

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

145

CAF 24-01135

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, SMITH, AND DELCONTE, JJ.

IN THE MATTER OF DAVID CHEUNG,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KIM NGYEN THI TRAN, RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

THOMAS L. PELYCH, HORNELL, FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered April 16, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, 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 mother appeals from an order that modified the parties' prior order of custody and parenting time by, inter alia, granting petitioner father sole legal and primary physical custody of the parties' child. Initially, we note that the mother "failed to preserve for our review her contention that the father failed to establish a change of circumstances warranting review of the prior order" (*Matter of Tisdale v Anderson*, 100 AD3d 1517, 1517 [4th Dept 2012] [internal quotation marks omitted]; see *Matter of Torres v Burchell*, 228 AD3d 1303, 1303 [4th Dept 2024], lv denied 42 NY3d 908 [2024]; *Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012]).

In any event, the mother's contention lacks merit inasmuch as the father met his burden of establishing "a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child[]" (*Matter of Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1315 [4th Dept 2022] [internal quotation marks omitted]; see *Torres*, 228 AD3d at 1303). The evidence at the hearing established "that the parties' relationship had become acrimonious" and had deteriorated since entry of the prior order (*Torres*, 228 AD3d at 1303; see *Matter of Fowler v Rothman*, 198 AD3d

1374, 1375 [4th Dept 2021], *lv dismissed* 38 NY3d 995 [2022]; *Matter of Gorton v Inman*, 147 AD3d 1537, 1538 [4th Dept 2017]). Moreover, the father established "that the mother, in violation of [the] existing order," failed to provide the father with the current address of the child or any educational and medical information for the child (*Matter of Moreno v Elliott*, 170 AD3d 1610, 1611 [4th Dept 2019]; see generally *Matter of Green v Bontzolakes*, 111 AD3d 1282, 1283-1284 [4th Dept 2013]) and also interfered with his telephone access with the child (see *Moreno*, 170 AD3d at 1611).

Affording "great deference to the determination of the hearing court with its superior ability to evaluate the credibility of the testifying witnesses" (*Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]; see *Matter of Ceravolo v Lefebvre*, 217 AD3d 1523, 1524 [4th Dept 2023], *lv dismissed in part & denied in part* 41 NY3d 926 [2024], *rearg denied* 41 NY3d 1007 [2024]), we further conclude that, contrary to the mother's contention, a sound and substantial basis in the record supports Family Court's determination that an award to the father of sole legal and primary physical custody was in the child's best interests (see *Matter of Dickes v Johnston*, 213 AD3d 1247, 1248 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; see generally *Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]).