INDEX NO. 2022-5391

IN THE

NEW SCOTLAND COURT OF APPEALS

In the Matter of NIKOLAS P.,

Appellant,

— against —

ELIZA J.,

Respondent.

ATTORNEY FOR THE CHILD,

Respondent.

On Appeal from the New Scotland
Third Appellate Division

BRIEF FOR RESPONDENT ELIZA J.

TEAM 28

Attorneys for Respondent Eliza J.

QUESTIONS PRESENTED

I. Whether the Third Appellate Division erred in denying a father's request for primary custody and relocation of a child 200 miles away when the child is emotionally sensitive to change, has lived with the mother for her entire life, the mother's home meets the standard of care for child safety, the father has not seen the child in almost three years, and the fourteen-year-old wishes to remain in the mother's care.

II. Whether a mother should be granted final decision-making authority as to her fourteen-year-old child's wish to switch to a doctor able to consult on birth control when the mother is the primary caregiver, the mother is the parent that noticed the child's menstrual pain, the child shares her feelings exclusively with the mother whom she sought birth control from, and the mother attends to the child's needs.

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STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

The Custody Agreement. Respondent Eliza J. ("the mother") and Petitioner Nikolas P. ("the father") have twin girls, Hallie, and Antonia. R. at 4. When the twins were about three months old, the father left. R. at 4. The parties agreed to each care for one twin due to the difficulty of caring for both babies and because the father only had a close bond to Hallie. R. at 4. The mother took physical custody of Antonia. R. at 4. The father took physical custody of Hallie, moving her to New York. R. at 4. The custody agreement awarded the father final decision-making authority for both children over their health decisions and all other major matters. R. at 4. When the girls were eleven, they insisted on spending the summers together. R. at 15. An amendment was executed that provided that the girls would spend alternating summers together with one parent and then the other. R. at 4. The girls only spent the summer of 2019 together. R. at 5, 25.

The Birth Control. The father filed a petition in May of 2022 to modify the custody agreement to award him full and sole custody of Antonia and Hallie. R. at 5. The catalyst being the father's desire to control a now fourteen-year-old Antonia to prevent her from taking birth control pills at what he views is, a young age. R. at 6. The father is concerned about the possible effects that the hormones may have on her silent child syndrome[1]. R. at 6. Antonia does not speak verbally in most environments but communicates by writing on her electronic notepad and speaks a few words at home with her mother. R. at 6. Antonia has frequent outbursts when interacting with her peers. R. at 9. Theses outbursts are exacerbated by Antonia's extreme

[1] Silent child syndrome, also known as selective mutism, is a behavioral disorder that renders a person unable to speak in certain social situations. R. at 5; *Insights Gleaned from the Tragedy at Virginia Tech*, Lucinda Roy, 17 Wash. & Lee J. Civil Rts. & Soc. Just. 93, 113 (2010).

menstrual pain. R. at 9. Antonia can hardly move when her menstrual pain flares up and it causes her great distress. R. at 8. Her teacher confirmed this pain and that it causes her to miss sporting events and is a disruption in school for her. R. at 21.

Upon Antonia's inquiry, the mother informed her that birth control was as a possible solution to her pain as it can be taken in such a way as to eliminate her periods. R. at 8. Antonia replied that she wished to see a doctor to get a prescription for them, so the mother inquired with the child's current doctor's office, Walden Family Medical Group ("Walden"). R. at 8. Walden told her they could not prescribe birth control. When the mother received an informal survey from Walden, she indicated that Antonia wanted to switch to a new doctor capable of prescribing birth control. R. at 8, 23. The mother asked a nurse what the steps would be to switch to Seely Community Medicine ("Seely"), but no official paperwork was ever submitted by the mother to make the switch. R. at 8, 23. The father agrees the switch was never actually made. R. at 19. The father argues the hormones in birth control will deter Antonia from speaking. R. at 6. He wants this issue to be evaluated only by the doctor he wants Antonia to see. R. at 6. Yet, he feels assured that Antonia's treatment and disorder will be properly addressed at Seely. R. at 20. And the doctors at Walden and Seely and the doctor in New York are equally qualified to treat Antonia. R. at 20. The mother requested that if she remains Antonia's primary custodial parent, that she be awarded the authority to make final medical decisions for Antonia so that she can switch Antonia's doctors and get a birth control prescription for the young woman. R. at 9.

The Father's Home. The father still resides in New York and would relocate Antonia there away from her mother if awarded sole custody. R. at 4, 5. Presently, the last time Antonia saw her father was the 2019 holiday season. R. at 25. When Antonia has visited the father, she texts her mother complaining about the activities that her stepmother, Maria, has her do and that the

father is not at the home much which is difficult for Antonia. R. at 9. The mother fears that the father will be too authoritarian and prevent Antonia from making her own decisions if she is forced to relocate to live with the father. R. at 9. Antonia requires a very strict schedule and becomes upset if that schedule is changed as she cannot handle quick transitions. R. at 9. The father believes his location will allow Antonia to have access to certain specialists are not available in New Scotland. R. at 5. But admits that the doctors in New Scotland are equally qualified. R. at 20.

The Mother's Home. Antonia and her mother still live in the New Scotland house. R. at 4. Antonia is now fourteen and she helps her mother around the house and has recently become more motivated and comfortable at school. R. at 3. 7, 23. Her mother describes her as "happy-go-lucky" and "intelligent." R. at 22. Her teacher confirmed she is a great student and a great athlete who is thriving in her fencing club. R. at 21. Antonia is used to her needs being met in a one-on-one capacity solely by her mother. R. at 24. She is so emotionally bonded to the mother that she often sleeps in the same bed as the mother. R. at 7. The mother tries to deter this behavior, but this often leads to a tantrum, and Antonia is less stressed when she sleeps with her mother or on the couch. R. at 7, 23. Despite the COVID-19 pandemic closing the mother's bridal boutique, she has restored her income by selling dresses online. R. at 8, 12. There was an incident in which the mother's electrical panel eroded and shut down electricity to the home and the mother quickly had it fixed in a few days. R. at 5, 8, 22. When the electricity was out, the mother heated bath water on the stove for the child and cooked her meals on a cooking stove which was deemed legally adequate. R. at 22. The father has paid a few months of the mother's mortgage, pays her child support, buys clothes and food for the girls, and covers their health care costs. R. at 5. According to a Department of Social Services ("DSS") caseworker's § 1029 court

ordered report, the home was a bit cluttered but by the end of the investigation the kitchen was clean, the living room was cleared, and the child's bedroom was functional. R. at 22. The DSS worker observed the maternal grandfather smoking a cigar on the porch and smelled a faint smell of cigar smoke in the home. R. at 10. Nevertheless, the mother's home meets the minimal standard of care for the safety of the children and Antonia is not in any immediate health and safety risks inside the mother's home. R. at 10, 22.

II. NATURE OF PROCEEDINGS

State Supreme Court. The State of New Scotland Supreme Court awarded the father residential and legal custody of Antonia emphasizing the inappropriateness of the mother and Antonia's co-sleeping occasions. R. at 11, 12. The mother was only awarded parenting time with the children every other summer and at times when the father may return to New Scotland with the children for a period. R. at 13. The Court awarded the father final decision-making authority. R. at 13. The mother and Antonia's AFC both appealed. R. at 16.

Appellate Court. The State of New Scotland Third Appellate Division found the Supreme Court's physical custody judgment was not supported by a sound and substantial basis in the record. R. at 25. And the Court granted the mother final decision-making authority as to Antonia's medical treatment as it relates to switching to Seely. R. at 27.

SUMMARY OF THE ARGUMENT

It is in Antonia's best interest to remain in the mother's primary care and for the mother to be the final decision-maker over Antonia's medical treatment. This Court should affirm the New Scotland Third Appellate Division's decision that (1) the change of custody and grant of relocation to New York lacked a sound and substantial basis in the record and (2) that the mother

is best fit for final decision-making authority as to Antonia switching doctors to obtain birth control.

First, the New Scotland Third Appellate Division properly determined that Antonia's best interest is served by staying with the mother. Antonia has a higher quality relationship with the mother as she has always lived with the mother, insists on sleeping with the mother, and has not seen the father in three years. The father's reasons for seeking relocation were not made in good faith and should not be considered. Even if the father's reasons are considered, Antonia is financially provided for in the mother's home and the DSS report proves the mother provides a safe, loving, and stable environment. If the father truly wishes for Antonia to see specialists in New York, he can arrange it for when she is in his care for the summer. Moreover, relocation will not enhance Antonia's life emotionally and educationally because Antonia is emotionally sensitive to change, and she can attend the summer camps available in New York without relocating. The financial disparity of the parties should not be dispositive because Antonia is provided for in both homes and the mother's business troubles are in the past and do not diminish her parenting abilities. The father did not present any plan for future contact or visits with the mother if Antonia were to move to New York. And the infrequency of the visitation arrangement ordered by the Supreme Court will not preserve Antonia's relationship with the mother. Finally, Antonia's preference to remain with her mother is entitled to great weight because she is of the advanced age of fourteen and is an intelligent girl regardless of her methods of communication. Therefore, this Court should affirm the dismissal of the father's request for modification and relocation.

Second, the New Scotland Third Appellate Division correctly awarded the mother final decision-making authority to decide whether Antonia can switch doctors to obtain birth control.

This issue involves a young woman suffering from unbearable menstrual pain and a father's unjustified prevention of her seeking treatment. So, Antonia's best interest is served by the mother having the final say. The mother's inquiry about the steps of switching Antonia's doctor and her indication on a survey did not violate the custody agreement. The mother's lack of communication with the father before asking the nurse and filling out the survey should not be held against her as it did not negatively affect the children and was merely an inquiry.

The mother is best fit to make the child's final medical decisions because she is physically present with Antonia and more involved in Antonia's needs. The mother takes Antonia to her extracurriculars, heats her bath water, cooks her meals, and is her primary caregiver. The mother was the one to observe her menstrual pain and seek out solutions that the father then prevented. And Antonia has shown willingness to share her feelings with only the mother. Shared responsibility of Antonia is best practiced if each parent has final decision-making authority over an area in her life rather than the father having complete control. Finally, the mother has shown she makes medical decision that are in Antonia's best interest. The switch to Seely to obtain birth control is in Antonia's best interest because it is a solution to her extreme pain that aggravates her behavioral disorder, it is Antonia's wish, and Seely is equally qualified to Walden and to the doctor the father suggested.

This Court should affirm the judgment of the Third Appellate Division Court.

ARGUMENT

Standard of Review. The State of New Scotland Third Appellate Division certified both questions to be heard on appeal. R. at 2. This Court reviews custody cases de novo and with authority as broad as that of the hearing court. *Matter of Martin v. Mills*, 943 N.Y.S.2d 631, 631 (App. Div. 3rd Dept. 2012).

I. THE THIRD DIVISION COURT CORRECTLY FOUND A LACK OF SOUND AND SUBSTANTIAL BASIS IN THE RECORD TO FIND FOR A CHANGE OF CUSTODY AND RELOCATION BECAUSE IT IS IN ANTONIA'S BEST INTEREST TO REMAIN WITH THE MOTHER.

The father failed to show that modification of the custody order and relocation of Antonia is in her best interest. Decisions made by Family Court are disturbed when not supported by a sound and substantial basis in the record. *Matter of O'Hara v. DeMarsh*, 75 N.Y.S.3d 673, 675 (App. Div. 3rd Dept. 2018). A finding is not supported by a sound and substantial basis when the trial court fails to consider the totality of the circumstances and weigh all the relevant factors. *Matter of Agyapon v. Zungia*, 56 N.Y.S.3d 198, 200 (App. Div. 2nd Dept. 2017). Factors including the parties' existing custody arrangement and the wishes of the child. *Id*.

The Supreme Court failed to give proper weight to Antonia's wishes and did not consider the existing custody arrangement of the parties at all. Rather, undue weight was afforded to Antonia's co-sleeping and the thrown hairdryer. The Supreme Court also did not acknowledge that this case involves a pray for a change of custody that requires relocation of the child, not merely a relocation by the custodial parent. Antonia has solely resided with the mother since the separation agreement, so she is the custodial parent, and the father is the noncustodial parent of Antonia. R. at 16. Granting the father's request for sole custody, effectively relocates the child. *Matter of Adam OO. v. Jessica QQ.*, 113 N.Y.S.3d 288, 289 (App. Div. 3rd Dept. 2019). Therefore, the focus of the inquiry is whether modification of the existing custodial arrangement is "necessary to further the best interest of the child with the proposed relocation factoring into the best interest analysis." *Id*. Such inquiry proves it is in Antonia's best interest to remain in her mother's physical custody.

A. Relocation Is Not In Antonia's Best Interest as It Would Be Too Difficult of a Change for Her Away from the Parent She is More Closely Bonded to and Wishes to Remain with, Will Not Enhance her Life, and Will be Detrimental to her Relationship with Her Mother.

When considering relocation in conjunction with the best interest analysis, relocation is clearly not in Antonia's best interest. A material change in circumstances does not need to be proven because the parties' custody agreement allows either parent to file a modification petition without such proof. R. at 16. The relocation factors that must be applied are (1) the quality of the relationships between the child and each parent, (2) each parent's reasons for seeking or opposing the move, (3) the degree to which the custodial parent's and the child's lives may be enhanced economically, emotionally, and educationally by the move, (4) the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, and (5) the feasibility of preserving the relationship between the noncustodial parent and the child through suitable custodial period arrangements. *Matter of James TT. v. Shermaqiae UU.*, 126 N.Y.S.3d 224, 226-227 (App. Div. 3rd Dept. 2020).

1. Antonia has a higher quality relationship with her mother as she has been her primary caregiver her entire life, the father left her at infancy, and he currently has not seen her in three years.

Antonia should remain with her mother because her relationship with her mother is stronger than with her father. The mother and Antonia are strongly bonded; the mother is the parent Antonia has always lived with, is the parent Antonia insists on co-sleeping with, and is the parent that spends time attending to her needs and extracurriculars. The only evidence of the father and Antonia having a positive relationship is his wife's testimony stating the two are close and communicate via text. R. at 7. In *Matter of Lintao v. Delgado*, the court held the mother who was the primary caregiver for the child's entire life, should keep physical custody when compared to the father who only saw the child on alternate weekends. 91 N.Y.S.3d 204, 206

(App. Div. 2nd Dept. 2019). Here, the father sees Antonia even less frequently. There is no evidence that the father ever visited or attempted to visit Antonia for the first eleven years of her life. It was not until Hallie and Antonia insisted that they be able to spend the summer together that the father hosted Antonia. The times the father has been Antonia's caregiver, have only been for short periods. R. at 25. An emphasis should be put on the length of time each parent spends as the child's primary caregiver. *See Matter of Adam OO.*, 113 N.Y.S.3d at 289 (emphasizing the father's relationship with the children because he was their primary caregiver for long stretches of time).

The father and Antonia do not have as close of a relationship because he has not even seen her in three years. His excuse is the health risk posed by the COVID-19 pandemic, but the state of New York lifted all restrictions in June 2021, and the father currently still has not seen Antonia.[2] Although the pandemic is a justified reason for suspending visits with a child, the visitation should resume once pandemic-related restrictions are lifted. *In re Adoption of D.W.-E.H.*, 2022-Ohio-528, 33 (Ct. App.); *In re K.M.*, 861 S.E.2d 10, 23 (N.C. Ct. App. 2021). Further, the pandemic cannot be blamed for why the father did not attempt to see Antonia for the first eleven years of her life or for why he chose to raise Hallie instead of her. When a father is physically absent from the child's life for years at a time while the mother is the primary caretaker attending to their needs and extracurricular activities, remaining with the mother is in the child's best interest. *Matter of Kristen MM. v. Christopher LL.*, 122 N.Y.S.3d 699, 703 (App. Div. 3rd Dept. 2020). The mother is Antonia's primary caregiver because she resides with her, and she provides all of Antonia's care. The mother meets with Antonia's teachers often, cooks

[2] *Governor Cuomo Announces Covid-19 Restrictions Lifted as 70% of Adult New Yorkers Have Received First Dose of COVID-19 Vaccine*, N.Y. State (June 15, 2021), https://www.governor.ny.gov/ news/governor-cuomo-announces-covid-19-restrictions-lifted-70-adult-new-yorkers-have-received-first.

her meals, and takes her to her extracurriculars. The mother takes her swimming, on walks, and to her writing class weekly. R. at 23. The couple of times Antonia was with her father, Maria was the one facilitating activities for her which she complained of, and complained the father was not around as much as she would like.

Antonia's desire for comfort from her mother when feeling distressed at night further proves the two share a closer bond than Antonia has with the father. The Supreme Court unduly and negatively focused on the mother and Antonia's co-sleeping. The factor should not be dispositive because the mother is trying her best to deter this behavior by her child that suffers from anxiety and a behavioral disorder. The co-sleeping should not have been viewed in such a negative light because it has a calming effect on Antonia who struggles to regulate her emotions and the court provides no basis for why this behavior should be deemed inappropriate. Research shows that co-sleeping is a legitimate way to afford considerable comfort to a child when distressed. (citing Mary Main et al., *Attachment Theory and Research: Overview with Suggested Applications to Child Custody*, 49 FAM. CT. REV. 426, 439 (2011)).

2. The father did not assert good faith reasons for seeking relocation; even if he did, Antonia is financially provided for in the mother's home which is a safe and stable environment according to the DSS report.

The father's claim that the mother's living conditions are his reason for seeking custody is flawed based on his testimony that her home has long been problematic, and that he left Antonia in her care for fourteen years without complaint. The home he complains of is the same home he lived in with the mother and willingly left an infant Antonia in. He alleges that the mother's financial troubles are another reason for him seeking custody, but such troubles occurred in 2020 while his petition was not filed until 2022. His assertion that there are silent child syndrome specialists near New York that are not available in New Scotland is also flawed; if the father

really wanted Antonia to see these specialists, he could have arranged it when she was in his care for the summer without forcing her move to New York. Only the good faith reasons for requesting the move should be considered as many states require. *Tropea v. Tropea*, 665 N.E.2d 145, 151 (1996); (citing Janet Leach Richards, *Children Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M.L. REV. 245, 250-251 (1999)).

Relocations that are not based on legitimate reasons or are based on frivolous reasons are not made in good faith. *State v. Whittington*, 193 So. 3d 1234, 1239 (La. Ct. App. 2016). The father's petition was filed when he discovered Antonia's desire to obtain birth control and the mother's support of it. The father's strong opposition to the birth control and his likely anger that he heard about it from a nurse rather than the mother, are not legitimate reasons for seeking relocation. R. at 19. Similarly, in *Matter of S.F. v. G.F.*, the mother's motivation to move the child was not legitimate because she had no concrete evidence of how a move to the suburbs would benefit the child. 906 N.Y.S.2d 783, 783 (Fam. Ct. 2009). Even if the living conditions, finances, and specialists were his true reasons for seeking relocation of the child, Antonia is financial provided for in the mother's home which is a safe, loving environment, and the medical care in New Scotland is sufficient according to the father.

The Supreme Court's finding that the mother throwing objects at the father was grounds for a change of custody was erroneous. R. at 12. The mother threw a hairdryer at the wall near the father, not at him, it was fourteen years ago, and there is no evidence to suggest the mother is violent. R. at 4. It is unclear if the children were present during this incident but even if they were, they were infants. Domestic violence exposure to the child is found when a father admits to choking the mother, giving her scratches on her neck and to throwing a rock through the dining room window with the child in the home. *Uzoma N. v. Dep't of Child Safety*, No. 1 CA-JV

22-0136, 2022 Ariz. App. Unpub. LEXIS 863, at *5-6 (Ct. App. Oct. 25, 2022). Here, the mother's one instance of tossing a hairdryer at the wall does not rise to this level because there is evidence of her being violent towards the father. Also, when a father threw an object at the mother and there was no indication that the children were present, it did not constitute a finding that the children were placed in imminent danger of impairment. *Matter of Divine K. M. (Andre G.)*, 2022 NY Slip Op 06929, *4-5 (App. Div. 2nd Dept.). Therefore, the incident is not grounds for a change of custody.

The DSS report proves the mother's home is a safe environment. The DSS finding that Antonia is not in any immediate health and safety risks in the mother's home means that the mother acts as a reasonable and prudent parent should under the circumstances. *Nicholson v. Scoppetta*, 820 N.E.2d 840, 846 (N.Y. 2004). The father's assertion that it was unsafe for the mother to leave Antonia alone around sharp sewing tools shows the father clearly does not know his daughter is used to yielding a sharp sword in her fencing club or that she is an intelligent girl capable of staying home alone once. Courts have found it is safe for children that are 10 and 14 to be left unsupervised by their mother when she works four nights a week. *Olson v. Olson*, No. C2-01-1231, 2001 Minn. Ct. App. LEXIS 1436, at *11 (Ct. App. Feb. 13, 2001). This is not a regular arrangement for Antonia, rather it occurred only once when the girl was eleven. So, the instance does not make the mother's environment unsafe. Also, the presence of the grandfather smoking outside the mother's home is not grounds for a change of custody. Courts have deferred the issue of second-hand smoke to state legislatures rather than using it as the only factor to remove a happy and healthy child from her home to relocate her to her father's home. *Heagy v. Kean*, 864 N.E.2d 383, 391 (Ind. Ct. App. 2007). And when a father fails to provide proof that

the adults in the home smoked around the child, his modification petition should be denied. *Burkhart v. Burkhart*, 960 S.W.2d 321, 323 (Tex. App. 1997).

The electrical panel incident did not create a lack of stability or safety. If there was a pattern of unpaid bills or evictions in the middle of winter, then that would constitute a lack of stability and safety. *In re Marriage of Gallagher*, 880 P.2d 1303, 1306-1307 (Mont. 1994). Such conditions are not comparable to a temporary electrical outage because it was not the mother's fault, was quickly remedied, and the living conditions it created were deemed legally adequate by the DSS report. The mother pays her bills on time and there are no facts to suggest that she has ever been evicted. Although the father helped her pay her mortgage during the pandemic in addition to child support, it was necessary to balance out the father's lack of paying more child support when he had a significant income increase. R. at 19. Further, if the father had not provided this assistance, he would be neglecting Antonia all together because he does not visit her nor is he a caregiver to her. The father only renders finances as a form of care for the child.

The mother rightfully opposes moving Antonia to New York because Antonia is used to her needs being met in a one-on-one capacity. If she moves in with her father, then Maria and the father will offer care for her and Hallie in a more authoritative way and not allow Antonia to make her own decisions. This would be a big shift for a child who requires strict compliance with a consistent schedule. Also, a shift to a more authoritative household where she would have less independence is certainly a downgrade in a teenager's eyes.

3. Relocation will not enhance Antonia's life because she is currently financially provided for, is emotionally sensitive to changes, and can attend the summer camp and see the specialists during the existing visitation schedule.

The father failed to prove that relocation will enhance Antonia's life. The Supreme Court inferred that Antonia's life would be economically enhanced by the move based solely on the

father's successful business. Rather than presenting evidence of the specific ways his economic status would benefit Antonia, the father just attacked the mother's lack of financial success during the pandemic. Although the mother had to close her bridal shop, at the time of trial she restored her stream of income by turning her business around, was able to buy Antonia a laptop, and pay her bills. Nevertheless, the financial disparity of the parties should not be dispositive because poverty is not a disqualification for successful parenting. *In re Adoption of Landaverde*, 465 N.Y.S.2d 6, 8 (App. Div. 1st Dept. 1983). The mother's financial circumstances should not be held against her if the best interests of the child are served by remaining with her. *Turner v. Turner*, 88 S.W.2d 1063, 1065 (Tex. Civ. App. 1935). This principle still applies even if wealth and worldly advancement may be offered in the other's home. *Id*. Even if Antonia's life will be economically enhanced by relocation, it is only one factor in the analysis. *Matter of Holtz v. Weaver*, 943 N.Y.S.2d 363, 364 (App. Div. 4th Dept. 2012).

Antonia's life will not be emotionally enhanced by the move but will be hindered. The mother fostered Antonia's emotional and educational success which would be disrupted if she is forced to relocate. The financial status and ability of each parent to provide for the child should not be overlooked, but "an equally valid concern is the ability of each parent to provide for the child's emotional and intellectual development." *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1263 (N.Y. 1982). Although the move would allow Hallie and Antonia to grow up together, it would not balance out the complete abandonment of the life she built with her mother. In *Matter of Jelani Pp (melissa Qq.)*, the court ruled against a change of custody and relocation of a child to Florida as it would be detrimental on the mother's relationship with the child and disrupt the stability the child currently has in New York. 147 N.Y.S.3d 709, 712 (App. Div. 3rd Dept. 2021). And the existence of family in Florida was not enough to prove emotional enhancement.

Jelani Pp., 147 N.Y.S.3d at 712. Similarly, Hallie's presence and the bond Antonia could grow with her father is not enough to prove emotional enhancement especially when the move would be detrimental on Antonia's relationship with her mother. Furthermore, Antonia's sensitivity to change will make such a distant move impact her negatively emotionally. Her teacher's testimony that she becomes distressed when her schedule is not complied with and when quick transitions are made shows Antonia's emotional distaste for change. The father claims a change in her hormones would be too difficult for Antonia so certainty a move over three hours away from her mother and the life she has established with her will be emotionally challenging.

The father failed to prove that Antonia's life will be enhanced educationally. When a father only identified the school that the child would attend with no evidence that it is a better educational opportunity rather than her current school where she is comfortable, he has failed to prove educational enhancement. *Jelani Pp.*, 147 N.Y.S.3d at 712. Here, the father does not provide any information about the school she would attend or any proof it is better than her current school. Antonia has become more comfortable and motivated in her current school, is an intelligent and great student, and is actively involved her community through sports and creative writing, so relocation would disrupt rather than enhance her education. Similarly, the court in *Matter of Cisse v. Graham* ruled against relocation of a thirteen-year-old child because she had lived with the mom since birth where she was academically successful and participated in a variety of extracurricular activities. 991 N.Y.S.2d 465, 475 (App. Div. 2nd Dept. 2014). Although there is a summer camp for children like Antonia in New York, she can attend such camps when the father has his summer possession, without relocation. Therefore, Antonia's life will not be educationally enhanced by the move.

4. Relocation will be detrimental to Antonia's relationship with the mother because the father did not present a plan for future contact or visits with the mother, nor will the infrequency of the supreme court's visitation arrangement preserve the relationship.

As in *Matter of Moredock v. Conti*, if the father had offered a plan to facilitate visitation with the mother on a biweekly basis and enable text conversations with the mother, then relocation may not be detrimental to Antonia's relationship with the mother. 12 N.Y.S.3d 711, 712 (App. Div. 4th Dept. 2015). But the father offered no plan to help Antonia maintain her relationship with her mother. New York is over 200 miles away from New Scotland making it a very distant location that will substantially affect the mother's visitation. R. at 0; *See Atkin v. McDaniel*, 585 N.Y.S.2d 849, 850 (App. Div. 3rd Dept. 1992) (finding North Carolina is a distant location from New York that substantially affects the other parent's visitation). So, a presumption that relocation in not in a child's best interest arises. *Hathaway v. Hathaway*, 572 N.Y.S.2d 92, 94 (App. Div. 3rd Dept. 1991). The father's testimony that he relocated to improve his financial circumstances lacks specificity, so he failed to prove exceptional circumstances for his move away from Antonia as is required to rebut the presumption. *Tropea*, 665 N.E.2d 149; *Lavelle v. Freeman*, 581 N.Y.S.2d 875, 876 (App. Div. 3rd Dept. 1992). He inherited his family's wine business that is in New York around the time of his move but does not assert this as an exceptional circumstance.

The Supreme Court's visitation arrangement is too infrequent to preserve the mother-daughter relationship. An order does not negatively affect the noncustodial parent's ability to maintain a relationship with the child when the order requires the custodial parent to transport the child to the noncustodial parent's house for visitation every other weekend, for four weeks in the summer, and the parties share holidays equally. *Bodrato v. Biggs*, 710 N.Y.S.2d 470, 696 (App. Div. 3rd Dept. 2000). Here, the Supreme Court order only allows the mother visitation

every other summer and when the father choses. This is far too infrequent to maintain the close bond the mother and Antonia share. Antonia is distressed when she is unable to sleep with the mother every night. So, she will certainty suffer when she is 200 miles away from the mother and only able to see her every other summer.

B. Antonia's Preference to Remain with the Mother as Shown in the *Lincoln* Hearing and the AFC's Appeal of the Order, Is Entitled to Great Weight Because She Is Intelligent, Communicative, and of the Advanced Age of Fourteen.

The Third Division Court properly afforded Antonia's preference the weight it deserved. Courts rely on the child's preference when the child is bright, communicative, understanding, and of a mature age. *JR v. TLW*, 371 P.3d 570, 575 (Wyo. 2016); *Hansen v. Hansen*, 327 N.W.2d 47, 49 (S.D. 1982). The mother and teacher's testimony that Antonia is intelligent and communicates through writing proves her preference should be relied upon. Her writing is likely very well because she shares what she learns in school with her mother through writing, attends weekly writing classes and her teacher describes her as being able to write an entire book about subjects, she is passionate about. R. at 21, 22, 23. She is also of advanced enough age because an almost fourteen-year-old was of an advanced age for his preferences to be entitled to "great weight." *Matter of McGovern v. McGovern*, 870 N.Y.S.2d 618, 622 (App. Div. 3rd Dept. 2009). Because she is fourteen, intelligent, and able to communicate, her preference must be given proper weight. The Court should not give Antonia's preference less weight on account of her selective mutism because her AFC is her voice, there is no indication that the mutism impairs her intelligence, and she is able to communicate her wishes in her own way.

Antonia wishes to remain with the mother. *Lincoln* hearings are confidential, so the record does not expressly state that Antonia wishes to remain with the mother. *Matter of Julie E. v. David E.*, 1 N.Y.S.3d 431, 434 (App. Div. 3rd Dept. 2015). *Lincoln* hearings are conducted to

allow a child to explain the reasons for her preference in private to the court as to not jeopardize the child's relationship with either parent by having them openly choose between the two. *Matter of Battin v. Battin*, 12 N.Y.S.3d 672, 673 (App. Div. 3rd Dept. 2015). The courts have access to Antonia's preference disclosed in the *Lincoln* hearing. R. at 16. Because the Third Division Court found the Supreme Court did not properly weigh Antonia's wishes, Antonia's preference given was likely to remain with the mother. Antonia's wish to not relocate is also evident in her AFC's appeal of the relocation finding on Antonia's behalf and argued it is not in her best interest. Therefore, this Court should conclude that Antonia's preference is to remain with the mother based on the *Lincoln* hearing, the Third Division Court's opinion, and Antonia's AFC's appeal.

Therefore, a change in custody and thus, a relocation is not in Antonia's best interest. The father, as the parent seeking the relocation and modification of custody, was responsible for showing the change and move are in the child's best interest which he failed to show. *Sellers v. Nicholls*, 851 S.E.2d 54, 59 (S.C. Ct. App. 2020).

II. THE THIRD DIVISION COURT CORRECTLY AWARDED THE MOTHER FINAL DECISION-MAKING AUTHORITY OVER ANTONIA'S MEDICAL TREATMENT BECAUSE SHE IS THE PARENT PHYSICALLY PRESENT ATTENDING TO ANTONIA'S NEEDS, WHO ANTONIA SHARES HER FEELINGS WITH, AND WILL DECIDE IN ANTONIA'S BEST INTEREST.

It is in Antonia's best interest for her mother to have final decision-making authority as to her medical treatment. The parties' custody agreement presumably granted them shared legal custody of Antonia because the father was designated as the final decision-maker. R. at 4. Final decision-making authority is granted when the parents share joint legal custody. *J.R. v. M.S.*, 55 N.Y.S.3d 873, 876 (Sup. Ct. 2017). Joint legal custody means the parents must communicate and come to an agreement on important decisions for the child. *Diehl v. Diehl*, 630 S.E.2d 25, 27 (N.C. Ct. App. 2006). When one parent has the final decision-making authority, he or she makes

the decision if the two cannot come to an agreement. *Diehl*, 630 S.E.2d at 27. Under § 248, the mother's request to modify the legal custody order can be changed by the court at any time if it is in the best interest of the child. R. at 30.

A. The Mother Did Not Violate the Custody Agreement Nor New Scotland Public Health Law § 381 When She Inquired About the Steps to Switch Doctors and Indicated Her Interest on an Informal Survey.

The decision to switch doctors and to have Antonia begin taking birth control was never actually decided. The mother merely indicated that she was thinking about switching doctors, asked what the steps to switch would be, and whether Walden was capable of prescribing birth control. Because the parties share legal custody of Antonia, the mother is required to consult with the father before making any major life decisions for Antonia. *State v. West*, 688 P.2d 406, 408 (Or. Ct. App. 1984). Although the mother did not consult with the father, her actions are not a violation of the joint legal custody agreement nor § 381's parental consent requirement because she never actually made the change and Antonia never received contraceptive information or services from Seely. Violations of joint legal custody orders have been found when a parent unilaterally terminates the children's relationship with their pediatrician or when a parent moves the child to a new school without consulting the other. *McNamara v. McNamara*, 263 A.3d 899, 915 (Conn. App. Ct. 2021). *Vyhlidal v. Vyhlidal*, 973 N.W.2d 171, 182 (Neb. 2022). The mother's actions do not rise to this level.

The mother's failure to consult with the father before inquiring about switching doctors should not be held against her because there is no evidence of ill intent on her part. And the parties have seemingly communicated and agreed on all prior matters concerning the children. Further, there is no indication that the lack of communication in this one instance negatively affected the children. When the parents are antagonistic towards each other, do not communicate

at all, and do not engage in joint decision making with respect to the children then joint legal custody is improper. *Matter of D'Amico v. Corrado*, 10 N.Y.S.3d 316, 318 (App. Div. 2nd Dept. 2015). That is not the case here so joint legal custody should remain and the one occurrence of failure to communicate should not be held against the mother when considering whether she is best fit to be the decision-maker over Antonia's medical treatment.

B. The Mother Is Best Fit to Have the Final Say Over Antonia's Medical Decisions Because She Is Physically with Antonia, Is More Involved in Antonia's Needs, Observes Antonia's Menstrual Pain, and Is Who Antonia Shares Her Feelings with

The Court rightfully used its discretion to distribute decision-making authority to the mother specifically over the decision of Antonia's medical treatment and a switch to Seely based upon the circumstances of the case. *Hall v. Hall*, 655 S.E.2d 901, 906 (N.C. Ct. App. 2008). The mother is more attuned to Antonia's medical needs because she is the one that recognized Antonia's pain and offered a solution. R. at 8. While the record is void of any indication that the father even knew of the pain she was suffering. The father did not express any concern about Antonia's pain and when he found out the mother was looking for a solution, he prevented it. Under the New Scotland Family Law Act § 248(b), the modification of legal custody to award the mother final decision-making authority is determined by the best interest standard. [3] Following this standard, when a mother appears to be more attuned to the child's educational needs, it is in the children's best interest that she has final decision-making authority as to educational issues. *S.A.M. v. B.A.H.*, Nos. CN00-08176, 03-10361, 2003 Del. Fam. Ct. LEXIS 127, at *8 (Fam. Ct. Aug. 7, 2003). Because the mother is more attuned to Antonia's medical

[3] § 248 was modeled after and is nearly identical to Del. Code Ann. tit. 13, § 729 (2004), so Delaware caselaw applying § 729 and Delaware's best interest statute, 13 Del. C. § 722(a) (2004), is accurate to this jurisdiction.

needs, it is in Antonia's best interest that the mother has the final decision-making authority as to medical issues.

Further, Antonia lives primarily with her mother who is more involved in caring for her as shown by the mother communicating with Antonia's doctors, meeting with Antonia's teachers, heating her bath water, and cooking her meals. R. at 6, 8, 22. Also, the mother made the decision about Antonia's need to seek relief for her menstrual pain while the father did not. Similarly, in *Matter of Moore v. Gonzalez*, the parents disagreed about the children's educational needs and found the mother should have the final say because she is the residential parent who is more involved with the children's needs daily. 21 N.Y.S.3d 292, 294 (App. Div. 2nd Dept. 2015). Also, a mother was awarded final decision-making authority over the children's education when she offered solution for their educational problems while the father denied such problems existed. *K.A.B. v. J.C.B.*, Nos. CN08-05241, 13-32537, 2014 Del. Fam. Ct. LEXIS 33, at *28-29 (Fam. Ct. May 14, 2014). Because the mother is responsible for Antonia's daily activities and care and is the parent physically present to observe Antonia's extreme menstrual pain, she is in the best position to make the final decision as to the birth control issue.

The father did not present any instances in which Antonia has shared her feelings with him. While she confides in her mother about her desire to obtain birth control to alleviate her menstrual pain, about her frustration at the activities Maria has her do, and how her father's absence upsets her. As in *J.R.*, the court found the mother should have final decision-making authority as to medical issues because she was the parent that attended to the child's needs and the child showed greater willingness to share his feelings with her than the father. 55 N.Y.S.3d at 882. Therefore, Antonia's willingness to share her feelings exclusively with the mother makes the mother the most informed parent to make this final medical treatment decision on her behalf.

The mother is not requesting final decision-making authority of all aspect of the child's life but only for medical decisions. The best way to allow each parent to both be meaningfully involved in major decisions concerning the child is to allow each parent to have final decision-making authority over different aspects of the child life. *Hodgins v. Hodgins*, 84 So. 3d 116, 125 (Ala. Civ. App. 2011). Under the current order, the father has all the decision-making power even though the mother is the parent actively involved in the child's life. While joint legal custody is a way for the father to be involved in Antonia's life despite his absence, he should not have decision-making authority in all aspects of her life because such absolute control is unfair to the mother. Unlimited decision-making authority over all matter regarding the child is incompatible with shared parental responsibility. *Schneider v. Schneider*, 864 So. 2d 1193, 1194 (Fla. Dist. Ct. App. 2004). So, the mother should have the final say in the small area of medical treatment as it relates to switching doctors.

Therefore, the mother, as the residential parent who attends to Antonia's needs was rightfully awarded final decision-making authority as to the birth control.

C. The Mother Makes Decisions That Are in Antonia's Best Interest as It Is in Antonia's Best Interest to Switch to Seely and Try Birth Control Pills to Alleviate Her Extreme Pain That Aggravates Her Behavioral Disorder.

It is in Antonia's best interest to see a physician at Seely and obtain birth control which proves the mother will make medical decisions that are in her daughter's best interest. Antonia can barely walk, and her behavioral outbursts worsen during her menstrual pain. The pain and suffering she is going through should be enough to justify seeing a gynecologist. Antonia also wishes to see a doctor at Seely and seeing a gynecologist there will put Antonia in a better position to find a solution to her menstrual suffering than a facility that does not offer

gynecological services. And Seely is equally qualified as Walden and as any physician the father wishes her to see. R. at 20.

It is in Antonia's best interest to give birth control a try as a solution to her extreme menstrual pain. The father claims fourteen is a young age for Antonia to take birth control pills but most women begin taking oral contraceptives as teenagers. (citing Rachel Kramer, *4 Essential Questions About Teen Birth Control*, Virtua Health (Feb. 8, 2021)).[4] In additional to the credible testimony detailing Antonia's suffering, teenagers in general are more likely to suffer from severe menstrual symptoms that make it difficult to go to school or complete daily activities. (citing Pandia Health Editorial Team, *When Should a Woman Start Birth Control*, Pandia Health, (Feb. 16, 2021) (reviewed by Sophia Yen, MD)).[5] Birth control designed to be taken continuously can alleviate menstrual pain by stopping a person's periods all together. R. at 8. Because gynecologists specialize in the female reproductive system, the Seely gynecologist can better address Antonia's pain than the doctors at Walden who are not gynecologists evident by their lack of ability to prescribe birth control.

The father claims that the hormones in birth control will deter Antonia from speaking but provides no evidence of that even being a possibility. If the father was truly concerned with Antonia's behavioral disorder, he would take notice of how her menstrual pain is aggravating her outbursts. Rather, he wants the issue assessed by a doctor that focuses on children with emotional disabilities and provides no specifics about the doctor or if the doctor even exists. And such doctor and the Seely doctors are equally qualified to address Antonia's special needs. R. at 19. Because of the father's lack of proof, the Court should not give weight to these base-less

[4] https://www.virtua.org/articles/4-essential-questions-about-teen-birth-control
[5] https://www.pandiahealth.com/resources/when-should-a-woman-start-birth-control/

claims. Antonia's treatment and disorder will be properly addressed and monitored at Seely as evident by the father's testimony admitting such. And Walden and the doctor the father plans on having Antonia see in New York have not offered any solutions for Antonia's pain which is the main issue in this case. Furthermore, Antonia wishes to make the switch which will help with a smooth transition and must be given great weight due to her advanced age and maturity. The child's wishes are an important factor in deciding what is in the child's best interest. *Chase v. Dep't of Servs. for Children, Youth & Their Families*, 911 A.2d 802, 813 (Del. 2006).

It is in Antonia's best interest to switch to Seely to obtain birth control because the other physicians have not offered any solutions to her pain, Antonia wishes to switch to Seely to obtain birth control, Seely is equally qualified to address her behavioral needs, and a gynecologist is best equipped to solve her menstrual problems.

CONCLUSION

Respondent Eliza J. respectfully requests that this Court affirm the decision of the New Scotland Third Appellate Division.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT ELIZA J.