

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

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_____AD3d_____

Submitted - September 7, 2012

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2011-05437
2011-05868

DECISION & ORDER

In the Matter of Erik Dowgiallo, appellant, v Kellie
Williams, respondent.

(Docket Nos. V-4325-10/11E, O-2359-11)

Robin N. Guttman, Melville, N.Y., for appellant.

Tor Jacob Worsoe, Jr., Holtsville, N.Y., for respondent.

Rachel A. Camillery, Babylon, N.Y., attorney for the child.

In related proceedings pursuant to Family Court Act articles 6 and 8, the father appeals from (1) an order of the Family Court, Suffolk County (Lechtrecker, Ct. Atty. Ref.), dated May 2, 2011, which, without a hearing, vacated a temporary order of protection and dismissed his family offense petition, and (2) an order of the same court dated June 1, 2011, which, without a hearing, dismissed his petition to modify a prior order of custody of the same court dated November 24, 2010, so as to award him sole residential custody of the subject child.

ORDERED that the orders dated May 2, 2011, and June 1, 2011, are affirmed, without costs or disbursements.

The Family Court properly vacated a temporary order of protection and dismissed the father's family offense petition against the mother, without a hearing, as the petition failed to allege conduct by the mother that would constitute disorderly conduct or reckless endangerment (*see* Family Ct Act §§ 812[1]; 832; *Matter of Davis v Venditto*, 45 AD3d 837, 838; *Matter of Jones v Roper*, 187 AD2d 593).

Further, the Family Court providently exercised its discretion in dismissing, without

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a hearing, the father's petition to modify an existing custody order so as to award him sole residential custody of the subject child. The father was required to make "some evidentiary showing sufficient to warrant a hearing" based upon a subsequent change of circumstances (*Matter of Mennuti v Berry*, 59 AD3d 625, 625), "such that a modification is necessary to ensure the continued best interests and welfare of the child" (*Matter of Leichter-Kessler v Kessler*, 71 AD3d 1148, 1149; see *Matter of Jean v Washington*, 71 AD3d 1145, 1146), and the father failed to do so.

The father's remaining contentions are not properly before this Court.

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

ENTER:


Aprilanne Agostino
Clerk of the Court