

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.

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)