

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

Decided and Entered: July 2, 2026

CV-25-0540

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In the Matter of JOSHUA BB.,  
Petitioner,

v

KAYLA BB.,  
Appellant.

MEMORANDUM AND ORDER

(And Two Other Related Proceedings.)

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Calendar Date: May 28, 2026

Before: Garry, P.J., Fisher, Mackey, Corcoran and Ryba, JJ.

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*Barbara Ann Montena*, Ballston Spa, for appellant.

*Teresa G. Donnellan*, Ballston Spa, attorney for the child.

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Fisher, J.

Appeal from an order of the Family Court of Saratoga County (Michael Hartnett, J.), entered March 18, 2025, 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.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of the subject child (born in 2012). Pursuant to an August 2021 custody order entered upon consent, the parties shared joint legal custody of the child with the mother having primary physical custody and the father having scheduled parenting time on the weekends and some weekday evenings. In 2024, the father filed a custody modification petition seeking primary physical custody of the child alleging, among other things, that

the mother could not provide the child with stability and structure, citing the child's poor academic performance. The mother cross-petitioned for modification seeking final decision-making authority over all decisions concerning the child and separately filed an enforcement petition alleging that the father violated the terms of the prior custody order. Following a fact-finding hearing and a *Lincoln* hearing, Family Court granted the father's modification petition, awarding him primary physical custody, and dismissed the mother's modification and enforcement petitions. The mother appeals.<sup>1</sup>

We affirm. "[W]here, as here, a parent seeks to modify an existing custody order, such parent must first show that a change in circumstances has occurred since the entry of the existing custody order that then warrants an inquiry into what custodial arrangement is in the best interests of the child" (*Matter of David JJ. v Tara KK.*, 240 AD3d 984, 985 [3d Dept 2025] [internal quotation marks and citations omitted]; see *Matter of Michael DD. v Jamie EE.*, 243 AD3d 1149, 1150 [3d Dept 2025]). "In determining the best interests of the child, courts must consider, among other factors, the quality of the parents' respective home environments, each parent's past performance and ability to provide for the child's physical, mental, emotional and intellectual needs and the willingness of each parent to foster a positive relationship between the child and the other parent" (*Matter of Michael YY. v Teresa ZZ.*, 242 AD3d 1343, 1344-1345 [3d Dept 2025] [internal quotation marks and citations omitted]; see *Matter of David JJ. v Tara KK.*, 240 AD3d at 986). "Given the superior position of Family Court to observe and evaluate the witnesses' testimony, its factual findings and credibility assessments are to be accorded great deference, and we will not disturb its custodial determination if supported by a sound and substantial basis in the record" (*Matter of Brooke PP. v Joshua QQ.*, 240 AD3d 1047, 1049 [3d Dept 2025] [internal quotation marks and citations omitted]; see *Matter of Henry CC. v Antoinette DD.*, 222 AD3d 1231, 1233 [3d Dept 2023]).

Initially, although the mother challenges Family Court's finding of a change in circumstances on appeal, during the fact-finding hearing she stated that she would not dispute that such a change had occurred. Our review of the record confirms this, as, since the prior order, the child has moved residences with the mother multiple times, facilitating multiple transfers into three different school districts. This coincided with a sharp decline in the child's academic performance, frequent school absences and tardiness, as well as the introduction of a new sport, hockey, that takes up a significant portion of the child's time. Under these circumstances, we are satisfied that this constitutes sufficient evidence of a change in circumstances warranting a best interests

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<sup>1</sup> The father did not file a brief in this appeal.

analysis (*see Matter of Anthony YY. v Emily ZZ.*, 189 AD3d 1924, 1924-1925 [3d Dept 2020]; *Matter of Lionel PP. v Sherry QQ.*, 170 AD3d 1460, 1461 [3d Dept 2019]; *Matter of Porter-Spaulling v Spaulding*, 164 AD3d 974, 976 [3d Dept 2018]).

Turning to Family Court's best interests analysis, we find that the court's custody determination is supported by a sound and substantial basis in the record. According to the testimonial evidence, the father has lived in the same house which he has owned since 2017 and has a full-time job working from 6:00 a.m. until 2:30 p.m., whereas the mother works part time with no set schedule, mostly in the evenings. Based on their schedules, the father frequently takes the child during the mother's parenting time when she is unavailable due to work. The mother has also moved multiple times, causing the child to transfer into three different school districts. In one instance, the mother failed to have the child properly registered with the new school district and the child missed the first week of school. The mother contends that the reason for the child's academic decline is his busy hockey schedule with practice or games as many as six nights a week, however, this ignores the fact that the mother agreed to and supported the child's enrollment and participation in the sport. Regardless, the number of absences and the tardiness reflected in the child's school records – which at one point resulted in the child no longer being allowed to participate in band – suggests that hockey is unlikely the sole reason for the child's academic challenges. To this point, the father testified that the child was in danger of failing the 2023/2024 school year, but he contacted the child's teachers, obtained missing assignments and worked with the child to complete them in order to prevent the child from failing. The mother was unaware of these efforts or that the missing assignments could be made up, suggesting that, were it not for the father's intervention, the child would have had to repeat a school year.<sup>2</sup>

While we note with concern the mother's testimony that the father unilaterally declined to give the child prescribed medications, Family Court found her testimony to be incredible. We discern no basis to disturb this finding, given her contradictory testimony as to the reason behind her multiple moves and how many hours per week that she worked. Furthermore, the father credibly testified that the child support order required the mother to enroll the child on her health insurance plan, however the father enrolled the child on his own plan after the mother allowed the child's coverage to lapse several times. Based on the foregoing, we find that Family Court's custody determination has a sound

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<sup>2</sup> Although not dispositive, we note that the attorney for the child aligns with the mother on appeal (*see Matter of Joseph E. v Crystal G.*, 233 AD3d 1285, 1286 n 3 [3d Dept 2024]).

and substantial basis in the record (*see Matter of Anthony YY. v Emily ZZ.*, 189 AD3d at 1925; *Matter of Lionel PP. v Sherry QQ.*, 170 AD3d at 1462; *Matter of William BB. v Melissa CC.*, 136 AD3d 1164, 1167 [3d Dept 2016]; *Matter of Billets v Bush*, 63 AD3d 1203, 1204 [3d Dept 2009]). The mother's additional arguments, to the extent not addressed above, have been examined and found to be without merit or rendered academic.

Garry, P.J., Mackey, Corcoran and Ryba, 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