

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

D32447
G/kmb

_____AD3d_____

Argued - June 21, 2011

WILLIAM F. MASTRO, J.P.
CHERYL E. CHAMBERS
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2010-10865
2011-00176

DECISION & ORDER

In the Matter of Cynthia Jablonsky-Urso, appellant,
v Thomas Urso, respondent.

(Docket Nos. O-14894/10, V-14896/10)

Law Office of Alan C. Stein, P.C., Plainview, N.Y., for appellant.

Mary Ellen O'Brien, Garden City, N.Y., for respondent.

In a family offense proceeding pursuant to Family Court Act article 8 and a related custody proceeding pursuant to Family Court Act article 6, the mother appeals (1) from an order of the Family Court, Suffolk County (Burke, Ct. Atty. Ref.), dated November 8, 2010, which, in effect, granted that branch of the father's motion which was to dismiss the family offense petition for lack of subject matter jurisdiction and, in effect, for failure to state a cause of action, and vacated a temporary order of protection dated August 20, 2010, (2), as limited by her brief, from so much of an order of the same court dated December 10, 2010, as granted that branch of the father's motion which was to dismiss the custody petition for lack of subject matter jurisdiction. By decision and order on motion dated January 10, 2011, this Court, inter alia, stayed enforcement of so much of the order dated November 8, 2010, as vacated the temporary order of protection dated August 20, 2010, and directed that the provisions of that temporary order of protection remain in effect pending hearing and determination of the appeals.

ORDERED that the order dated November 8, 2010, is reversed, on the law, without costs or disbursements, the temporary order of protection dated August 20, 2010, is reinstated, that branch of the father's motion which was to dismiss the family offense petition for lack of subject matter jurisdiction is denied, and the matter is remitted to the Family Court, Suffolk County, for a fact-finding hearing and a determination of the family offense petition with respect to the allegations contained therein; and it is further,

October 4, 2011

Page 1.

MATTER OF JABLONSKY-URSO v URSO

ORDERED that the order dated December 10, 2010, is affirmed insofar as appealed from, without costs or disbursements.

Contrary to the mother's contention, the Family Court properly granted that branch of the father's motion which was to dismiss her petition for custody of the parties' son for lack of subject matter jurisdiction. Domestic Relations Law § 75-a(7) defines a child's home state as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding" (Domestic Relations Law § 75-a[7]; *see Matter of Navarrete v Wyatt*, 52 AD3d 836). Under the Uniform Child Custody Jurisdiction and Enforcement Act, "[h]ome state jurisdiction is paramount and whether to accept jurisdiction is a home state prerogative" (*Matter of Navarrete v Wyatt*, 52 AD3d at 836). Here, the Family Court properly determined that New York was not the subject child's home state and, therefore, that New York did not have jurisdiction over this custody dispute (*see* Domestic Relations Law § 76).

However, the Family Court erred in refusing to exercise temporary emergency jurisdiction over the family offense petition (*see* Domestic Relations Law § 76-c) and in summarily dismissing the family offense petition upon its finding that the allegations contained in the mother's family offense petition were insufficient to sustain a family offense.

The determination of whether a family offense was committed is a factual issue to be resolved by the hearing court (*see Matter of Hall v Hall*, 45 AD3d 842; *Matter of Pastore v Russo*, 38 AD3d 556), and the allegations asserted in a petition seeking the issuance of an order of protection must be supported by "a fair preponderance of the evidence" (Family Ct Act § 832; *see Matter of Hasbrouck v Hasbrouck*, 59 AD3d 621; *Matter of Patton v Torres*, 38 AD3d 667). The Family Court in this instance improperly determined that the mother failed to demonstrate that the father possessed the intent required to sustain any of the family offenses alleged in the petition, as it did so without the benefit of a hearing.

Based on the foregoing, that branch of the father's motion which was to dismiss the family offense petition must be denied and the matter remitted to the Family Court, Suffolk County, for a fact-finding hearing and a determination of the family offense petition with respect to the allegations contained therein.

The parties' remaining contentions are without merit or need not be reached in light of our determination.

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

ENTER: 
Matthew G. Kiernan
Clerk of the Court