

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

D24287  
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Submitted - June 19, 2009

WILLIAM F. MASTRO, J.P.  
FRED T. SANTUCCI  
RANDALL T. ENG  
PLUMMER E. LOTT, JJ.

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2008-04766  
2008-04770

DECISION & ORDER

In the Matter of Philip Benincasa, Jr., appellant,  
v Deana M. Benincasa, respondent.  
(Proceeding No. 1)

In the Matter of Deana M. Benincasa, respondent, v  
Philip Benincasa, Jr., appellant.  
(Proceeding No. 2)

(Docket Nos. V-3264/03, O-3783-07)

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John R. Lewis, Sleepy Hollow, N.Y., for appellant.

Kalman D. Rothman, Nanuet, N.Y., for respondent.

Christopher Widholm, New City, N.Y., attorney for the child.

In a family offense proceeding pursuant to Family Court Act article 8, and a related proceeding pursuant to Family Court Act article 6, Philip Benincasa, Jr., appeals (1) from an order of protection of the Family Court, Rockland County (Warren, J.), dated May 1, 2008, which, after a hearing, upon, in effect, finding that he committed the family offense of harassment in the second degree and granting the family offense petition, is in favor of Deana M. Benincasa and against him for a period of two years, and (2), as limited by his brief, from so much of an order of the same court, also dated May 1, 2008, as, after a hearing, denied that branch of his petition which was to modify certain visitation provisions contained in an order of the same court dated September 20, 2007.

September 8, 2009

Page 1.

MATTER OF BENINCASA v BENINCASA  
MATTER OF BENINCASA v BENINCASA

ORDERED that the order of protection is reversed, on the law, without costs or disbursements, the family offense petition is denied, and that proceeding is dismissed; and it is further,

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

Since the record does not support the Family Court's determination that the appellant committed the family offense of harassment in the second degree, the order of protection must be reversed, the family offense petition denied, and that proceeding dismissed (*see* Penal Law § 240.26[3]; Family Ct Act §§ 812[1]; 832; 841; *Matter of Hasbrouck v Hasbrouck*, 59 AD3d 621; *Matter of Patton v Torres*, 38 AD3d 667, 668; *Matter of Cavanaugh v Madden*, 298 AD2d 390, 391-392).

The appellant, however, failed to demonstrate that a change of the location where he picks up and drops off the parties' child for visitation would be in the best interests of the child (*see Matter of Wilson v McGlinchey*, 2 NY3d 375, 380-381; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 95). Accordingly, the Family Court properly denied that branch of his petition which was to modify certain visitation provisions of the order dated September 20, 2007, regarding the location of the visitation exchange.

MASTRO, J.P., SANTUCCI, ENG and LOTT, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court