

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAF 22-01291

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF LILLYANA B., ALSO KNOWN AS
LILLYANA M.

MEMORANDUM AND ORDER

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

BRITTNEY B., RESPONDENT.

RONDELL T.M., APPELLANT.
(APPEAL NO. 1.)

AMDURSKY, PELKY, FENNEL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF
COUNSEL), FOR APPELLANT.

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered February 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child and placed the child with her maternal grandparents.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: The father of the child who is the subject of these proceedings, a nonparty in appeal No. 1 and the petitioner in appeal No. 2, appeals from an order of disposition in appeal No. 1 entered in a proceeding pursuant to Family Court Act article 10 that made a finding of neglect against respondent mother and placed the child with her maternal grandparents. In appeal No. 2, the father appeals from an order dismissing his petition for custody of the child. On both appeals, the father contends that he was denied his constitutional right to raise his child without first being proven to be unfit. We reject that contention.

Shortly before the child turned one year old, petitioner in appeal No. 1, the Oswego County Department of Social Services (DSS), filed a neglect petition against the mother. At the time, paternity for the child had not been established. The following day, the father signed and filed an acknowledgment of paternity for the child. The child was removed from the mother's care and placed with the maternal

grandparents. Approximately three months later, the father filed a petition for custody of the child. Family Court adjudicated the child a neglected child by the mother, and over the course of several months held a combined dispositional hearing on the article 10 proceeding and a hearing on the father's custody petition.

Where, as here, Family Court Act articles 6 and 10 proceedings are pending at the same time, the court "may jointly hear the hearing on the custody and visitation petition under [article 6] and the dispositional hearing on the petition under article [10] . . . ; provided, however, the court must determine the custody and visitation petition in accordance with the terms of . . . article [6]" (Family Ct Act § 651 [c-1]; see § 1055-b [a-1]; *Matter of Nevaeh MM. [Sheri MM.-Charles MM.]*, 158 AD3d 1001, 1002 [4th Dept 2018]). In an article 6 custody proceeding, it is well settled that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied absent a finding that the parent has relinquished that right because of "surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstances" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]; see *Matter of Michael J.M. v Lisa M.H.*, 192 AD3d 1470, 1471 [4th Dept 2021]; *Matter of Smith v Ballam*, 176 AD3d 1591, 1592 [4th Dept 2019]). If extraordinary circumstances are established, then the court may make an award of custody based on the best interests of the child (see *Bennett*, 40 NY2d at 548).

We agree with the court that extraordinary circumstances existed here based on the father's abandonment of the child (see *Matter of Nicole L. v David M.*, 195 AD3d 1058, 1061 [3d Dept 2021]; *Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]; *Nevaeh MM.*, 158 AD3d at 1003). DSS's witnesses testified that the father had not visited with the child much, if at all, before the neglect petition was filed and, after the neglect petition was filed, the father visited the child only twice in the one-year period before the hearing concluded. Although the father testified that he visited with the child on many occasions before the neglect petition was filed, the court found his testimony not credible. We see "no reason to disturb the court's credibility determinations inasmuch as they are supported by the record" (*Matter of Aaren F. [Amber S.]*, 181 AD3d 1167, 1168 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]). In addition to failing to establish or maintain contact with the child, the father also did not provide financial support for the child or contact the grandparents or the DSS caseworker regarding the child's well being.

We have considered the father's remaining contention and conclude that it is without merit.