

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

D25352
W/prt

_____AD3d_____

Submitted - November 10, 2009

STEVEN W. FISHER, J.P.
DANIEL D. ANGIOLILLO
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2009-05023

DECISION & ORDER

In the Matter of Kevin J. Ross, appellant,
v Kristi S. Ross, respondent.

(Docket Nos. V-930-05, V-931-05, V-1924-05,
V-1925-05)

Stern & Rindner, Goshen, N.Y. (Mark D. Stern of counsel), for appellant.

Bloom & Bloom, P.C., New Windsor, N.Y. (Peter E. Bloom of counsel), for
respondent.

Catherine A. Sheridan, Carle Place, N.Y., attorney for the children.

In related child custody proceedings pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Orange County (Kiedaisch, J.), entered April 16, 2009, which, without a hearing, granted the mother's motion to dismiss his petition to modify an order of custody and visitation of the same court dated April 21, 2006, awarding sole legal custody of the parties' children to the mother.

ORDERED that the order entered April 16, 2009, is reversed, on the law, without costs or disbursements, the motion is denied, and the matter remitted to the Family Court, Orange County, for a hearing and a determination on the petition thereafter.

"In order to modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances so that modification is required to protect the best interests of

December 8, 2009

Page 1.

MATTER OF ROSS v ROSS

the child” (*Matter of Fallarino v Ayala*, 41 AD3d 714, 714; *see Matter of Strand-O’Shea v O’Shea*, 32 AD3d 398; *Scheuring v Scheuring*, 27 AD3d 446, 447; *Matter of Heuthe v McLaren*, 1 AD3d 514). The best interests of the child are determined by a review of the totality of the circumstances (*see Eschbach v Eschbach*, 56 NY2d 167, 171; *Matter of Fallarino v Ayala*, 41 AD3d at 714-715). Willful interference with a noncustodial parent’s right to visitation is so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [offending party] is unfit to act as a custodial parent (*see Matter of Gurewich v Gurewich*, 58 AD3d 628, 629; *Matter of Joosten v Joosten*, 282 AD2d 748; *Entwistle v Entwistle*, 61 AD2d 380, 384-385). A parent seeking a change of custody is not automatically entitled to a hearing, but must make some evidentiary showing of a change in circumstances sufficient to warrant a hearing (*see Matter of Hongach v Hongach*, 44 AD3d 664; *Matter of Miller v Lee*, 225 AD2d 778).

The Family Court erred in granting the mother’s motion to dismiss the father’s petition to modify a prior order of custody and visitation awarding her sole legal custody of the parties’ children, as the father alleged a change of circumstances sufficient to warrant a hearing (*see Matter of Gurewich v Gurewich*, 58 AD3d at 629; *Matter of Darla N. v Christine N.*, 289 AD2d 1012; *cf. Matter of Davies v Davies*, 223 AD2d 884, 885-887).

FISHER, J.P., ANGIOLILLO, LOTT and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court