

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

Decided and Entered: December 26, 2024

CV-23-1968

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In the Matter of GABRIELLE Q.,  
Respondent,

v

JAMES R.,  
Appellant.

MEMORANDUM AND ORDER

(And Another Related Proceeding.)

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Calendar Date: November 13, 2024

Before: Aarons, J.P., Pritzker, Ceresia, McShan and Mackey, JJ.

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*Lindsay H. Kaplan*, Kingston, for appellant.

*Michelle I. Rosien*, Philmont, for respondent.

*Claudia S. Davenport*, Kingston, attorney for the child.

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Ceresia, J.

Appeal from an order of the Family Court of Ulster County (Keri A. Savona, J.), entered October 3, 2023, which, among other things, granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody and visitation.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of the subject child (born in 2011). In 2020, Family Court entered an order of custody on consent that, among other things, granted the parents joint legal custody of the

child, with the mother having primary physical custody and the father having parenting time every weekend from Friday afternoon through Monday morning. In 2022, after the Ulster County Department of Social Services filed a neglect petition against the father, the court adjudicated the child to be neglected by the father due to a pattern of excessive corporal punishment causing extensive bruising to the child. The court ordered the father's visits with the child to be supervised and mandated that the father undergo a mental health evaluation and complete courses in domestic violence and parenting.

In 2023, the mother filed a petition for modification of the custody order, seeking sole legal and physical custody of the child with no parenting time for the father. After a fact-finding hearing at which testimony was given by a Department of Social Services caseworker, the mother and the father, Family Court granted the petition. The father appeals.<sup>1 2</sup>

Where, as here, a party seeks to modify a prior custody and parenting time order and there is no dispute that a change in circumstances has occurred since entry of that order, "the question accordingly turns to what custodial arrangement is in the best interests of the child" (*Matter of Christopher TT. v Lisa UU.*, 211 AD3d 1371, 1372 [3d Dept 2022] [internal quotation marks, brackets and citation omitted]). Although parenting time with a noncustodial parent is presumed to be in a child's best interests, "that presumption may be overcome where the party opposing visitation sets forth compelling reasons and substantial evidence that such visitation would be detrimental or harmful to the child's welfare" (*Matter of Ajmal I. v LaToya J.*, 209 AD3d 1161, 1162-1163 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Matter of Lora PP. v Alphonso PP.*, 221 AD3d 1321, 1323 [3d Dept 2023]). The wishes of the child, who in this case was 12 years old at the time of the hearing, are not determinative but are entitled to consideration as part of the best interests analysis (see *Matter of Stephen G. v Lara H.*, 139 AD3d 1131, 1132-1133 [3d Dept 2016], *lv denied* 27 NY3d 1187 [2016]; *Matter of Tamara FF. v John FF.*, 75 AD3d 688, 690 [3d Dept 2010]).

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<sup>1</sup> The attorneys representing the child at both the fact-finding hearing and on appeal are supportive of the mother's position.

<sup>2</sup> On appeal, the father does not challenge Family Court's grant of sole legal custody to the mother, focusing instead on the court's decision to suspend his parenting time.

The caseworker, who was assigned to the case after the neglect determination, testified that the child has a diagnosis of autism which can manifest in outbursts and difficulty controlling his emotions. Although the caseworker saw the child have such outbursts during home visits, they became stronger and more violent when the child had supervised telephone calls with the father. During those calls, which occurred biweekly between October 2021 and April 2022, the interactions between the father and the child did not go well, and frequently the child would become angry and scream that he was going to kill his father and anyone who tried to make him see his father. After April 2022, the child persistently refused to engage in any further calls, although the caseworker continued to schedule them for nearly another year. According to the caseworker, the child's emotions and behaviors significantly improved once contact with the father ceased. The caseworker also testified that the father initially refused to comply with Family Court's order that he undergo evaluation and treatment, asserting that these requirements were unnecessary, and only complied with some of his obligations after the caseworker filed a violation petition against him.

The mother's testimony revealed that the child is enrolled in a school specializing in children with trauma, after having been rejected by 16 other schools due to his behavioral challenges. During the period when the child visited the father on weekends, he would often become upset and dysregulated upon returning to the mother, with bruises and feces on his body and urine on his clothing. The child would show the mother his bruises, saying that the father had grabbed him. During exchanges of the child at the conclusion of visits, the father would frequently act aggressively toward the mother in the child's presence, such as by pulling on her car door handles or blocking her attempts to close her apartment door. The child would become upset on these occasions and would try to get the father to stop. The mother echoed the caseworker's observation that the child's behavior had improved since his visits with the father had ended, and she noted that the child was performing better academically and had developed an increased interest in extracurricular activities. The mother testified about working with therapists to learn how to effectively manage the child's behaviors without resorting to physical discipline.

It was the father's testimony that his parenting style is more aggressive when it comes to discipline, while the mother's style is to pacify the child and give him what he wants, which does not prepare the child well for adult life. The father testified as to his belief that a father's role is to be a disciplinarian and a mother's role is to offer emotional support, which a father does not provide. He indicated that physical discipline can be effective to manage the child's behaviors, but conceded that professionals do not advise using this method because, in his opinion, it is politically incorrect for them to do so. The

father also stated that he very much wants a relationship with the child and that he would not use corporal punishment on the child again.

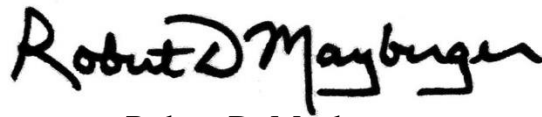
In suspending the father's parenting time, Family Court concluded that the father lacked insight into the child's special needs as well as the impact of his own behaviors upon the child. The court credited the caseworker's testimony that even telephone contact with the father caused the child to experience stress, anger and violent outbursts. The court rejected as not credible the father's claim that he would discontinue the use of corporal punishment in light of his other comments on the subject, and we defer to the court's credibility assessments (*see Matter of Ajmal I. v LaToya J.*, 209 AD3d at 1163; *Matter of Katie R. v Peter Q.*, 207 AD3d 844, 846 [3d Dept 2022]). Given the foregoing, we conclude that there is a sound and substantial basis in the record for the court's determination, and we therefore decline to disturb it (*see Matter of Angela H. v St. Lawrence County Dept. of Social Servs.*, 180 AD3d 1143, 1149 [3d Dept 2020]; *Matter of Attorney for Children v Barbara N.*, 152 AD3d 903, 906 [3d Dept 2017]).

With regard to the father's argument that Family Court should have considered testimony from an expert on childhood autism in order to determine whether there were any viable alternatives to suspending his parenting time, no such claim was raised by the father at any point during the fact-finding hearing and it is therefore unpreserved for review (*see Matter of Autumn B. v Jasmine A.*, 220 AD3d 1073, 1077 [3d Dept 2023], *lv denied* 41 NY3d 901 [2024]). In any event, the father has failed to demonstrate that such expert testimony was necessary for the court to render an appropriate decision.

Aarons, J.P., Pritzker, McShan and Mackey, 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 style with a large, stylized "R" and "M".

Robert D. Mayberger  
Clerk of the Court