

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

Decided and Entered: November 29, 2012

513345

In the Matter of CATHERINE C.,
Respondent,

v

BILLY D.,

Appellant.

MEMORANDUM AND ORDER

(And Another Related Proceeding.)

Calendar Date: October 15, 2012

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

Samuel D. Castellino, Elmira, for appellant.

Norbert A. Higgins, Binghamton, attorney for the children.

Lahtinen, J.

Appeal from an order of the Family Court of Chemung County (Buckley, J.), entered July 15, 2011, which granted petitioner's applications, in two proceedings pursuant to Family Ct Act articles 6 and 8, for, among other things, custody of the parties' children.

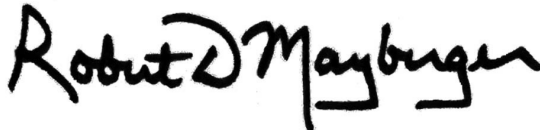
In this custody dispute between petitioner and respondent, Family Court, among other things, granted petitioner legal and physical custody at a time when respondent was incarcerated. The record reflects that Family Court's order was entered July 15, 2011 and mailed that same day to respondent by a court clerk. Respondent's notice of appeal from the order was not filed until September 2, 2011. As relevant here, Family Ct Act § 1113 requires that an appeal "must be taken no later than [35] days

from the mailing of the order to the appellant by the clerk of the court." Respondent's appeal was untimely as it was filed beyond the 35-day period and, accordingly, the appeal must be dismissed (see Matter of Deandre GG. [Charlice HH.], 79 AD3d 1384, 1385 [2010], lv denied 16 NY3d 708 [2011]; Matter of Alexis BB., 285 AD2d 751, 752 [2001]; Matter of Sullivan v Sullivan, 254 AD2d 573, 573 [1998]; see also Cappiello v Cappiello, 66 NY2d 107, 108 [1985] [observing that "the failure timely to serve a notice of appeal goes to jurisdiction over the subject matter, which may be raised at any time"]).

Rose, J.P., Spain, Kavanagh and McCarthy, JJ., concur.

ORDERED that the appeal is dismissed, 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