



WHEN A PARTY’S ATTORNEY APPEARS THE PARTY IS NOT IN DEFAULT AND MAY THEREFORE APPEAL, FAMILY COURT SHOULD NOT HAVE AWARDED CUSTODY TO NONPARENTS ABSENT A HEARING DEMONSTRATING EXTRAORDINARY CIRCUMSTANCES AND THE BEST INTERESTS OF THE CHILD (FOURTH DEPT).

The Fourth Department determined mother was not in default, because her attorney had appeared, and therefore mother can appeal the award of custody to the nonparent petitioners. The Fourth Department further determined Family Court should have held a hearing to determine whether extraordinary circumstances justified awarding custody to nonparents. The prior consent order of custody in favor of the nonparents does not demonstrate extraordinary circumstances:

“A parent’s right to be heard on a matter of child custody is fundamental and not to be disregarded absent a convincing showing of waiver’ ” Moreover, “[i]t is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances” ... and further establishes that an award of custody to the nonparent is in the best interests of the child “The burden of proving extraordinary circumstances rests on the nonparent, and the mere existence of a prior consent order of custody in favor of the nonparent is not sufficient to demonstrate extraordinary circumstances”... . Inasmuch as the court erred in depriving the mother of custody without conducting the requisite evidentiary hearing ... , we reverse and remit the matter to Family Court for a hearing on the custody petition. [Matter of Hilton v Hilton, 2019 NY Slip Op 04572, Fourth Dept 6-7-19](#)