

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

883

CAF 24-01212

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF ERIC BROWN, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JULIANA RUPERTO, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CASEY S. DUFFY OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW J. DIPASQUALE, ROCHESTER, FOR RESPONDENT-RESPONDENT.

LAURA ESTELA CARDONA, EAST SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered May 24, 2024, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation with the subject child.

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, petitioner father appeals from an order that dismissed his petition seeking visitation with the subject child. We affirm.

Although visitation with a noncustodial parent is presumed to be in the best interests of the child, even when the parent seeking visitation is incarcerated (see *Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]; *Matter of Smith v Stewart*, 145 AD3d 1534, 1535 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]), "the presumption may be rebutted when it is shown, 'by a preponderance of the evidence, that visitation would be harmful to the child' " (*Matter of Fewell v Ratzel*, 121 AD3d 1542, 1542 [4th Dept 2014], quoting *Granger*, 21 NY3d at 92; see *Matter of Fowler v Jones*, 225 AD3d 1162, 1162 [4th Dept 2024], *lv denied* 42 NY3d 903 [2024]). "[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Brown v Terwilliger*, 108 AD3d 1047, 1048 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013] [internal quotation marks omitted]; see *Fowler*, 225 AD3d at 1162).

Contrary to the father's contention, Family Court's determination that visitation as requested by the father would not be in the child's

best interests has a sound and substantial basis in the record (see *Matter of Grayson v Lopez*, 178 AD3d 1427, 1428 [4th Dept 2019]). "[W]here, as here, domestic violence is alleged, the [court] must consider the effect of such domestic violence upon the best interests of the child[]" (*id.* [internal quotation marks omitted]; see *Matter of Bloom v Mancuso*, 175 AD3d 924, 926 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]; *Matter of Carroll v Carroll*, 125 AD3d 1485, 1487 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]). There was evidence that the father committed acts of domestic violence against respondent mother, including tasing her one time when she was three months pregnant with the child and choking her another time when she was eight months pregnant with the child to the point where she lost consciousness and was hospitalized. He also repeatedly punched her during an incident while she was holding the two-month-old child. Additionally, there was testimony from the mother to support the court's further finding that the father, who has been incarcerated since the child was 11 months old, was seeking communication with the child only because he wanted to communicate with the mother (see *Matter of Rulinsky v West*, 107 AD3d 1507, 1508 [4th Dept 2013]).

The father's contention that he was denied due process of law by the court's alleged preconceived determinations of credibility and demonstrated lack of impartiality is not preserved for our review (see *Matter of Torres v Burchell*, 228 AD3d 1303, 1304 [4th Dept 2024], *lv denied* 42 NY3d 908 [2024]; *Matter of Anthony J. [Siobvan M.]*, 224 AD3d 1319, 1319 [4th Dept 2024]), and we decline to exercise our power to review the father's contention in the interest of justice.