

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

D21399
C/kmg

_____AD3d_____

Submitted - November 10, 2008

HOWARD MILLER, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
ARIEL E. BELEN, JJ.

2007-06649
2008-02349

DECISION & ORDER

In the Matter of Alexandr Seleznov, appellant,
v Eleonora Pankratova, respondent.
(Proceeding No. 1)

In the Matter of Eleonora Pankratova, respondent,
v Alexandr Seleznov, appellant.
(Proceeding No. 2)

(Docket Nos. F-32564-06/07B, F-32564-06/06A)

Helene Bernstein, Brooklyn, N.Y., for appellant.

In two related proceedings pursuant to Family Court Act article 4, the father appeals from (1) an order of the Family Court, Kings County (Silber, J.), dated June 5, 2007, which denied his objections to an order of the same court (LaFreniere, S.M.), dated March 9, 2007, dismissing his petition, among other things, for downward modification of his child support obligation and a change in custody of the parties' child from the mother to him, on the ground of lack of jurisdiction, and (2) an order of the same court (Hepner, J.), dated March 7, 2008, which, after a hearing, confirmed an order of the same court (LaFreniere, S.M.), dated January 3, 2008, finding that he willfully violated a child support order of the same court (LaFreniere, S.M.), dated November 17, 2006, and committed him to the New York City Department of Corrections for a term of imprisonment of six months with the opportunity to purge the contempt by payment of the sum of \$8,000 toward his arrears.

ORDERED that the order dated June 5, 2007, is reversed, on the law, without costs or disbursements, and the matter is remitted to the Family Court, Kings County, for further

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proceedings consistent herewith; and it is further,

ORDERED that the appeal from so much of the order dated March 7, 2008, as committed the father to the New York City Department of Corrections for a term of imprisonment of six months is dismissed as academic, without costs or disbursements, as the period of incarceration has expired (*see Matter of Kainth v Kainth*, 36 AD3d 915); and it is further,

ORDERED that the order dated March 7, 2008, is affirmed insofar as reviewed, without costs or disbursements.

The Family Court erred in dismissing the father's petition which sought, among other things, downward modification of his child support obligation and a change in custody of the parties' child from the mother to him. Under the circumstances of this case, the Family Court possessed jurisdiction to adjudicate the father's petition on the merits (*see Family Ct Act § 652[b][ii]*; *Matter of Renzulli v McElrath*, 286 AD2d 335, 336; *cf. Coleman v Coleman*, 294 AD2d 530; *Lahaie v Stortecky*, 91 AD2d 723). Accordingly, the matter must be remitted to the Family Court, Kings County, for such a determination.

The Family Court correctly determined that the father willfully violated the order of support dated November 17, 2006. The father admitted at a hearing on March 9, 2007, that he had not paid any child support since 2005, which constituted prima facie evidence of a willful violation of the order of support, and shifted the burden to the father to offer competent, credible evidence of his inability to comply with the order of support (*see Family Ct Act § 454[3][a]*; *Matter of Powers v Powers*, 86 NY2d 63, 69; *Yeager v Yeager*, 38 AD3d 534; *Matter of Kainth v Kainth*, 36 AD3d 915, 916; *Matter of Jarrett v Mosslih*, 34 AD3d 808; *Matter of Teller v Tubbs*, 34 AD3d 593). The father failed to meet his burden. The evidence established, by clear and convincing evidence, that the father willfully and deliberately situated himself in a position to have limited income, and failed to demonstrate that he had made reasonable efforts to obtain gainful employment to meet his child support obligation (*see Matter of Teller v Tubbs*, 34 AD3d at 594).

The father's remaining contention is without merit.

MILLER, J.P., DICKERSON, LEVENTHAL and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court