

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

Decided and Entered: December 26, 2024

CV-23-2064

In the Matter of JESSE HH.,
Appellant,

v

LINDSEY II.,
Respondent.

(Proceeding No. 1.)

(And Another Related Proceeding.)

MEMORANDUM AND ORDER

In the Matter of LINDSEY II.,
Respondent,

v

JESSE HH.,
Appellant.

(Proceeding No. 3.)

Calendar Date: November 15, 2024

Before: Egan Jr., J.P., Pritzker, Lynch, Fisher and Powers, JJ.

Hug Law, PLLC, Albany (*Matthew C. Hug* of counsel), for appellant.

Mack & Associates, PLLC, Albany (*Joseph P. Drescher* of counsel), for respondent.

Nicole R. Rodgers, Saratoga Springs, attorney for the child.

Lynch, J.

Appeal from an order of the Family Court of Schenectady County (Margaret C. Tabak, Referee), entered September 27, 2023, which, among other things, granted petitioner's application, in proceeding No. 3 pursuant to Family Ct Act article 6, for custody of the parties' child.

Lindsey II. (hereinafter the mother) and Jesse HH. (hereinafter the father) are the parents of a child (born in 2017). After the parties separated in or around 2020, they maintained an informal custody arrangement which, most recently, had the child in the mother's care during the week and in the father's care on weekends. After the mother relocated with the child to Virginia in the fall of 2022, the father filed a pro se petition in Saratoga County Family Court seeking custody. He subsequently retained counsel, who filed an amended petition on his behalf in Schenectady County Family Court. The mother was directed to return the child to New York during the pendency of the proceedings, pursuant to an order to show cause signed in December 2022. The child was returned to New York as directed and resided with the maternal grandparents, while the father continued to exercise parenting time on the weekends. The mother subsequently filed a petition for primary physical custody of the child and permission to relocate. Following fact-finding and *Lincoln* hearings, Family Court issued an order in September 2023 that awarded the parties joint legal custody, with primary physical custody granted to the mother in Virginia during the school year and a schedule of parenting time for the father during the summer, school breaks and holidays as determined by subsequent order.¹ The father appeals.²

Contrary to the father's contention, we conclude that Family Court's custody determination is supported by a sound and substantial basis in the record.³ Where, as

¹ A subsequent order was entered in February 2024 enumerating the father's parenting time schedule as contemplated by the September 2023 order.

² This Court denied the father's motion for a stay pending appeal (*see* 2023 NY Slip Op 78681[U] [3d Dept 2023]).

³ The attorney for the child below supported an award of custody in favor of the father due to the child's familiarity with New York. The attorney for the child on appeal supports the award of primary physical custody to the mother in Virginia during the school year.

here, a parent's relocation initiates the commencement of a custody proceeding resulting in an initial custody determination, strict application of the relocation factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727 [1996]) is not required (*see Matter of O'Hara v DeMarsh*, 161 AD3d 1271, 1271-1272 [3d Dept 2018]; *Matter of Finkle v Scholl*, 140 AD3d 1290, 1291 [3d Dept 2016]). Family Court's paramount concern is the best interests of the child, "which requires the consideration of factors such as the quality of the parents' respective home environments, the need for stability in the child[]'s li[fe], each parent's willingness to promote a positive relationship between the child[] and the other parent and each parent's past performance, relative fitness and ability to provide for the child[]'s intellectual and emotional development and overall well-being" (*Matter of James EE. v Vanessa EE.*, 228 AD3d 1025, 1025-1026 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]). "Although a parent's decision to reside in a distant locale is a very important factor among the constellation of factors to be considered in arriving at a best interests determination, other pertinent circumstances must be considered, primary among them being the quality of the home environment with each parent and each parent's ability to guide and provide for the child's overall well-being" (*Matter of Alexander K. v Jaheria L.*, 230 AD3d 966, 967 [3d Dept 2024] [internal quotation marks and citations omitted]). "Because Family Court is in a superior position to assess witness credibility and make findings of fact, this Court will not disturb Family Court's decision so long as it is supported by a sound and substantial basis in the record" (*Matter of O'Hara v DeMarsh*, 161 AD3d at 1272 [citations omitted]).

The record demonstrates that both parties are fit and loving parents who wish to play an active role in the child's life. Both parties also spent a considerable amount of time caring for the child before the initiation of these proceedings. However, the mother has most recently served as the child's primary residential custodian and has also historically undertaken the primary responsibility for the child's schooling and healthcare. As for the circumstances precipitating the mother's relocation, she explained that she left her prior casino-related employment in New York due to childcare constraints and took a job in Virginia, where she resides with her husband in a residence that has a separate bedroom for the child. The mother informed the father about her plan to relocate before doing so in an attempt to "keep him involved," demonstrating her commitment to maintaining the child's relationship with him (*cf. Matter of Aden HH. v Charish GG.*, 226 AD3d 1109, 1112 [3d Dept 2024]). The mother expected to double her income in her new position and intended to enroll the child in private school as a result, believing that smaller class sizes would be beneficial for his educational and emotional needs. At the time of the fact-finding hearing, the mother's work schedule enabled her to be available

for the child on weekdays after school and she had the support of her husband to help with bedtime during her evening shifts. She also intended to enroll the child in soccer if awarded primary physical custody, testifying that the father had previously pushed back on her requests in this regard.

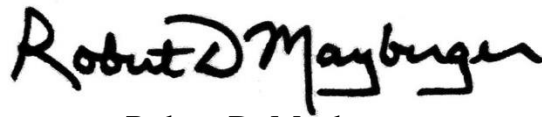
In contrast to the mother's home environment, at the time of the fact-finding hearing, the father was residing with the paternal grandparents in a residence that required him to share a room with the child. Although the father maintained that arrangements would be made for the child to have his own room if he was awarded custody, he acknowledged that no such arrangements had been made during the prior three years. The father's work schedule was also more variable than the mother's, sometimes requiring him to work 11- to 12-hour shifts and up to seven days per week during the summer. Accordingly, he relied more heavily on outside resources to assist with childcare. Although the father maintained that he could potentially take time off work to care for the child if awarded primary physical custody, he did not offer a concrete plan in this regard. We also note that a concern was raised as to whether the father had allowed the child to be in the presence of the paternal uncle, who is a convicted sex offender.

We are mindful that a majority of the child's extended family lives near the father, including a half sibling with whom the child has a close relationship. However, the half sibling is in the father's care for only a portion of each month and the father was awarded substantial parenting time with the child during the summer and on holidays, thereby enabling the child to preserve this relationship (*see id.*). The hearing testimony also demonstrates that the parties are able to work amicably for the benefit of the child and the mother was committed to maintaining the child's relationship with the father, confirming that she would "help facilitate substantial and liberal access" if she was awarded primary physical custody. In these circumstances, Family Court's determination that it was in the child's best interests to award the mother primary physical custody in Virginia during the school year has a sound and substantial basis in the record (*see id.*; *Matter of Faea OO. v Isaiah PP.*, 220 AD3d 1132, 1135 [3d Dept 2023], *lv denied* 41 NY3d 901 [2024]; *Matter of Anthony F. v Kayla E.*, 191 AD3d 1108, 1110-1111 [3d Dept 2021], *lv denied* 37 NY3d 901 [2021]; *Matter of Shirley v Shirley*, 101 AD3d 1391, 1393 [3d Dept 2012]). Our determination renders the mother's estoppel argument academic.

Egan Jr., J.P., Pritzker, Fisher and Powers, 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