

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

D30494
C/prt

_____AD3d_____

Submitted - March 1, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
ROBERT J. MILLER, JJ.

2010-00920

DECISION & ORDER

In the Matter of Michelle Perez, respondent,
v Andy F. Estevez, appellant.

(Docket No. V-8995-09)

Kent V. Moston, Hempstead, N.Y. (Jeremy L. Goldberg and David A. Bernstein of counsel), for appellant.

Gail M. Berkowitz, Northport, N.Y., for respondent.

Roberta Fox, Sea Cliff, N.Y., attorney for the child.

In a child custody proceeding pursuant to Family Court Act article 6, the father appeals, as limited by his brief, from so much of an order of the Family Court, Nassau County (Eisman, J.), dated December 15, 2009, as, without a hearing, awarded the mother sole legal and residential custody of the subject child.

ORDERED that the order is reversed insofar as appealed from, on the law, without costs or disbursements, and the matter is remitted to the Family Court, Nassau County, for an evidentiary hearing on the issue of custody and for a new determination on the petition thereafter; and it is further,

ORDERED that pending the hearing and new determination, the subject child shall remain in the sole custody of the mother, and the provisions of the order dated December 15, 2009, regarding telephone contact between the father and the subject child shall remain in effect.

March 22, 2011

MATTER OF PEREZ v ESTEVEZ

Page 1.

“[A]s a general rule, it is error as a matter of law to make an order respecting custody based upon controverted allegations without the benefit of a full hearing” (*Matter of Khan v Dolly*, 6 AD3d 437, 439; *see Matter of Peek v Peek*, 79 AD3d 753; *Matter of Klang v Klang*, 235 AD2d 476; *see also Matter of Garcia v Ramos*, 79 AD3d 872). “Since the court has an obligation to make an objective and independent evaluation of the circumstances, a custody determination should be made only after a full and fair hearing at which the record is fully developed” (*Matter of Peek v Peek*, 79 AD3d at 754 [internal citation omitted]). However, “it is not necessary to conduct such a hearing where the court already possesses sufficient relevant information to render an informed determination in the child’s best interest” (*Matter of Feldman v Feldman*, 79 AD3d 871, 871; *cf. Matter of Peek v Peek*, 79 AD3d 753).

Under the circumstances of this case, the Family Court lacked sufficient information to render an informed determination as to the child’s best interest, and thus, the matter must be remitted to the Family Court, Nassau County, for an evidentiary hearing (*see Matter of Peek v Peek*, 79 AD3d 753; *Matter of Khan v Dolly*, 6 AD3d at 439). The fact that the father was incarcerated at the time that the Family Court made its determination was an insufficient basis to award sole custody to the mother without first affording the father the benefit of a hearing (*see Matter of Deputy-Wade v Wade*, 298 AD2d 655, 656; *Matter of D’Entremont v D’Entremont*, 254 AD2d 576, 576-577).

The parties’ remaining contentions have been rendered academic in light of our determination or are without merit.

ANGIOLILLO, J.P., FLORIO, BELEN and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court