

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1352

CAF 11-02134

PRESENT: CENTRA, J.P., FAHEY, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF HEIDI BARKSDALE,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFERY M. GORE, SR., RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT.

STEPHEN D. MILLER, OLEAN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered October 14, 2011 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, sentenced respondent to four months in jail.

It is hereby ORDERED that said appeal from the order insofar as it concerns commitment to jail is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Respondent appeals from an order confirming the determination of the Support Magistrate that respondent had willfully violated a prior child support order and that committed him to a four-month jail term. We affirm the order with respect to the willful violation of the support order. "There is a presumption that a respondent has sufficient means to support his or her . . . minor children . . . , and the evidence that respondent failed to pay support as ordered constitutes 'prima facie evidence of a willful violation' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452, quoting Family Ct Act § 454 [3] [a]; see *Matter of Jelks v Wright*, 96 AD3d 1488, 1489). Consequently, the evidence submitted by petitioner that respondent failed to pay support as set forth in the prior order was sufficient to establish that he willfully violated that prior order. Thus, the burden shifted to respondent to submit "some competent, credible evidence of his inability to make the required payments" (*Matter of Powers v Powers*, 86 NY2d 63, 70; see *Jelks*, 96 AD3d at 1489). Respondent did not present evidence establishing that he made reasonable efforts to obtain gainful employment to fulfill his support obligation, and he therefore failed to meet that burden (see *Jelks*, 96 AD3d at 1489; *Matter of Hunt v Hunt*, 30 AD3d 1065, 1065).

Respondent's contention that a jail term was improperly imposed is moot inasmuch as that part of the order with regard to the

commitment has expired by its own terms (see *Matter of Alex A.C. [Maria A.P.]*, 83 AD3d 1537, 1538; *Matter of Lomanto v Schneider*, 78 AD3d 1536, 1537). We therefore dismiss respondent's appeal from that part of the order (see *Alex A.C.*, 83 AD3d at 1538).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court