

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - October 24, 2006

HOWARD MILLER, J.P.
DAVID S. RITTER
FRED T. SANTUCCI
ROBERT J. LUNN, JJ.

2005-09844

DECISION & ORDER

In the Matter of Mahitab I. El-Sheemy, petitioner-respondent, v Ezzat A. El-Sheemy, et al., respondents, Ahmad El-Sheemy, appellant.

(Docket No. V-31752/04)

Peter Dailey, New York, N.Y., for appellant.

Steven M. Bernstein, Brooklyn, N.Y. (Cecilia A. Silver of counsel), for petitioner-respondent.

Carol Sherman, Brooklyn, N.Y. (Janet Neustaetter and Barbara H. Dildine of counsel), Law Guardian for the child.

In a child custody proceeding pursuant to Family Court Act article 6, the father appeals, as limited by his brief, from so much of an order of the Family Court, Kings County (Hepner, J.), dated August 29, 2005, as denied his cross petition for custody.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The Family Court dismissed the father's cross petition for custody based on lack of personal jurisdiction over the mother. We affirm so much of the order as dismissed the cross petition, but for a reason different from that stated by the Family Court.

By affirmatively seeking custody and participating in the proceedings, the mother waived her claim that the Family Court did not acquire personal jurisdiction over her (*see Matter of*

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Borggreen v Borggreen, 13 AD3d 756, 757; *see also Matter of Fallon v Fallon*, 4 AD3d 426, 427; *Matter of Brozzo v Brozzo*, 192 AD2d 878, 880). However, the father in his cross petition and supporting documents failed to make any evidentiary showing in support of his otherwise conclusory allegations that would justify a hearing on the issue of whether awarding custody to him, solely or jointly with the paternal grandparents, would be in the child's best interests (*see Jackson v Jackson*, 31 AD3d 386; *Matter of Grassi v Grassi*, 28 AD3d 482, 482; *Matter of Carpenter v Whitaker*, 5 AD3d 681, 681; *Matter of Madden v Cavanaugh*, 307 AD2d 266, 267). Accordingly, although for a reason different from than that relied upon by the Family Court, we affirm the denial of the father's cross petition (*see Jackson v Jackson, supra; Matter of Grassi v Grassi, supra* at 482; *Matter of Carpenter v Whitaker, supra* at 681; *Matter of Madden v Cavanaugh, supra* at 267).

In light of our determination, we need not reach the remaining contentions raised by the mother and the Law Guardian.

MILLER, J.P., RITTER, SANTUCCI and LUNN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court