

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

D27527  
O/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - April 30, 2010

MARK C. DILLON, J.P.  
FRED T. SANTUCCI  
L. PRISCILLA HALL  
PLUMMER E. LOTT, JJ.

2008-11447

DECISION & ORDER

In the Matter of Cathy Drake, respondent,  
v Charon Carroll, appellant.

(Docket No. V-7758-03)

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Elliot Green, Brooklyn, N.Y., for appellant.

Mark Brandys, New York, N.Y., for respondent.

Karen P. Simmons, Brooklyn, N.Y. (Barbara H. Dildine and Janet Neustaetter of counsel), attorney for the children.

In a child custody proceeding pursuant to Family Court Act article 6, the father appeals, as limited by his brief, from so much of an order of the Family Court, Kings County (Feldman, J.H.O.), dated December 11, 2008, as, after a hearing, granted the maternal aunt's petition to modify an order of the same court (Silber, J.) dated March 17, 2004, awarding him sole custody of the subject children, and awarded the maternal aunt sole custody of the children.

ORDERED that the order dated December 11, 2008, is affirmed insofar as appealed from, without costs or disbursements.

As between a parent and a nonparent, a parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent relinquished that right due to the surrender, abandonment, persistent neglect, unfitness, or other like extraordinary circumstances (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 549-550; *Matter of Jiminez v Jiminez*, 57 AD3d 781; *Matter of K.F.T. v D.P.G.*, 54 AD3d 1044; *Matter of Dungee v Simmons*, 307 AD2d 312, 312-313;

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*see also Matter of Courtney B.*, 47 AD3d 808). The burden is on the nonparent to prove the existence of extraordinary circumstances (*see Matter of Darlene T.*, 28 NY2d 391, 394; *Matter of K.F.T. v D.P.G.*, 54 AD3d 1044), and “[a]bsent proof of such extraordinary circumstances, an inquiry into the best interests of the child is not triggered” (*Matter of Jiminez v Jiminez*, 57 AD3d 781; *see Matter of Nadia Kay R.*, 125 AD2d 674, 678). Inasmuch as the Family Court is in the best position to evaluate the testimony, credibility, character, temperament, and sincerity of the parties, its findings are entitled to great weight and should not be set aside where they have a sound and substantial basis in the record (*see Matter of Miller v Shaw*, 51 AD3d 927; *Matter of Garcia v Perez*, 48 AD3d 812, 813; *Matter of Fishburne v Teelucksingh*, 34 AD3d 804, 805; *Matter of Cambridge v Cambridge*, 13 AD3d 443, 444; *Matter of Rudy v Mazzetti*, 5 AD3d 777, 778).

The Family Court properly determined that the petitioner, a maternal aunt who has had physical custody of the subject children for an extended period of time since their mother’s death, sustained her burden of demonstrating extraordinary circumstances in this case (*see Matter of Holmes v Glover*, 68 AD3d 868). Moreover, the Family Court's determination that an award of custody to the petitioner would be in the best interests of the subject children is supported by a sound and substantial basis in the record, and we discern no basis to disturb it (*see Matter of Bennett v Jeffreys*, 40 NY2d 543).

The father's remaining contentions are without merit.

DILLON, J.P., SANTUCCI, HALL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court