

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 8, 2011

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511223

In the Matter of RICKEY
SHERMAN,

Appellant,

v

MEMORANDUM AND ORDER

STEPHANY COOK,

Respondent.

(And Two Other Related Proceedings.)

Calendar Date: October 18, 2011

Before: Rose, J.P., Lahtinen, Kavanagh, McCarthy and Garry, JJ.

Kathleen M. Spann, Greene, for appellant.

Craig Fritzsch, Binghamton, for respondent.

Jehed Diamond, Delhi, attorney for the child.

McCarthy, J.

Appeals (1) from an order of the Supreme Court (Charnetsky, J.), entered June 3, 2010 in Broome County, which partially granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to hold respondent in willful violation of a prior order of visitation, (2) from an order of said court, entered November 18, 2010 in Broome County, which partially granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to hold respondent in willful violation of a prior order of visitation, and (3) from an order of said court, entered November 24, 2010 in Broome County, which

dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to hold respondent in willful violation of a prior order of visitation.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) have a child in common (born in 2006). Pursuant to a September 2009 order, the mother has sole custody and the father was granted visitation on alternate weekends. The father filed three petitions alleging that the mother willfully violated the order by depriving him of visitation during specified periods of time. Supreme Court resolved two of the petitions by finding that the mother willfully violated the order, but imposed no punishment. The court dismissed a third petition, finding that the mother violated the order but her violation was not willful. The father appeals.

Supreme Court had discretion as to what sanction to impose, if any, for the mother's two willful violations, and we give deference to its determination in that regard (see Matter of Glenn v Glenn, 262 AD2d 885, 886 [1999], lv dismissed and denied 94 NY2d 782 [1999]; Matter of Wright v Wright, 205 AD2d 889, 892 [1994]). Based upon the court's ability to observe the witnesses and assess their demeanor, as well as the court's history with this family, we cannot say that the court abused its discretion in declining to impose any punishment here (compare Matter of Terry v Borggreen, 6 AD3d 1001, 1002-1003 [2004]).


On the third violation petition, Supreme Court found that the mother did prevent the father from exercising visitation on the one date alleged, but that she did so because she heard a dog barking in the father's apartment and both parents were aware that the child is allergic to dogs. The court accepted the mother's testimony addressing this occasion and her concern for the child's health. According deference to the court's credibility determinations, we cannot say that the court abused its discretion in holding that the father failed to meet his burden of proving a willful violation by clear and convincing evidence (see Matter of Cobane v Cobane, 57 AD3d 1320, 1322-1323 [2008], lv denied 12 NY3d 706 [2009]; Matter of Rebecca O. v Todd P., 309 AD2d 982, 983 [2003]; see also Dwyer v De La Torre, 279

AD2d 854, 857 [2001])).

Rose, J.P., Lahtinen, Kavanagh and Garry, JJ., concur.

ORDERED that the orders are affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court