

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22290
C/hu

_____AD3d_____

Submitted - January 30, 2009

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
THOMAS A. DICKERSON
ARIEL E. BELEN, JJ.

2008-00181
2008-00183

DECISION & ORDER

In the Matter of Mary Ann Delano, appellant,
v Joseph L. Desimone, respondent.

(Docket Nos. V-2722-07, V-2742-07, V-2743-07)

Salvatore C. Adamo, New York, N.Y., for appellant.

Robin J. Suttenger, New York, N.Y., for respondent.

Jessica Bacal, Esq., P.C., Katonah, N.Y., attorney for the child.

In a child custody proceeding pursuant to Family Court Act article 6, and a related family offense proceeding pursuant to Family Court Act article 8, the mother appeals (1) from an order of the Family Court, Orange County (Klein, J.), dated November 21, 2007, which, after a hearing, dismissed, with prejudice, her petition seeking custody of her two minor children, and (2), as limited by her brief, from so much of an order of the same court dated December 5, 2007, as, after a hearing, dismissed, with prejudice, her family offense petition.

ORDERED that the order dated November 21, 2007, is affirmed, without costs or disbursements; and it is further,

ORDERED that the order dated December 5, 2007, is affirmed insofar as appealed from, without costs or disbursements.

March 3, 2009

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To modify an existing custody arrangement, there must be a showing of a sufficient change of circumstances such that modification is required to protect the best interests of the child (see *Matter of Zeis v Slater*, 57 AD3d 793; *Matter of Manfredo v Manfredo*, 53 AD3d 498). “The best interests of the child are determined by a review of the totality of the circumstances” (*Matter of Zeis v Slater*, 57 AD3d 793). “Since the Family Court’s custody determination is largely dependent upon an assessment of the credibility of witnesses and upon the character, temperament, and sincerity of the parents, the Family Court’s determination should not be disturbed unless it lacks a sound and substantial basis in the record” (*Matter of Zeis v Slater*, 57 AD3d 793). Here, the Family Court’s determination that the petitioner failed to satisfy her burden of demonstrating that there existed a change of circumstances warranting a change of custody is supported by a sound and substantial basis in the record.

“The determination of whether a family offense was committed is a factual determination to be resolved by the Family Court” (*Matter of Fleming v Fleming*, 52 AD3d 600, 601, quoting *Matter of Robinson v Bennett*, 49 AD3d 652, 652). “Where the Family Court is primarily confronted with issues of credibility, its factual determinations are afforded great weight on appeal” (*Matter of Fleming v Fleming*, 52 AD3d at 601, quoting *Matter of Hijri v Fargaly*, 49 AD3d 737, 737; see *Matter of Robinson v Bennett*, 49 AD3d at 652; *Matter of Larson v Gilliam*, 49 AD3d 650, 650; *Matter of Spillman v Spillman*, 40 AD3d 770, 770). Here, the evidence proffered in support of the family offense petition failed to establish that the respondent committed a family offense.

MASTRO, J.P., BALKIN, DICKERSON and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court