

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

1154

CAF 17-01898

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL F. MCKENZIE, SR.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JESSICA L. POLK, RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Genesee County (Eric R. Adams, A.J.), entered September 7, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint legal custody of the subject child with primary physical residence to petitioner.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an order that, inter alia, modified a prior order of custody and visitation by awarding the parties joint legal custody of the subject child with primary physical residence with petitioner father and visitation to the mother. We reject the mother's contention that there was not a sufficient change in circumstances warranting an inquiry into whether modification of the prior order is in the child's best interests. "Where an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[]" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [4th Dept 2005] [internal quotation marks omitted]). Here, there was a sufficient change in circumstances inasmuch as the parties "had in practice altered the custody and visitation arrangement set forth in the stipulated order" (*Matter of Donnelly v Donnelly*, 55 AD3d 1373, 1373 [4th Dept 2008]). Contrary to the mother's further contention, we conclude that a sound and substantial basis in the record supports Supreme Court's determination that awarding the father primary physical custody of the subject child is in the child's best interests (see *Matter of Cross v*

Caswell, 113 AD3d 1107, 1107-1108 [4th Dept 2014]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court