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

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CAF 22-01496
PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF VICTORIA A. PRITTY-PITCHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DELBERT W. HARGIS, JR., RESPONDENT-APPELLANT,
AND NICOLE E. HARGIS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

THE LAW OFFICE OF DONALD A. WHITE, WEBSTER (DONALD A. WHITE OF COUNSEL), FOR PETITIONER-RESPONDENT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Allison J. Nelson, A.J.), entered August 31, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, found respondent Delbert W. Hargis, Jr., to be in contempt of court.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals in appeal No. 1 from an order that, among other things, found him in contempt of court for failing to comply with a prior order of custody and visitation (prior order) insofar as it granted petitioner, the paternal aunt of the subject child, visitation with the child. In appeal No. 2, the father appeals from an order that, among other things, modified the prior order by awarding petitioner sole legal and physical custody of the child.

In appeal No. 1, the father contends that the prior order was improper insofar as it awarded visitation to a nonparent and that Family Court thus erred in finding him in contempt. "[A]n appeal from a contempt order that is jurisdictionally valid does not bring up for review the prior order" (*Burns v Grandjean*, 210 AD3d 1467, 1475 [4th Dept 2022]; *see Matter of North Tonawanda First v City of N. Tonawanda*, 94 AD3d 1537, 1538 [4th Dept 2012]). "However misguided

and erroneous [the father believed] the court's order . . . [to] have been [he] was not free to disregard it and decide for himself the manner in which to proceed" (*Matter of Balter v Regan*, 63 NY2d 630, 631 [1984], *cert denied* 469 US 934 [1984]; *see Burns*, 210 AD3d at 1475). Inasmuch as the father does not contest the jurisdictional validity of the prior order and does not dispute that he violated the order by refusing to abide by the provisions granting visitation to petitioner, we reject his contention that the court erred in finding him in contempt.

Contrary to the father's contention in appeal No. 2, the court was not required to make a finding of extraordinary circumstances prior to addressing the merits of petitioner's amended modification petition. Although a nonparent generally lacks standing to seek custody, a nonparent may establish standing upon a showing of extraordinary circumstances (*see Matter of Byler v Byler*, 207 AD3d 1072, 1072-1073 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]). Here, the court determined in a prior order in this matter that petitioner established the existence of extraordinary circumstances, and that finding "cannot be revisited in a subsequent proceeding seeking to modify custody" (*Matter of Green v Green*, 139 AD3d 1384, 1385 [4th Dept 2016]; *see Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585 [4th Dept 2014]).

We likewise reject the father's contention that the court erred in determining that it was in the best interests of the child to award sole legal and physical custody to petitioner. In determining whether a requested custody modification is in the best interests of the child, "the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each [party] to provide for the child's emotional and intellectual development and the wishes of the child" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; *see Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489, 1490 [4th Dept 2018], *lv denied* 32 NY3d 918 [2019]). The court is "in the best position to evaluate the character and credibility of the witnesses" (*Matter of Nunnery v Nunnery*, 275 AD2d 986, 987 [4th Dept 2000]), and this Court will not set aside a court's determination regarding custody "unless it lacks an evidentiary basis in the record" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449 [4th Dept 2007]; *see Matter of Nordee v Nordee*, 170 AD3d 1636, 1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]; *Matter of Hill v Rogers*, 213 AD2d 1079, 1079 [4th Dept 1995]). We conclude that the court's custody determination is supported by a sound and substantial basis in the record and should not be disturbed (*see Nordee*, 170 AD3d at 1637). Among other things, the father had absconded with the child to another state and had repeatedly interfered with petitioner's ability to see the child who she raised for the majority of the child's life. Thus, although the father and petitioner both appear on this record to be capable of caring for the child, the court, in making its custody and visitation determination, properly considered, among other factors, the father's contempt of court, his disregard for the child's relationship with a person the

child considers to be her mother, and the child’s wishes.

The father’s contention that the court erred in granting temporary custody to petitioner during the pendency of these proceedings is moot inasmuch as the order of temporary custody has been superseded by the order in appeal No. 2 (*see Matter of LaBella v Robertaccio*, 191 AD3d 1457, 1458-1459 [4th Dept 2021]; *Matter of Gorton v Inman*, 147 AD3d 1537, 1538 [4th Dept 2017]; *Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696 [4th Dept 2016]).

Respondent mother’s challenge to the dismissal with prejudice of her petition seeking modification of an amended custody order is not properly before us inasmuch as the mother did not appeal from the order dismissing her petition (*see Byler*, 207 AD3d at 1076; *Matter of Timothy M.M. v Doreen R.*, 188 AD3d 1711, 1713 [4th Dept 2020]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court