

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

1228

CAF 10-01945

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, SCONIERS, AND GREEN, JJ.

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IN THE MATTER OF HOWARD G. MESSIMORE,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

STACY M. MESSIMORE, RESPONDENT-RESPONDENT.

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CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (KRYSTAL A. RUPERT OF COUNSEL), FOR PETITIONER-APPELLANT.

TYSON BLUE, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

SUSAN A. SOVIE, ATTORNEY FOR THE CHILD, WATERTOWN, FOR NATALEIGH M.M.

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Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered September 9, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, ordered that respondent is to have primary physical custody of the subject child.

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

Memorandum: Petitioner father commenced this proceeding seeking to modify the existing custody provisions in the judgment of divorce, which was entered while he was deployed overseas with the United States Army, by awarding him primary physical custody of the parties' child. We agree with the father that his return from deployment constituted a change in circumstances warranting review of the existing custody arrangement (see Family Ct Act § 651 [f] [3]). Contrary to the father's contention, however, we conclude that Family Court did undertake such a review in light of the change in circumstances. The court held an evidentiary hearing, during which witnesses were called by both parties, conducted an in camera interview with the parties' child and thereafter made a determination based upon the best interests of the child (*cf. Matter of Hughes v Davis*, 68 AD3d 1674). Contrary to the further contention of the father, we conclude that the court's determination that the best interests of the child are served by continuing primary physical custody with respondent mother is supported by a sound and substantial basis in the record (*see Matter of McLeod v McLeod*, 59 AD3d 1011).

Entered: November 18, 2011

Patricia L. Morgan  
Clerk of the Court