

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

Decided and Entered: June 27, 2024

CV-22-2338  
CV-23-0476  
CV-23-0675

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In the Matter of JACOB L.,  
Appellant,

v

MEMORANDUM AND ORDER

HEATHER L.,  
Respondent.

(And Another Related Proceeding.)

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Calendar Date: May 3, 2024

Before: Garry, P.J., Reynolds Fitzgerald, Fisher, McShan and Powers, JJ.

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*Lisa K. Miller*, McGraw, for appellant.

*Andrea J. Mooney*, Ithaca, for respondent.

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

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Powers, J.

Appeals from four orders of the Family Court of Tompkins County (Scott A. Miller, J.), entered November 9, 2022, December 6, 2022, March 6, 2023 and April 3, 2023, which, among other things, dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of the subject child (born in 2020). Pursuant to a September 2021 consent order, the mother was granted sole legal and primary physical custody of the child, with the father having supervised parenting time. As a part of this order, the father was required to abstain from alcohol consumption, with regular testing in order to demonstrate his compliance, and to undergo alcohol treatment until satisfactorily discharged. This order contained a condition whereby if the father tested negative for alcohol through June 2022, his parenting time would be converted to unsupervised. However, if he tested positive, his parenting time would be suspended.

In May 2022, upon his discharge from alcohol abuse treatment, the father filed a custody modification petition alleging numerous purported changes in circumstances, including that his work schedule had changed, and Family Court granted the father unsupervised parenting time on a temporary basis. However, in September 2022, the mother filed a proposed emergency order to show cause, which the court treated as a modification petition, seeking a suspension of the father's parenting time based on a video she obtained which purported to show the father consuming alcohol. The court entered a temporary order reducing the father's parenting time and requiring supervision in advance of a hearing on the matter.

Following a hearing on the discrete issue of whether the father had consumed alcohol as the mother had alleged, Family Court found in a November 2022 order that the father had violated the September 2021 order and dismissed his modification petition for failure to establish a change in circumstances based upon this apparent violation. The court then supplemented the order of dismissal with a written decision and order in December 2022 similarly finding that the father was unable to establish a change in circumstances.<sup>1</sup> The mother's request for counsel fees was then granted, and she was

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<sup>1</sup> As part of this order, Family Court also granted the mother's request to extend an order of protection that had been entered for her benefit at the same time as the September 2021 consent order. The order of protection has expired by its own terms, and therefore any appeal from it has been rendered moot (*see Matter of Noelia F. [Noel G.]*, 204 AD3d 1122, 1123 [3d Dept 2022]), and because this order of protection was not issued with a finding that the father had committed a family offense, the "enduring consequences" that may result from such a finding do not result here as the father claims (*Matter of Smith v Morrison*, 196 AD3d 772, 773 n [3d Dept 2021]).

awarded \$12,385.55 in counsel fees pursuant to a March 2023 order. Finally, in an April 2023 order, Family Court clarified that the September 2021 consent order was still the operative custody arrangement. In addition, the court ordered that the father's parenting time be supervised, that he enroll in an abstinence-based alcohol abuse treatment program to be approved by the attorney for the child and set a graduated parenting time schedule on the condition that the father is compliant with treatment and does not consume or test positive for alcohol. The father appeals from each respective order.

The father contends that Family Court erred in finding that he had failed to demonstrate a change in circumstances since entry of the prior custody order. We agree and, for this reason, reverse Family Court's dismissal of the father's modification petition. "[A] parent seeking to modify an existing custody and parenting time order first must demonstrate that a change in circumstances has occurred since the entry thereof to warrant the court undertaking a best interests analysis" (*Matter of Barrett LL. v Melissa MM.*, 224 AD3d 942, 943 [3d Dept 2024] [internal quotation marks and citations omitted]). However, "an order entered on consent, without a plenary hearing, is entitled to less weight" (*Matter of Virginia OO. v Alan PP.*, 214 AD3d 1045, 1046 [3d Dept 2023] [internal quotation marks and citation omitted]; *accord Matter of Alexis WW. v Adam XX.*, 220 AD3d 1094, 1095 [3d Dept 2023]).

The September 2021 consent order required that the father remain in alcohol abuse treatment and dictated that he "shall not consume any alcohol at any time." The order specified that "[i]n the event that the father has a positive alcohol urine screen his parenting time shall be suspended, until an agreement by the parties or further order of the court," however his "parenting time [was to] become unsupervised commencing on June 30, 2022, as long as [he] ha[d] not tested positive for alcohol." By these terms, the father would advance to unsupervised visitation – an automatic happening – without further order of the court if he were to satisfy the conditions set forth therein. Yet, the September 2021 consent order did not require the father to satisfy these conditions before filing any subsequent modification petition (*compare Matter of Jessica EE. v Joshua EE.*, 188 AD3d 1479, 1480 [3d Dept 2020]) and "a court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation" (*Matter of Torres v Ojeda*, 108 AD3d 570, 571 [2d Dept 2013] [internal quotation marks and citation omitted]; *see Matter of Mazo v Volpert*, 223 AD3d 907, 909 [2d Dept 2024]; *Matter of Bonilla-Wright v Wright*, 213 AD3d 1289, 1291 [4th Dept

2023]). Family Court therefore erred in determining, as part of the November 2022 and December 2022 orders, that the father's concession to having consumed a single alcoholic beverage days before his next scheduled parenting time "demonstrate[d] that he cannot establish any . . . change in circumstance[s]." Similarly, the court also erred in finding that these same facts established that the mother had demonstrated a change in circumstances as part of the April 2023 order.

"A change in circumstances is demonstrated through new developments or changes that have occurred since the previous custody order was entered" (*Matter of John EE. v Jalyssa GG.*, 222 AD3d 1219, 1221 [3d Dept 2023] [internal quotation marks and citations omitted]). The father asserted in his petition that his work schedule had changed, which the mother conceded to be true, indicating that they had to alter his parenting time to accommodate his new work schedule. Based upon this, the father had demonstrated a change in circumstances warranting inquiry into whether a change in the custody or parenting time arrangement was in the best interests of the child (*see Matter of Mary N. v Scott M.*, 218 AD3d 890, 892 [3d Dept 2023]; *Matter of Thomas SS. v Alicia TT.*, 206 AD3d 1534, 1536 [3d Dept 2022]; *Matter of Lundgren v Jaeger*, 162 AD3d 1427, 1428 [3d Dept 2018]; *compare Matter of Kenneth N. v Elizabeth O.*, 209 AD3d 1133, 1134 [3d Dept 2022]). Yet, because of Family Court's singular focus on the father's consumption of alcohol, it wholly failed to inquire into this situation or any other issues during the brief fact-finding hearing. Instead, according to the court, the sole purpose of the hearing was to determine whether the father had "willfully violated" the September 2021 order "by consuming alcohol."

As the father's petition was dismissed without a full fact-finding hearing, the record does not allow us to undertake the required analysis into whether modification of the current custody arrangement would be in the best interests of the child, and, mindful of the time that has passed and that there are currently custody proceedings ongoing before Family Court, we remit the matter for a determination in this respect (*see Matter of Theresa M. v Gaddiel M.*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 03115, \*1 [3d Dept 2024]; *Matter of Chad KK. v Jennifer LL.*, 219 AD3d 1581, 1585 [3d Dept 2023]). As we must remit the matter to Family Court, we caution the court away from directing that the father completely abstain from the consumption of alcohol or dictating the specific type of treatment method the father must utilize beyond what is necessary to protect the child during his parenting time (*see generally Matter of Carmine GG. [Christopher HH.]*, 174 AD3d 999, 1000 [3d Dept 2019]; *Matter of Naricia Y.*, 61 AD3d 1048, 1049 [3d Dept

2009]). However, that is not to say that if the father's treatment plan requires abstinence from alcohol that he is not required to comply with such plan. Similarly, we must stress that "the first and paramount concern of the court" must be the best interests of the child (*S.L. v J.R.*, 27 NY3d 558, 564 [2016]), and that the court should not rely upon the father's apparent need to "regain the trust of the mother" as it had so heavily throughout the orders on appeal.

We also agree with the father's contention that Family Court abused its discretion in awarding \$12,385.55 in counsel fees to the mother based upon the foregoing conclusion. "When exercising its discretionary powers [to award counsel fees], a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions as well as the complexity of the case and the extent of legal services rendered" (*Yezzi v Small*, 206 AD3d 1472, 1477 [3d Dept 2022] [internal quotation marks and citations omitted]; *cf. Matter of Angelica CC. v Ronald DD.*, 214 AD3d 1091, 1095 [3d Dept 2023], *lv denied* 39 NY3d 915 [2023]). Here, despite no violation petition being filed against the father, the court found that "the father's willful violation" of the prior custody order and his "deceptions concerning his alcohol consumption" warranted the imposition of counsel fees. Essentially this resulted in sanctioning the father for filing the modification petition based upon his subsequent consumption of alcohol (*see generally Matter of Decker v Davidson*, 107 AD3d 1320, 1321 [3d Dept 2013]). Considering our determination as to the court's mistaken determination that the father was unable to demonstrate a change in circumstances, we also reverse the court's award of counsel fees to the mother as an abuse of discretion.

The father's remaining contentions, including that Family Court abused its discretion in denying his request for recusal (*see Sprole v Sprole*, 151 AD3d 1413, 1413-1414 [3d Dept 2017]), have been reviewed and found to be lacking in merit.

Garry, P.J., Reynolds Fitzgerald, Fisher and McShan, JJ., concur.

ORDERED that the orders are reversed, on the law, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert D. Mayberger  
Clerk of the Court