

44 A.D.3d 1114, 844 N.Y.S.2d 450, 2007 N.Y. Slip Op. 07784  
(Cite as: 44 A.D.3d 1114, 844 N.Y.S.2d 450)

Supreme Court, Appellate Division, Third Department, New York.

In the Matter of Wendy HOHENFORST, Formerly Known as Wendy DeMagistris, Respondent,

v.

Thomas DeMAGISTRIS, Appellant.  
(And Two Other Related Proceedings.).

Oct. 18, 2007.


**Background:** Mother brought action against father, alleging that father had violated temporary order of protection, and seeking sole legal and physical custody of their children and a permanent order of protection. The Family Court, Fulton County, Jung, J., denied father's motion to vacate default judgment entered against him, and he appealed.

**Holdings:** The Supreme Court, Appellate Division, Peters, J., held that:

- (1) father was denied his statutory right to counsel, and, thus, entry of default judgment against him was not warranted, and
- (2) entry of default judgment deprived father of due process.

Reversed and remitted.

West Headnotes

**[1] Judgment 228**  **143(2)**

228 Judgment


228IV By Default

228IV(B) Opening or Setting Aside Default

228k143 Excuses for Default

228k143(2) k. Necessity for Excuse.

Most Cited Cases

**Judgment 228**  **145(2)**

228 Judgment

228IV By Default

228IV(B) Opening or Setting Aside Default  
228k145 Meritorious Cause of Action or Defense

228k145(2) k. Necessity for Showing Meritorious Cause of Action or Defense. Most Cited Cases

A party seeking to vacate a default judgment must establish both a reasonable excuse for the default and a meritorious defense to the underlying claim, but such a showing is not necessary when there was never a genuine default and there was a denial of a party's fundamental right to due process. U.S.C.A. Const.Amend. 14.

**[2] Attorney and Client 45**  **76(1)**

45 Attorney and Client

45II Retainer and Authority

45k76 Termination of Relation

45k76(1) k. Act of Parties. Most Cited Cases

Father was denied his statutory right to counsel in mother's proceedings alleging that father had violated temporary order of protection, and seeking sole legal and physical custody of their children and a permanent order of protection, and, thus, entry of default judgment against father was not warranted, where his counsel withdrew without providing requisite notice. McKinney's CPLR 321(b)(2); McKinney's Family Court Act § 262(a).


**[3] Child Custody 76D**  **500**

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk500 k. In General. Most Cited Cases

**Child Custody 76D**  **923(1)**

76D Child Custody

76DXIII Appeal or Judicial Review

76Dk913 Review

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76Dk923 Harmless Error  
76Dk923(1) k. In General. Most Cited  
Cases

**Constitutional Law 92 ↪4396**

92 Constitutional Law  
92XXVII Due Process  
92XXVII(G) Particular Issues and Applications  
92XXVII(G)18 Families and Children  
92k4396 k. Child Custody, Visitation,  
and Support. Most Cited Cases  
(Formerly 62k21, 62k20 Breach of the Peace)

**Constitutional Law 92 ↪4488**

92 Constitutional Law  
92XXVII Due Process  
92XXVII(G) Particular Issues and Applications  
92XXVII(G)25 Other Particular Issues  
and Applications  
92k4488 k. Orders for Protection.  
Most Cited Cases  
(Formerly 62k21, 62k20 Breach of the Peace)

**Protection of Endangered Persons 315P ↪106**

315P Protection of Endangered Persons  
315PII Security or Order for Peace or Protection  
315PII(E) Violations, Contempt, and Conviction  
315Pk102 Proceedings in General  
315Pk106 k. Hearing and Determination.  
Most Cited Cases  
(Formerly 62k21, 62k20 Breach of the Peace)  
Family Court's failure to advise father of his statutory  
right to counsel in mother's proceedings alleging that  
he had violated temporary order of protection, and  
seeking sole legal and physical custody of their  
children and a permanent order of protection,  
deprived father of his right to due process,  
warranting reversal and remittal of the matter for  
a new hearing. U.S.C.A. Const.Amend. 14; McKin-

ney's Family Court Act § 262(a).

**[4] Attorney and Client 45 ↪76(1)**

45 Attorney and Client  
45II Retainer and Authority  
45k76 Termination of Relation  
45k76(1) k. Act of Parties. Most Cited  
Cases

An attorney's purported withdrawal without proof  
that reasonable notice was given is ineffective, and  
a default judgment entered thereon is deemed im-  
proper. McKinney's CPLR 321(b)(2).

**[5] Prisons 310 ↪310**

310 Prisons  
310II Prisoners and Inmates  
310II(H) Proceedings  
310k307 Actions and Litigation  
310k310 k. Presence or Appearance.  
Most Cited Cases  
(Formerly 98k6)

Even an incarcerated parent has a right to be heard  
on matters concerning his child, when there is  
neither a willful refusal to appear nor a waiver of  
appearance.  
\*\*451 Elmer Robert Keach III, Amsterdam, for  
appellant.

Livingston L. Hatch, Plattsburgh, for respondent.

Ian R. Arcus, Law Guardian, Albany.

Before: MERCURE, J.P., PETERS, SPAIN,  
CARPINELLO and KANE, JJ.

PETERS, J.

\*1114 Appeal from an order of the Family Court of  
Fulton County (Jung, J.), entered September 28,  
2005, which, in three proceedings pursuant to Fam-  
ily Ct. Act articles 6 and 8, denied respondent's mo-  
tion to vacate a default judgment entered against

him.

Petitioner and respondent are the parents of two children (born in 1989 and 1992). Prior to their divorce in June 2004, petitioner was granted temporary legal and physical custody of the children and a temporary order of protection was issued against respondent. In September 2004, petitioner sought sole legal and physical custody of the children by alleging, among other things, that respondent violated the temporary order of protection. Shortly thereafter, petitioner filed a separate violation petition, later amended to allege, among other things, that respondent made threats towards her and her family in violation of the temporary order of protection. For that reason, she further sought a permanent order of protection. Respondent filed two family offense petitions.

Only hours before a March 3, 2005 proceeding concerning all of these petitions, respondent allegedly verbally threatened petitioner's counsel in the hallway of Family Court. Upon overhearing such threats, a court officer arrested respondent \*1115 and placed him in a holding center down the hall. At the hearing before Family Court, respondent's counsel, petitioner and her counsel, as well as the Law Guardian, appeared. After Family Court reviewed the circumstances underlying respondent's arrest that morning, his counsel moved to withdraw his representation without indicating to the court that he had informed respondent of his intent to do so. With no objection by either petitioner's counsel or the Law Guardian, Family Court granted such motion. Petitioner's counsel also moved to be relieved. After ensuring that petitioner did not object to her counsel's withdrawal and that she wanted to go forward with the proceeding, Family Court granted that motion.

The Law Guardian successfully moved to dismiss the petitions filed by respondent, with prejudice, for a failure to prosecute. As to the remaining petitions, a brief inquest was held wherein the Law Guardian

merely confirmed with petitioner that "all [of] the allegations contained in [the] petition [were] true." The Law Guardian thereafter referenced a previously\*\*452 stipulated forensic evaluation of the parties to support her recommendation that petitioner be granted sole legal and physical custody, with no visitation to respondent. With respect to the violation petitions, the Law Guardian requested a "stay away" order of protection for three years and that respondent be found in willful violation, warranting a sentence of 180 days for each violation. A warrant and order of commitment was then issued by Family Court. A subsequent custody order, prepared by the Law Guardian, found respondent in default, mirroring the custody position as well as the resolution of the violation petitions made by the Law Guardian.<sup>FN1</sup>

FN1. Although not part of the record on appeal, respondent commenced a proceeding for a writ of habeas corpus in August 2005, challenging the legality of the warrant and orders of commitment issued by Family Court. Supreme Court (Sise, J.) granted the petition, immediately released respondent and, according to respondent, ordered him to file a motion to vacate the default judgment entered by Family Court.

In September 2005, respondent filed a motion, upon his attorney's affirmation, seeking to vacate the default judgment and the recusal of Judge Jung from all further proceedings. By decision and order entered September 28, 2005, Family Court denied the recusal motion as well as respondent's motion to vacate upon a finding that the proffer failed to set forth a meritorious defense to the petitions.<sup>FN2</sup> Respondent appeals and we reverse.

FN2. Nearly a year after his filing of his notice of appeal, respondent moved, pursuant to CPLR 2221(e), to renew his motion to vacate the default judgment and requested that Judge Jung recuse himself. That

motion was denied.

[1] \*1116 “A party seeking to vacate a default judgment must establish both a reasonable excuse for the default and a meritorious defense to the underlying claim” (*Trim v. Trim*, 21 A.D.3d 1203, 1204, 801 N.Y.S.2d 417 [2005] [citations omitted]; see *Matter of Taylor v. Staples*, 33 A.D.3d 1089, 1090, 822 N.Y.S.2d 649 [2006], *lv. dismissed and denied* 8 N.Y.3d 830, 828 N.Y.S.2d 290, 861 N.E.2d 106 [2007] ), but such a showing is not necessary where, as here, there was never a genuine default and there was a denial of a party's fundamental right to due process (see *Matter of Cleveland W.*, 256 A.D.2d 1151, 1152, 684 N.Y.S.2d 121 [1998]; *Matter of James R.*, 238 A.D.2d 962, 962-963, 661 N.Y.S.2d 160 [1997] ).

[2][3][4][5] An attorney of record may withdraw as counsel only upon notice to his or her client (see CPLR 321[b][2]; *Matter of Dunn [Brackett]*, 205 N.Y. 398, 403, 98 N.E. 914 [1912]; *Birky v. Katsilogiannis*, 37 A.D.3d 631, 632, 830 N.Y.S.2d 753 [2007]; *Matter of Kindra B.*, 296 A.D.2d 456, 458, 745 N.Y.S.2d 74 [2002]; *Matter of Williams v. Lewis*, 258 A.D.2d 974, 974, 685 N.Y.S.2d 382 [1999] ). Here, there is no indication that respondent's counsel ever informed him, prior or during his incarceration in Family Court, that he was seeking to withdraw as counsel. “A purported withdrawal without proof that reasonable notice was given is ineffective” (*Matter of Williams v. Lewis*, 258 A.D.2d at 974, 685 N.Y.S.2d 382 [citations omitted]; see *Matter of Meko M.*, 272 A.D.2d 953, 954, 708 N.Y.S.2d 787 [2000] ) and a default judgment entered thereon has been deemed improper (see *Matter of Williams v. Lewis*, 258 A.D.2d at 974, 685 N.Y.S.2d 382; compare *Matter of Hermann v. Chakurmanian*, 243 A.D.2d 1003, 1004, 663 N.Y.S.2d 413 [1997] ). The absence of evidence that respondent was put on notice of his counsel's intent to withdraw his representation in accordance with the mandates of CPLR 321(b)(2) rendered \*\*453 Family Court's determination that respondent

was in “default” improper. When Family Court then conducted an inquest, ultimately awarding custody to petitioner and an order of contempt against respondent, respondent was further denied his statutory right to counsel (see Family Ct. Act § 262 [a] ). While we recognize that a party may waive such a right by a knowing, willing and voluntary waiver (see *Matter of Hassig v. Hassig*, 34 A.D.3d 1089, 1091, 825 N.Y.S.2d 165 [2006]; *Matter of Bauer v. Bost*, 298 A.D.2d 648, 650, 748 N.Y.S.2d 803 [2002] ), no waiver occurred here. “[E]ven an incarcerated parent has a right to be heard on matters concerning [his] child, where there is neither a willful refusal to appear nor a waiver of appearance” (*Matter of Tristram K.*, 25 A.D.3d 222, 226, 804 N.Y.S.2d 83 [2005]; see *Matter of Kendra M.*, 175 A.D.2d 657, 658, 572 N.Y.S.2d 583 [1991] ). Family Court was required to advise respondent of his statutory right to counsel before proceeding to the merits of these petitions (see *Matter of Hassig v. Hassig*, 34 A.D.3d at 1091, 825 N.Y.S.2d 165; *Matter of Frierson v. Goldston*, 9 A.D.3d 612, 614, 779 N.Y.S.2d 670 [2004] ); its failure to do so constituted a fundamental deprivation of his rights to due process (see *Matter of Williams v. Bentley*, 26 A.D.3d 441, \*1117 442, 809 N.Y.S.2d 205 [2006]; *Matter of Wilson v. Bennett*, 282 A.D.2d 933, 934, 724 N.Y.S.2d 520 [2001] ). The order must therefore be reversed and the matter remitted for a new hearing on all petitions before a different judge (see *Matter of Williams v. Williams*, 35 A.D.3d 1098, 1100, 827 N.Y.S.2d 328 [2006] ). In the interim, temporary physical and legal custody of the children will remain with petitioner.

ORDERED that the order is reversed, on the law, without costs, motion granted, default judgment vacated and matter remitted to the Family Court of Fulton County for further proceedings not inconsistent with this Court's decision.

MERCURE, J.P., SPAIN, CARPINELLO and KANE, JJ., concur.  
 N.Y.A.D. 3 Dept.,2007.

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