

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

D33239  
N/prt

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Submitted - September 20, 2011

WILLIAM F. MASTRO, A.P.J.  
ANITA R. FLORIO  
RANDALL T. ENG  
SANDRA L. SGROI, JJ.

2010-04432

DECISION & ORDER

In the Matter of Debra McCarthy, appellant,  
v Michael McCarthy, respondent.

(Docket No. O-3290-08/10G)

Gina M. Scelta, Centerport, N.Y., for appellant.

In a family offense proceeding pursuant to Family Court Act article 8, the petitioner appeals from an order of the Family Court, Suffolk County (Burke, Ct. Atty. Ref.), dated April 8, 2010, which, without a hearing, in effect, denied her petition to modify an order of protection of the same court (Kelly, J.), dated March 26, 2009, and, in effect, for a new order of protection, and dismissed the proceeding.

ORDERED that the appeal from so much of the order dated April 8, 2010, as, in effect, denied that branch of the petition which was to modify the order of protection dated March 26, 2009, is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order dated April 8, 2010, is reversed insofar as reviewed, on the law, without costs or disbursements, that branch of the petition which was, in effect, for a new order of protection is reinstated, and the matter is remitted to the Family Court, Suffolk County, for a hearing on that branch of the petition, and a new determination thereafter.

The order of protection dated March 26, 2009, which the petitioner sought to extend by that branch of her petition which was to modify that order of protection, expired by its own terms on March 26, 2010, the date on which she filed her petition. As a result, the appeal from so much of the order dated April 8, 2010, as, in effect, denied that branch of the petition which was to modify

December 13, 2011

Page 1.

MATTER OF McCARTHY v McCARTHY

that order of protection must be dismissed as academic (*see Matter of Prehna v Prehna*, 24 AD3d 917; *Pollack v Pollack*, 260 AD2d 562). However, since the Family Court was authorized to issue a new order of protection upon finding that the respondent had willfully violated the order of protection dated March 26, 2009, as well as prior orders of protection (*see* Family Ct Act § 846-a; *Matter of Spillman v Spillman*, 40 AD3d 770), and since the petitioner alleged such violations in support of her petition, it was error for the Family Court to summarily deny that branch of her petition which was, in effect, for a new order of protection, and to dismiss the proceeding (*see Matter of Czaban v Czaban*, 44 AD3d 937). Accordingly, that branch of the petition must be reinstated and the matter remitted to the Family Court, Suffolk County, for a hearing on that branch of the petition, and a new determination thereafter.

MASTRO, A.P.J., FLORIO, ENG and SGROI, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court