

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - December 2, 2008

WILLIAM F. MASTRO, J.P.
HOWARD MILLER
DANIEL D. ANGIOLILLO
EDWARD D. CARNI, JJ.

2008-03631

DECISION & ORDER

In the Matter of Daniel Barnette, respondent,
v Taniesha Blair, appellant.

(Docket No. V-1453-03)

David Bliven, White Plains, N.Y., for appellant.

Richard J. Strassfield, White Plains, N.Y., for respondent.

Lisa Goldman, White Plains, N.Y. (Neal D. Futerfas of counsel), attorney for the child.

In a child custody proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Westchester County (Horowitz, J.), entered March 7, 2008, which, without a hearing, upon a finding that she had failed to comply with a certain provision of an order of the same court entered April 6, 2007, granted the father's petition for custody of the subject child.

ORDERED that the order entered March 7, 2008, is reversed, on the law and the facts, with costs, the petition is denied, custody of the subject child is restored to the mother, and the proceeding is dismissed.

The subject child was born on February 15, 1998, and by stipulation dated May 21, 2003, the parties agreed that the mother would have custody of the child, with liberal visitation to the father. Thereafter, the Family Court issued an order of custody and visitation entered April 6, 2007,

December 23, 2008

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which, in relevant part, directed the mother to relocate with the child to an address within a 40-mile radius of the father's residence.

After the mother relocated with the child to a residence 39.9 miles from the father's home, the Family Court found that the mother had failed to comply with the 40-mile radius provision in the order entered April 6, 2007. Upon this finding, the Family Court, in an order entered March 7, 2008, without a hearing, awarded custody of the child to the father.

The Family Court's finding was erroneous and in contravention of its acknowledgment, in open court and in other orders of the same court, that the mother complied with the order entered April 6, 2007, by relocating to a residence within the 40-mile radius (*see Potier v Potier*, 198 AD2d 180). Accordingly, the instant petition should have been denied and the proceeding should have been dismissed.

MASTRO, J.P., MILLER, ANGIOLILLO and CARNI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court