

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

Decided and Entered: March 10, 2016

520479

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In the Matter of MONIQUE D.

WASHINGTON,

Respondent,

v

MEMORANDUM AND ORDER

ERIC K. EDWARDS,

Appellant.

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Calendar Date: February 17, 2016

Before: McCarthy, J.P., Egan Jr., Rose and Lynch, JJ.

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John M. Scanlon, Binghamton, for appellant.

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Egan Jr., J.

Appeal from an order of the Family Court of Broome County (Connerton, J.), entered January 22, 2015, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 4, to hold respondent in violation of a prior order of support.

The parties are the parents of two children (born in 2004 and 2008). Pursuant to a 2010 order of support, respondent (hereinafter the father) was required to pay \$185 biweekly in child support. In 2014, petitioner (hereinafter the mother) commenced this proceeding alleging that the father had violated the 2010 support order. A Support Magistrate determined that the father had violated the order, but that the violation was not willful, and established arrears in the amount of \$17,726. The father filed written objections, arguing that the Support Magistrate acted inappropriately by actively participating in the hearing. Family Court denied the objections, and the father now

appeals.

"[T]he [S]upport [M]agistrate shall conduct the hearing in the same manner as a court trying an issue without a jury in conformance with the procedures set forth in the [CPLR]" (22 NYCRR 205.35 [a]; see Family Ct Act § 439 [d]). Here, although the mother, appearing pro se, testified that the father had only paid approximately \$100 a year in support since the 2010 order, she informed the Support Magistrate that she did not have any documentary evidence to support her allegation. At the conclusion of her testimony, the Support Magistrate again questioned the mother as to whether she had any further evidence in regard to her petition. After the mother answered in the negative, the Support Magistrate provided her with a copy of the Broome County Office of Child Support Enforcement Support Obligation Summary, which summarized the amounts owed and the payment history regarding the 2010 order and indicated that the father was in arrears. Over the father's objection, the Support Magistrate then questioned the mother regarding the contents of the summary. At the conclusion of the case, the Support Magistrate repeated his question to the mother as to whether she had any documents that she would like to enter into evidence. After she again answered in the negative, the Support Magistrate inquired whether the mother was requesting that the summary report be admitted into evidence, at which point she answered affirmatively and, over the father's continued objections, the document was admitted into evidence. The Support Magistrate thereafter used the contents of the summary report as the basis for his calculation of the amount that the father was in arrears.

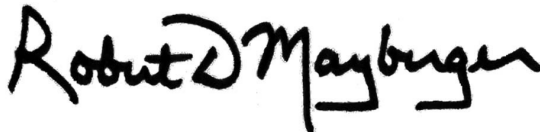
Certainly, a Support Magistrate "may properly question witnesses to insure that a proper foundation is made for the admission of evidence and question a witness in an effort to clarify confusing testimony as well as to facilitate the orderly and expeditious progress of the hearing" (Matter of Eshale O., 260 AD2d 964, 964 [1999] [internal quotation marks, brackets, ellipses and citations omitted]; see Matter of Cadle v Hill, 23 AD3d 652, 653 [2005]; cf. Matter of Smith v O'Donnell, 107 AD3d 1311, 1313 [2013]). In our view, however, the Support Magistrate exceeded his authority here. By actually providing the evidence to the mother during the hearing and using his questions to

ensure that she introduced that evidence, we cannot say that the Support Magistrate was merely ensuring that a proper foundation was set for the admission of the evidence or facilitating the expeditious progress of the hearing. Accordingly, Family Court erred in denying the father's objections to the order of the Support Magistrate.

McCarthy, J.P., Rose and Lynch, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Broome County for further proceedings not inconsistent with this Court's decision.

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