

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

Matthews v. Matthews

56 A.D.2d 1268 · Decided November 21, 2008

SUMMARY

The appellate court reversed an order denying the father's motion to vacate a prior custody order entered upon his default. It held that the father was deprived of his statutory right to counsel under Family Court Act § 262 because his repeated requests for assigned counsel were ignored and there was no evidence that he waived that right. The matter was remitted for further proceedings, and the court also criticized the imposition of a \$500 donation as a condition of avoiding dismissal.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Fourth Department
WRITING FOR THE COURT	Scudder, P.J.; Martoche, J.; Lunn, J.; Peradotto, J.; Green, J.
JURISDICTION	New York
DECIDED	November 21, 2008
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Respondent father appealed an order of Family Court dismissing his motion to vacate a prior custody order entered upon his default.
PRECEDENTIAL VALUE	published
PARTIES	Respondent father v. Petitioner mother

TOPICS

- family law procedure
- child custody
- default
- sanctions
- appellate procedure

PRACTICE AREAS

- family law
- civil procedure
- appellate procedure

QUESTIONS PRESENTED

- Whether the father's motion to vacate a custody order entered upon his default should have been granted because he was deprived of his statutory right to appointed counsel under Family Court Act § 262.

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2. Whether Family Court improperly conditioned dismissal of the motion on a \$500 donation without prior notice or an opportunity for the father to present evidence concerning his ability to pay.

HOLDINGS

1. A default custody order must be vacated when the respondent was entitled to appointed counsel under Family Court Act § 262, repeatedly requested counsel, and there is no evidence that he waived that right.
2. A sanction requiring payment of \$500 cannot be sustained where the respondent received no prior notice and no opportunity to present evidence concerning his ability to pay.

FACTUAL BACKGROUND

The father did not personally appear in court but made multiple requests for assignment of an attorney, which were ignored. He asserted that he was indigent, lived in Vermont, and had only a bicycle for transportation, and that he was not permitted to appear by telephone. Family Court dismissed his motion to vacate the default custody order and required a \$500 donation to Vera House in lieu of attorney's fees.

PROCEDURAL HISTORY

Family Court, Onondaga County, entered a custody order awarding custody of the parties' children to the mother upon the father's default. The father moved to vacate that order, asserting indigence, lack of transportation, repeated requests for appointed counsel, and inability to appear by telephone. Family Court dismissed the motion, conditioned dismissal with prejudice on a \$500 donation to Vera House, and the father appealed. The Appellate Division reversed, granted the motion, vacated the December 4, 2006 order, and remitted for further proceedings on the petition.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The motion to vacate was granted, the order entered December 4, 2006 was vacated, and the matter was remitted to Family Court, Onondaga County, for further proceedings on the petition. The order entered March 22, 2006 was to remain in effect pending a new determination.

CASES CITED

- Matter of Arlene R. v. Wynette G., 37 A.D.3d 1044, 1044-1045 (2007)
- Matter of Ross v. Padova, 123 A.D.2d 381, 384 (1986)

OPINION

PER CURIAM.

Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered June 4, 2007 in a proceeding pursuant to Family Court Act article 6. The order dismissed the

motion of respondent to vacate a prior custody order. It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the order entered December 4, 2006 is vacated and the matter is remitted to Family Court, Onondaga County, for further proceedings on the petition.

Memorandum: Respondent father contends that his motion to vacate an order awarding custody of the parties' children to petitioner mother upon his default should have been granted. We agree. As the father correctly contends, he was deprived of his right to counsel pursuant to Family Court Act § 262 because, although he did not personally appear in court, it is undisputed *1269that he made multiple requests for the assignment of an attorney and his requests were ignored.

Indeed, in support of his motion to vacate the order entered upon his default, the father asserted that he was indigent and was living in Vermont, and that his only means of transportation was a bicycle. He further asserted that he was not permitted to appear by way of the telephone.

In the absence of any evidence in the record before us that the father waived the right to an attorney, reversal is required (see *Matter of Arlene R. v Wynette G.*, 37 AD3d 1044, 1044-1045 [2007]). We note that, pending a new determination, the order entered March 22, 2006 remains in effect.

We note in addition that the Referee erred in ordering that the father's motion would be dismissed "with [prejudice]" unless the father made a donation in the amount of \$500 to the Vera House, in lieu of attorney's fees.

The mother had no attorney's fees because she had assigned counsel, and thus it is unclear on the record before us whether the payment was ordered as a sanction. In any event, "the manner in which the award was made would require its reversal" inasmuch as there was no prior notice to the father nor was he afforded the opportunity to submit any evidence with respect to his ability to pay that amount (see generally *Matter of Ross v Padova*, 123 AD2d 381, 384 [1986]).

Present—Scudder, P.J., Martoche, Lunn, Peradotto and Green, JJ.