

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

884

CAF 24-01210

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

IN THE MATTER OF RONNIE BURLEY, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KYLE E. RICHMOND, RESPONDENT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),
FOR RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered January 19, 2024, in a proceeding pursuant to Family Court Act article 6. The order confirmed the report of a Referee that awarded petitioner sole legal and primary physical custody of 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, respondent father appeals from an order confirming a report by the Referee that, among other things, granted petitioner maternal uncle's amended custody petition and awarded him sole legal and primary physical custody of the subject child. We affirm.

The father's contention that Family Court did not conduct the required review of decisions and reports pursuant to Family Court Act § 651 (e) is improperly raised for the first time on appeal and thus is not properly before us (see *Matter of Jonathan M. v Jessica N.*, 236 AD3d 1360, 1362 [4th Dept 2025], lv denied 44 NY3d 902 [2025]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

With respect to the father's contention that he was denied effective assistance of counsel, we note at the outset that, "because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings" (*Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010] [internal quotation marks omitted]). " 'So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, a [parent's] constitutional right to the effective assistance of counsel will have

been met' " (*Matter of Laura E. v Matthew E.*, 226 AD3d 1117, 1118 [3d Dept 2024]; see *Matter of Rotundo v Deptola*, 232 AD3d 1323, 1323-1324 [4th Dept 2024]). Here, we are unable to review the father's allegation that counsel failed to request an adjournment inasmuch as it "involves matters outside the record on appeal" (*Rotundo*, 232 AD3d at 1324; see *Matter of Brooks v Martinez*, 218 AD3d 568, 569 [2d Dept 2023]). The father's allegations that counsel also failed to object to the court's admonishment regarding the father's disruptive behavior and failed to make an expanded or follow-up request for a *Lincoln* hearing did not constitute ineffective assistance because those actions would have had "little or no chance of success" (*People v Wilmet*, 239 AD3d 1436, 1438 [4th Dept 2025], *lv denied* 44 NY3d 985 [2025] [internal quotation marks omitted]). Indeed, the admonishment was not improper (see generally *People v Mercer*, 66 AD3d 1368, 1369 [4th Dept 2009], *lv denied* 13 NY3d 940 [2010]) and the court properly exercised its discretion in declining to hold a *Lincoln* hearing (see *Matter of Brady J.S. v Darla A.B.*, 208 AD3d 1023, 1026 [4th Dept 2022], *lv denied* 39 NY3d 904 [2022]). We reject the father's allegations that counsel was ineffective for not asking him questions on the substantive legal issues and for not submitting a written response to the Referee's report inasmuch as he did not "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015] [internal quotation marks omitted]). Finally, although counsel was unable to meet with the father prior to the date of the hearing due to circumstances beyond her control, " '[t]he record, viewed in its totality, establishes that the [father] received meaningful representation' " (*Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]; see *Rotundo*, 232 AD3d at 1324).

We reject the father's contention that the court abused its discretion in denying his request to substitute assigned counsel. "The right of an indigent party to assigned counsel under the Family Court Act is not absolute," and a party seeking the appointment of substitute counsel "must establish that good cause for release existed necessitating dismissal of assigned counsel" (*Matter of Destiny V. [Mark V.]*, 107 AD3d 1468, 1469 [4th Dept 2013] [internal quotation marks omitted]; see *Matter of Biskupski v McClellan*, 278 AD2d 912, 912 [4th Dept 2000]). The father failed to make that showing here (see *Matter of Bracken v Bracken*, 225 AD3d 1241, 1241 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024]; see generally *People v Linares*, 2 NY3d 507, 511 [2004]).

We also reject the father's contention that the court's determination is not supported by a sound and substantial basis in the record. It is well settled that "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). "[A] parent's incarceration does not, standing alone, per se constitute an extraordinary circumstance" (*Matter of Lisa F. v Thomas E.*, 211 AD3d 1367, 1369 [3d Dept 2022]), and "[t]he extraordinary circumstances

analysis must consider the cumulative effect of all issues present in a given case . . . , including, among others, the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the . . . parent allowed such custody to continue without trying to assume the primary parental role" (*Matter of Tuttle v Worthington* [appeal No. 2], 219 AD3d 1142, 1144 [4th Dept 2023] [internal quotation marks omitted]). Here, it is undisputed that the subject child has lived with the uncle his entire life, and following the death of the child's mother, the uncle " 'ha[s] taken care of the child . . . and provided him with stability' " (*id.*; see *Matter of DellaPiana v DellaPiana*, 161 AD3d 1228, 1231 [3d Dept 2018]). During that time, the father never sought to assume the primary parental role, and the child " 'developed a strong emotional bond' " with the uncle (*Tuttle*, 219 AD3d at 1145; see *Matter of Lewis v Speaker*, 143 AD3d 822, 824 [2d Dept 2016]). We thus conclude that the court properly determined that the uncle established the existence of extraordinary circumstances (see *Matter of Cathcart v Williams*, 236 AD3d 1479, 1480 [4th Dept 2025]; see also *Tuttle*, 219 AD3d at 1145) and that it properly determined that it was in the best interests of the child to award sole legal and primary physical custody to the uncle (see *Cathcart*, 236 AD3d at 1480; *Matter of Chasity CC. v Frederick DD.*, 165 AD3d 1412, 1416-1417 [3d Dept 2018]; see also *Tuttle*, 219 AD3d at 1145).