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

1471

CAF 09-02459

PRESENT: MARTOCHE, J.P., SMITH, FAHEY, PERADOTTO, AND GREEN, JJ.

IN THE MATTER OF MARK S. THREET,
PETITIONER-RESPONDENT,

V   MEMORANDUM AND ORDER

REGINA M. THREET, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 26, 2009 in a proceeding pursuant to Family Court Act article 8. The order of protection directed respondent to refrain from offensive conduct against petitioner and the parties' child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent contends in this proceeding pursuant to Family Court Act article 8 that Family Court erred in determining that respondent committed a family offense against petitioner. We reject that contention. Although respondent appeals from the fact-finding order rather than from the order of protection issued following the dispositional hearing, we nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the order of protection, which constitutes an order of disposition pursuant to Family Court Act § 841 (d) (*see Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188; *see also* CPLR 5520 [c]). The court's "assessment of the credibility of the witnesses is entitled to great weight, and the record supports the court's finding that petitioner was a more credible witness than respondent" (*Danielle S.*, 41 AD3d at 1189). The record also supports the court's determination that petitioner met his burden of establishing by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree (*see* Penal Law § 240.26 [1]) and thus that an order of protection in favor of petitioner was warranted (*see* Family Ct Act § 812 [1]).

Entered: December 30, 2010   Patricia L. Morgan
                                               Clerk of the Court