

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

D32784
N/prt

_____AD3d_____

Submitted - October 18, 2011

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2010-09545

DECISION & ORDER

In the Matter of Tyrell Johnson, respondent,
v Taray Lee, appellant.

(Docket No. V-33971-09)

Lewis S. Calderon, Jamaica, N.Y., for appellant.

Etta Ibok, Brooklyn, N.Y., for respondent.

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Kings County (O'Shea, J.), dated September 14, 2010, which denied her motion to vacate an order of the same court dated February 11, 2010, which, upon her default in appearing, awarded custody of the subject child to the father.

ORDERED that the order dated September 14, 2010, is reversed, on the facts and in the exercise of discretion, without costs or disbursements, the mother's motion to vacate the order dated February 11, 2010, is granted, the order dated February 11, 2010, is vacated, and the matter is remitted to the Family Court, Kings County, for further proceedings on the petition.

A party seeking to vacate a default must establish a reasonable excuse for the default and a potentially meritorious defense (*see* CPLR 5015[a][1]; *Matter of Dellagatta v McGillicuddy*, 31 AD3d 549, 550; *Matter of Oliphant v Oliphant*, 21 AD3d 376; *Matter of Butterworth v Sperber*, 6 AD3d 530). However, the general rule with respect to opening defaults in civil actions "is not to be rigorously applied to cases involving child custody" (*Gorsky v Gorsky*, 148 AD2d 674, 674; *see Ito v Ito*, 73 AD3d 983; *D'Alleva v D'Alleva*, 127 AD2d 732, 734).

November 1, 2011

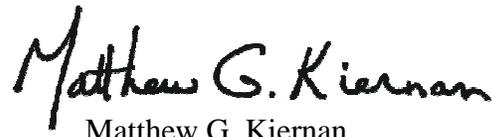
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Under the circumstances presented, and recognizing that the law favors resolution on the merits in child custody proceedings (*see Matter of Lee v Morgan*, 67 AD3d 681; *Matter of Pinto v Putnam County Support Collection Unit*, 295 AD2d 350, 351; *Matter of Tauber v Tauber*, 152 AD2d 674), the Family Court should have granted the mother's motion to vacate the custody order entered upon her default in appearing. Accordingly, we reverse the order appealed from and remit the matter to the Family Court, Kings County, for further proceedings on the petition.

RIVERA, J.P., ENG, BELEN and AUSTIN, 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