

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

Decided and Entered: December 6, 2012

514414

In the Matter of JASON BOIVIN,
Appellant,

v

MEMORANDUM AND ORDER

ISIS GONZALEZ,
Respondent.

Calendar Date: November 20, 2012

Before: Peters, P.J., Rose, Lahtinen, Malone Jr. and Garry, JJ.

Sandra M. Colatosti, Albany, for appellant.

Leah Walker Casey, Schenectady, for respondent.

Rachel A. Rappazzo, Schenectady, attorney for the child.

Peters, P.J.

Appeal from an order of the Family Court of Schenectady County (Taub, J.), entered March 22, 2012, which dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, for custody of the parties' child.

The parties are the parents of a child born in July 2010 in Puerto Rico. The child and respondent (hereinafter the mother) continued to reside in Puerto Rico until May 2011, when petitioner (hereinafter the father) transported them, together with the mother's child from another relationship, to his home in Schenectady County. In October 2011, following a domestic dispute, the mother and the children sought temporary housing assistance from the Schenectady County Department of Social Services and, three weeks later, they returned to Puerto Rico.

After the mother and child left the father's residence, the father commenced this proceeding seeking custody of the child. The mother sought dismissal of the proceeding on the ground that Family Court lacked subject matter jurisdiction because New York is not the child's home state pursuant to Domestic Relations Law § 76. Following a hearing, Family Court determined that it did not have jurisdiction over the matter and dismissed the petition. The father now appeals.

The father argues that the mother wrongfully removed the child from New York and, therefore, the period of time that she has spend in Puerto Rico since leaving New York should count toward the six-month period required to establish New York as her home state for jurisdictional purposes (see Domestic Relations Law §§ 75-a, 76; Matter of Joy v Kutzuk, 99 AD3d 1049, 1050 [2012]; Felty v Felty, 66 AD3d 64, 70-71 [2009]; Matter of Krymko v Krymko, 32 AD3d 941, 942 [2006]). The father did not raise the issue of wrongful removal before Family Court and, therefore, it is not preserved for appellate review (see Matter of Harmony S., 22 AD3d 972, 973 [2005]; Matter of Isaiah O. v Andrea P., 287 AD2d 816, 817 [2001]). In any event, the record does not support the contention that the mother's return to Puerto Rico with the child was wrongful, and it is clear from the father's own testimony that the child did not reside in New York for a period of six months at any time prior to the commencement of this proceeding (cf. Matter of Joy v Kutzuk, 99 AD3d at 1050-1051). Therefore, the basic requirements for jurisdiction are not present and the proceeding was properly dismissed.

Rose, Lahtinen, Malone Jr. and Garry, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, prominent "R" at the beginning.

Robert D. Mayberger
Clerk of the Court