal grandmother secreted the child away from the mother, and the father commenced the first of these proceedings for custody. The mother, in turn, cross-petitioned for custody. Family Court initially awarded temporary custody of the child to the maternal grandmother but, in June 2012, returned the child to the mother. Following a fact-finding hearing at which the parents and the maternal grandmother testified, Family Court granted the parties joint legal custody of the child, awarded the mother physical custody of the child and established a visitation schedule for the father. The father appeals, and we affirm.

"In determining custody, Family Court was required to assess the best interests of the child by considering factors such as the child's age and wishes, and the parents' relative fitness, stability and previous performance, as well as their respective home environments and abilities to guide the child, provide for his well-being, and encourage his relationship with the other parent" (Matter of Dana A. v Martin B., 72 AD3d 1136, 1137 [2010] [citations omitted]; see Bowman v Engelhart, 112 AD3d 1187, 1187 [2013]). "Great deference is accorded to both Family Court's assessment of the witnesses' credibility and its ultimate custody determination," especially in cases like this one where the court must choose between two less than ideal parents (Matter of Baker v Baker, 82 AD3d 1462, 1462 [2011] [citations omitted]; see Matter of Dana A. v Martin B., 72 AD3d at 1138).

The mother has been the child's primary caregiver, assumed responsibility for his medical needs and has willingly engaged in treatment for her prescription drug dependency and other maladies. While she has been disabled from working for some time, she has stabilized her financial situation and maintains an appropriate residence for the child. She has also improved her relationship with the maternal grandmother, who lives nearby and serves as a resource for the child. Moreover, despite the father's contention that the mother was obstructing his relationship with the child, Family Court noted her testimony that she has endeavored to encourage their relationship and will continue to do so.

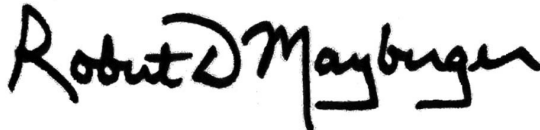
In contrast, the record reflects that the father has only had sporadic contact with the child, remains financially

dependent upon his parents, and is approximately \$25,000 in arrears on his child support obligation. The father also has an eventful criminal history, and has refused to consider relocating to New York despite admitting that the child had developed significant emotional contacts here. Under these circumstances, a sound and substantial basis in the record supports Family Court's determination that the best interests of the child would be served by awarding physical custody to the mother (see Matter of Bambrick v Hillard, 97 AD3d 921, 922-923 [2012]; Matter of Baker v Baker, 82 AD3d at 1462-1463).

McCarthy, Garry, Lynch and Clark, 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