

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

D36662
T/kmb

_____AD3d_____

Submitted - October 16, 2012

REINALDO E. RIVERA, J.P.
CHERYL E. CHAMBERS
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2012-00893

DECISION & ORDER

In the Matter of Heather J. Cummings,
respondent, v Neil Rosoff, appellant.
(Proceeding Nos. 1, 2, 3)

In the Matter of Neil Rosoff, appellant,
v Heather J. Cummings, respondent.
(Proceeding Nos. 4, 5)

(Docket Nos. O-195/11, V-197-11, V-198-11,
V-440-11, V-441-11)

Bruce A. Petito, Poughkeepsie, N.Y., for appellant.

Lieberman & LeBovit, Yorktown Heights, N.Y. (Mitchell Lieberman of counsel), for
respondent.

In four related custody and visitation proceedings pursuant to Family Court Act article 6, and a related family offense proceeding pursuant to Family Court Act article 8, the father appeals from an order of the Family Court, Dutchess County (Posner, J.), dated December 12, 2011, which denied his motion to vacate (1) an order of the same court dated March 14, 2011, awarding custody of the subject children to the mother with supervised visitation to him upon his default in appearing for a scheduled court date, (2) an order of the same court, also dated March 14, 2011, dismissing his petition for custody upon his default in appearing for a scheduled court date, and (3) an order of protection of the same court, also dated March 14, 2011, in effect, upon a finding that he committed the family offenses of harassment in the first degree and harassment in the second degree, made upon his default in appearing for a scheduled court date, inter alia, directing him to stay away from the mother and the subject children for a period of two years except for supervised visitation.

December 5, 2012

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ORDERED that the order dated December 12, 2011, is reversed, on the facts and in the exercise of discretion, without costs or disbursements, the father's motion to vacate the orders and the order of protection dated March 14, 2011, is granted, the orders and the order of protection dated March 14, 2011, are vacated, and the matter is remitted to the Family Court, Dutchess County, for further proceedings on the petitions.

“A party seeking to vacate an order entered upon his or her default is required to demonstrate a reasonable excuse for the default and the existence of a potentially meritorious cause of action or defense” (*Matter of Lorraine D. v Widmack C.*, 79 AD3d 745, 745; *see* CPLR 5015[a]; *Matter of Mongitore v Linz*, 95 AD3d 1130; *Matter of Jurow v Cahill*, 56 AD3d 559, 559-560). However, “the law favors resolution on the merits in child custody proceedings,” and thus the “general rule with respect to opening defaults in civil actions is not to be rigorously applied to cases involving child custody” (*Matter of Johnson v Lee*, 89 AD3d 733, 733 [internal quotation marks omitted]; *see Lueders v Boma-Lueders*, 85 AD3d 1130, 1131; *Ito v Ito*, 73 AD3d 983).

Under the particular circumstances presented here, and in light of the policy favoring resolutions on the merits in child custody proceedings, the Family Court improvidently exercised its discretion in denying the father's motion to vacate his default.

RIVERA, J.P., CHAMBERS, HALL and LOTT, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court