

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

D30447
C/hu

_____AD3d_____

Submitted - February 25, 2011

WILLIAM F. MASTRO, J.P.
CHERYL E. CHAMBERS
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2010-03633
2010-03634
2010-03635

DECISION & ORDER

In the Matter of Damion R. Barrett, appellant, v
Aleshia Maxwell Barrett, respondent.
(Appeal Nos. 1 and 2)

In the Matter of Aleshia Maxwell Barrett,
respondent, v Damion R. Barrett, appellant.
(Appeal No. 3)

(Docket No. F-11731-06/09H, I)

George E. Reed, Jr., White Plains, N.Y., for appellant.

In two related support proceedings pursuant to Family Court Act article 4, the husband appeals from (1) an order of the Family Court, Westchester County (Jordan, S.M.), entered September 30, 2009, which, upon findings of fact of the same court dated September 28, 2009, made after a hearing, denied his petition for a downward modification of his spousal and child support obligations as set forth in a prior order of the same court dated January 30, 2007, (2) an order of the same court (Horowitz, J.), entered March 15, 2010, which denied his objections to the order entered September 30, 2009, and (3) an order of the same court (Horowitz, J.), entered March 17, 2010, which, upon, in effect, confirming so much of the findings of fact as found that he willfully violated the spousal and child support provisions of the order dated January 30, 2007, and recommended that he be incarcerated for a period of six months unless he purged the contempt by payment of the sum of \$7,898, directed his incarceration for a period of six months with the opportunity to purge the contempt by payment of the sum of \$7,898.

March 15, 2011

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ORDERED that the appeal from the order entered September 30, 2009, is dismissed, without costs or disbursements, as that order was superseded by the order entered March 15, 2010; and it is further,

ORDERED that the order entered March 15, 2010, is affirmed, without costs or disbursements; and it is further,

ORDERED that the order entered March 17, 2010, is affirmed, without costs or disbursements.

The Family Court properly determined that the appellant, who was required to submit specific written objections to the order of the Support Magistrate entered September 30, 2009, within 35 days after that order was mailed to him (*see* Family Ct Act § 439[e]), failed to timely submit his written objections to that order (*see Matter of Herman v Herman*, 11 AD3d 536). Under these circumstances, the Family Court properly denied the appellant's objections to the Support Magistrate's order entered September 30, 2009.

The Family Court also properly confirmed the Support Magistrate's determination that the appellant willfully failed to obey the support order (*see* Family Ct Act § 439[a]). The appellant's failure to pay support constituted prima facie evidence of a willful violation of that order (*see* Family Ct Act § 454[3][a]; *Matter of Powers v Powers*, 86 NY2d 63, 69). This prima facie showing shifted the burden to the appellant to come forward with competent, credible evidence that his failure to pay support in accordance with the terms of the support order was not willful (*see Matter of Powers v Powers*, 86 NY2d at 69-70). The appellant failed to satisfy his burden (*see Matter of Falk v Owen*, 29 AD3d 991, 991-992).

The appellant's remaining contentions are without merit.

MASTRO, J.P., CHAMBERS, LOTT and COHEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court