

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on August 24, 2018.

PRESENT: Hon. David Friedman Justice Presiding,
Barbara R. Kapnick
Marcy L. Kahn
Ellen Gesmer
Cynthia S. Kern, Justices.

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In the Matter of a Proceeding under
Article 6 of the Family Court Act.

Nicholas Wayne Vitucci,
Petitioner,

-against-

M-4101
Docket No. V-08793-18/18A

Mehrak Radparver,
Respondent.

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Respondent mother having moved for leave to appeal from the interim order of the Family Court, Bronx County, entered on or about May 4, 2018, which continued an earlier order of custody and visitation on consent by the Family Court, Westchester County dated January 23, 2012, and a modification order dated April 9, 2018,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied in its entirety.

All concur except Gesmer, J., who dissents as follows:

GESMER, J. (dissenting)

I respectfully dissent and would grant petitioner's motion for leave to appeal the order of May 4, 2018, as it would be an appropriate exercise of our discretion to do so (Family Ct Act § 1112). First, the motion was unopposed, even though both the father's attorney and the child's attorney were served. Second, to the extent that the motion is denied on the basis that the Notice of Appeal was not timely, there is no indication of this

in the record before us, and by denying the motion on that basis, we deprive petitioner of the opportunity to show that it was timely. Third, the May 4 order appears to be in derogation of the mother's rights as the child's sole legal custodian, in that it directed the mother to enroll the child at a particular school. Finally, the fact that a trial is scheduled to commence on August 24 is not a reason to deny the motion, as the commencement of the trial will not necessarily give the mother timely relief.

ENTERED: August 24, 2018


DEPUTY CLERK