

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

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CAF 23-01710

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF AMBER M. DONER, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

THEODORE E. FLORA, III, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

TODD G. MONAHAN, SCHENECTADY, FOR RESPONDENT-APPELLANT.

BROWNLOW LAW OFFICE, P.C., ROCHESTER (WINSTON R. BROWNLOW OF COUNSEL),
FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered August 14, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical custody of the subject child to petitioner.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, respondent-petitioner father appeals, in appeal No. 1, from an order that, inter alia, granted petitioner-respondent mother's petition for modification of custody and awarded her primary physical custody of the subject child. In appeal No. 2, the father appeals from an order that dismissed his modification petition. We affirm in both appeals.

Contrary to the father's contention, Family Court did not err in awarding primary physical custody of the subject child to the mother. It is well settled that " 'a court's determination regarding custody . . . , based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1266 [4th Dept 2019]). Here, we perceive no basis to disturb the court's credibility assessment and factual findings, and we conclude that its custody determination is supported by a sound and substantial basis in the record (*see id.*).

Further, we reject the father's contention that he received ineffective assistance of counsel, insofar as the father failed to

establish "the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Ballard v Piston*, 178 AD3d 1397, 1398 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]; see generally *Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1566-1567 [4th Dept 2023], *lv denied* 40 NY3d 905 [2023]).

We have reviewed the father's remaining contentions and conclude that none warrants modification or reversal of the orders.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court