

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

Decided and Entered: December 24, 2014

518143

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In the Matter of McKENZIE D.

KING, Now Known as

McKENZIE D. ST. CLAIR,

Appellant,

v

MEMORANDUM AND ORDER

CODY L. CHESTER,

Respondent.

(And Another Related Proceeding.)

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Calendar Date: October 16, 2014

Before: Lahtinen, J.P., Garry, Egan Jr., Lynch and Devine, JJ.

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Bartlett, Pontiff, Stewart & Rhodes, PC, Glens Falls (Mark E. Cerasano of counsel), for appellant.

Cheryl Maxwell, Plattsburgh, attorney for the child.

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Devine, J.

Appeal from an order of the Family Court of Franklin County (Silver, J.H.O.), entered June 26, 2013, which, among other things, granted respondent's application, in a proceeding pursuant to Family Ct Act article 6, for custody of the parties' child.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the unmarried parents of a daughter (born in 2003). Within months of the child's birth, the mother agreed to have the child's maternal grandmother care for the child in the Town of Dickinson, Franklin County, so that the

mother could leave the area to attend college. The child has lived continuously in that community since her birth. The mother was away at school from 2003 until she earned her undergraduate degree in 2008, occasionally visiting the child on certain weekends, holidays or school vacations. After graduation, the mother moved to Delaware with her then-boyfriend until 2011, while the child remained with the maternal grandmother. The father enlisted in the military before the child was born and was twice deployed to Iraq, rarely able to see the child until he was discharged in 2007.

When the mother returned to New York in 2011 and indicated her intent to relocate the child to Saratoga County, the maternal grandmother filed a petition for sole legal and physical custody of the child, which Family Court (Hall, J.) granted temporarily. However, when the maternal grandmother withdrew her petition and moved out of state, Family Court granted temporary primary physical custody of the child to the father, which order included parenting time for the mother. The parties had each commenced a proceeding seeking custody and primary physical placement of the child. After a trial on the respective custody petitions, Family Court awarded the parties joint legal custody, with primary physical placement of the child to the father, and established a visitation schedule for the mother. The mother now appeals.

The mother contends that Family Court's order granting primary physical custody of the child to the father was not in the child's best interests and must be reversed by this Court. We disagree. In making its custody determination, Family Court was obligated to consider "the parents' past performance and relative fitness, their willingness to foster a positive relationship between the child and the other parent, as well as their ability to maintain a stable home environment and provide for the child's overall well-being" (Matter of Alleyne v Cochran, 119 AD3d 1100, 1100-1101 [2014] [internal quotation marks and citations omitted]; see Matter of Holland v Klingbeil, 118 AD3d 1077, 1078 [2014]; Matter of Adams v Morris, 111 AD3d 1069, 1069-1070 [2013]). The child's wishes are also considered by the court in making its final determination (see Matter of Windom v Pemberton, 119 AD3d 999, 999 [2014]). When making custody determinations, the best interests of the child is always the

most important factor to consider (see Eschbach v Eschbach, 56 NY2d 167, 171 [1982]; Matter of Eck v Eck, 33 AD3d 1082, 1083 [2006]; Matter of Lopez v Robinson, 25 AD3d 1034, 1035 [2006]). Furthermore, "[g]iven the superior position of Family Court to evaluate the testimony and assess the credibility of witnesses," we give great deference to its determination where it has adequate support in the record (Matter of Keen v Stephens, 114 AD3d 1029, 1030 [2014]; see Matter of Anson v Anson, 20 AD3d 603, 604 [2005], lv denied 5 NY3d 711 [2005]; Matter of Wolcott v Cook, 265 AD2d 748, 750 [1999]).

The record establishes that the child was raised by her maternal grandmother for the first nine years of her life, during which time the mother moved to several different places – all of which were a distance from the child – in order to pursue her academic and professional goals. Despite the maternal grandmother's laudable efforts, the mother's testimony clearly showed that, at the time of the trial, the mother no longer maintained a relationship with the maternal grandmother, nor did she encourage the child to communicate with her grandmother. In fact, during their trial testimony, the mother and the maternal aunt attempted to tear down the maternal grandmother, criticizing the manner in which she cared for the child for nine years. While the dissent opines that Family Court unfairly criticized the mother for trying to better herself by attending college and otherwise attaining financial and emotional stability, the evidence shows that, rather than reunite with the child after graduating from college, the mother moved out of state so that her boyfriend could find a new job. While the mother was out of state from 2008 to 2009, she made no attempt to have the child become a part of her daily life, testifying that she and her then-boyfriend thought it was in their "best interests" that they familiarize themselves with the area before relocating the child. However, even after returning to New York, the mother did not petition for custody of the child for another two years. Based upon evidence of this nature, Family Court reasonably found the mother's excessive delay in seeking custody of the child was "the most concerning factor" weighing against granting primary custody to the mother, as was the mother "tak[ing] prolonged advantage of [the maternal grandmother's] generosity, up until such time as when the mother decided that she was in a position of sound

social and financial standing, such that she can now take care of her child." We agree with Family Court's assessment of the facts and circumstances of this case and further observe that, while the mother now seeks to uproot the child from the only community she has ever known, the mother has made no attempt during that time to integrate herself back into that community so that the relocation of the child might be avoided altogether.

While the father is far from perfect, the evidence portrays him in a different light. He testified that, although he made attempts to visit with the child while on leave from military duty, he was told by the mother, on more than one occasion, that he had no place in the child's life. Upon being discharged from the military in 2007, the father made efforts to gain the trust of the maternal grandmother and worked with her and his mother in fashioning a visitation schedule so that he could build a relationship with the child.

Family Court further considered the parties' respective parental strengths and weaknesses, specifically acknowledging that the mother had attained financial stability, owned a home with her husband in a good school district and could address the child's health and educational needs. The court also took note of the father's previous struggles with posttraumatic stress disorder and alcohol-related driving offenses, but heard positive testimony regarding the father's successful rehabilitation and commitment to providing the child with a safe and stable home. The father further averred that he supported the child's relationship with the mother and would remain flexible in scheduling visitation so that the child would be able to participate in family events with the mother's extended family. Further, the father considered it important to encourage the child to maintain a relationship with the maternal grandmother, who had raised the child since infancy.

In its comprehensive and reasoned decision, Family Court concluded that, while both the mother and father are loving and competent parents who are dedicated to the child and are able to provide for her needs, keeping the child in the community where she has lived since birth would not only comport with the child's wishes, but would also provide her with much needed stability.

Family Court found that the mother's proposal to relocate the child to Saratoga County was a concern in that it would remove the child from the place where she has established friendships, bonds with her paternal grandparents, has become involved in activities with the father – including participation in an American Legion youth service program and a recreational soccer league – and cares for her horse and other pets (see Matter of Barker v Dutcher, 96 AD3d 1313, 1313-1314 [2012]). Although relocation of the child was but one factor "among all factors to be considered in making a best interests determination" (Matter of Sullivan v Sullivan, 90 AD3d 1172, 1173 [2011]), we disagree with the dissent's conclusion that the evidence weighs soundly and substantially in favor of granting primary physical custody to the mother. The mother and her spouse live in a larger house that is located in an affluent neighborhood, where the child will be able to spend time with the mother's extended family; however, the father's current living situation provides the child with similar opportunities. The dissent overlooks the close relationship that the child has formed with the father's parents and other nearby relatives and friends, and it unnecessarily minimizes the child's own express wishes that the custody arrangement remain as it currently stands. Although Family Court erroneously revealed certain matters that were discussed during the Lincoln hearing, such error does not undermine the court's determination that the child's best interests would be served by remaining with her father. Thus, as Family Court's order has a sound and substantial basis in the record, its award of primary physical custody to the father shall remain undisturbed (see id.; Matter of Baker v Spurgeon, 85 AD3d 1494, 1497 [2011], lv dismissed 17 NY3d 897 [2011]).

Finally, although the mother asserts that Family Court should have given her greater visitation, Family Court's order was constructed in such a way that the child would be able to spend sufficient time with both parents without unnecessarily disrupting the child's academic and social schedule, and we find no reason to create an alternate arrangement (see Matter of Alleyne v Cochran, 119 AD3d at 1101-1102; Matter of Braswell v Braswell, 80 AD3d 827, 831 [2011]; Murray v Skiff-Murray, 289 AD2d 805, 807 [2001]).

Lahtinen, J.P., and Egan Jr., J., concur.

Lynch, J. (dissenting).

Because we do not agree that there is a sound and substantial basis for finding that the child's best interests are served by awarding primary physical custody to respondent (hereinafter the father), we respectfully dissent.<sup>1</sup> In our view, Family Court's observation that it was "self-serving and convenient for [petitioner (hereinafter the mother)] to take prolonged advantage of [the maternal grandmother's] generosity, up until such time as when the mother decided that she was in a position of sound social and financial standing, such that she can now take care of her child," indicates that the court did not consider the father to have an obligation equal to that of the mother to care for the child during the early years of her life and is a fundamental flaw in the court's analysis. Importantly, both parents allowed the maternal grandmother to raise their child, and there is not really any dispute in the record that this decision was best for the child at the time.

Turning to the applicable factors, "the principal concern in any child custody dispute is the best interests of the child, to be determined by reviewing such factors as maintaining stability for the child, the child's wishes, the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent" (Matter of Baker v Spurgeon, 85 AD3d 1494, 1496 [2011], lv dismissed 17 NY3d 897 [2011] [internal quotation marks, brackets and citation omitted]). As this is an initial custody determination, the mother's decision to relocate "is but one factor among many" that may be considered as part of the best interests analysis (Matter of Saperston v Holdaway, 93 AD3d 1271, 1272 [2012], appeal dismissed 19 NY3d 887 [2012], 20 NY3d 1052 [2013]), and the focus must be whether it is

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<sup>1</sup> Despite being advised that he could apply for assignment of counsel, the father did not participate in this appeal.

in the child's best interests to live with the mother or the father, not on whether a proposed relocation would be in the child's best interests (see id.; compare Matter of Tropea v Tropea, 87 NY2d 727, 740-741 [1996]).

Considering the parties' past performance, and despite the recent estrangement between the mother and maternal grandmother,<sup>2</sup> the record shows that, from the time the mother left for college, she remained in almost daily contact with the grandmother with regard to the child's development, health and education and had frequent visits with the child over the years while working to put herself through school. The mother testified that it was always her intent and goal to get into a position where she could have the child live with her. In our view, the record shows that the mother made considerable efforts in maintaining a relationship with the child throughout the child's life. For example, the actual, uncontroverted testimony was that from 2003 to 2004, the mother was home every weekend and every holiday and break during the first semester at college, returned home during the mid-semester break, was home 70% of the weekends during the second semester, and resided at home all summer. During the 2004 to 2005 school year, the mother was attending school full time and working 30 hours a week. She returned home more than half of the weekends, despite not having a car after November 2004. The mother lived at home during the 2005 to 2006 school year through the end of the summer of 2006, although she would occasionally spend overnights with a boyfriend, who lived in the Town of Potsdam, St. Lawrence County. The mother testified that from the fall 2006 semester through her graduation from college in August 2008, she was again working at least 30 hours a week, and that she returned home at least two weekends a month and was home for holidays and school breaks.

After the mother graduated in August 2008, she moved out of state because her boyfriend, who is now her husband, accepted an engineering position in Delaware after losing his job in the City

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<sup>2</sup> We do not find anything in the record indicating that the mother "attempted to tear down" or otherwise criticize the maternal grandmother.

of Plattsburgh, Clinton County. The mother testified that when they moved to Delaware, it was everyone's belief that the child would move to Delaware beginning in the fall of 2009. The mother testified that from August 2008, when the child was five years old, to July 2011, when the child was eight years old, the child visited Delaware and the mother traveled to New York to be with the child on holidays and for both the mother's and the child's birthdays. The mother testified that it was in "our" best interest to become familiar with the area before moving the child. Indeed, by the end of the summer of 2009, the mother had moved into a different home and had completed all of the paperwork to have the child start school in Delaware beginning in September 2009. This did not occur because the father, with the maternal grandmother's assistance, petitioned for visitation. The mother filed a cross petition for custody, but the parties ultimately agreed to withdraw their respective petitions and resumed their informal arrangement, with the maternal grandmother having primary physical custody of the child.

The evidence demonstrates that the mother returned to New York in July 2011 while her boyfriend remained in Delaware because she believed that the maternal grandmother was going to petition for custody of the child and she believed that she should be in New York so she could seek custody. After the maternal grandmother petitioned for custody in late July or early August 2011, the mother cross-petitioned for custody in September 2011 and the father cross-petitioned for custody in January 2012. This is the proceeding under review.

For his part, while his military service, including two eight-month deployments in Iraq, is commendable, the father had one contact with the child as an infant, but did not contact the maternal grandmother or mother or otherwise inquire of the child for more than four years, even when home on leave between his overseas deployments.<sup>3</sup> Upon his honorable discharge in 2007, the father enjoyed occasional visits with the child at both his and

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<sup>3</sup> The father's record testimony was that the mother told the father once, in December 2003, when the child was five months old, that he "wasn't going to be a part of [the child's] life."

the maternal grandmother's convenience. Still, it was not until 2009, when the mother attempted to relocate the child to Delaware, that he sought, with the maternal grandmother's assistance, a formal visitation schedule. The father testified that after the informal resolution of the 2009 petition and cross petition, he saw the child approximately every other weekend. By temporary order issued in October 2011, the maternal grandmother was granted primary physical custody, with the mother granted three weekends and the father one weekend of parenting time each month. In September 2012, after the maternal grandmother withdrew her petition for custody and moved to Arizona, Family Court issued an order granting the father primary physical custody of the child with extensive parenting time to the mother.<sup>4</sup> By the November 2012 custody hearing, the revised custodial arrangement was relatively new for the mother, the father and the child.

As for their respective abilities to provide for the child's well-being, the mother is working nearly full time, and her husband is employed full time as a civil engineer. They each own cars and together purchased a home in a community with a good school, and the child has developed a relationship with her maternal aunt and cousins who live nearby. The maternal aunt and the mother's husband each testified with regard to their relationships with the child and ability to help care for her. At the time of trial, the father, who had been deemed by the Department of Veterans Affairs in 2011 to have an increased disability of 70% as a result of posttraumatic stress disorder, was not working, but was attending school full time.<sup>5</sup> He was renting a home from his mother and, because his driver's license had been suspended until 2015 after he was convicted of multiple alcohol-related offenses, he relied on his mother, father and

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<sup>4</sup> Pursuant to the September 2012 order, the mother had custody of the child for two weekends and two full weeks during the period beginning August 3, 2012 to September 9, 2012.

<sup>5</sup> We note that this evaluation was not considered permanent, and is subject to future review by the Department of Veterans Affairs after December 2015.

unspecified friends and acquaintances for transportation for himself and the child.

The attorney for the child argues that Family Court's determination is supported by the requisite sound and substantial basis. In this regard, if a child is able to articulate a custodial preference, his or her "wishes are 'some indication of what is in [his or her] best interests'" (Matter of Rivera v LaSalle, 84 AD3d 1436, 1438 [2011], quoting Eschbach v Eschbach, 56 NY2d 167, 173 [1982]). However, in general, a nine-year-old child's preference should not be given "great weight" (Matter of Rivera v LaSalle, 84 AD3d at 1439 [internal quotation marks and citations omitted]).<sup>6</sup>

Finally, while Family Court focused on the mother's estrangement from the maternal grandmother, the evidence clearly demonstrates that the mother and the father both expressed a willingness to foster a relationship with the other parent. To this end, the mother testified during the hearing that she would be willing to allow the father to exercise parenting time two weekends a month with more time in the summer, holidays and during school vacations. In our view, based on the evidence adduced at the hearing, the child's best interests would be served if the mother had primary physical custody and the child's relationship with her father, paternal grandparents, friends and pets can continue to develop and grow through the father's exercise of liberal parenting time. Accordingly, we would reverse Family Court's order, grant primary physical custody to the mother and remit to Family Court to develop a liberal parenting schedule for the father.

Garry, J., concurs.

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<sup>6</sup> Family Court erred to the extent that it discussed the substance of its conversation with the child (see Matter of Lawrence v Kowatch, 119 AD3d 1004, 1006 n 1 [2014]; Matter of Rivera v LaSalle, 84 AD3d at 1437).

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