

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1099

CAF 14-00999, CAF 14-02096

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF TOBIAS WITZIGMAN,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JENNIFER WITZIGMAN, RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ESQ., ATTORNEY
FOR THE CHILDREN, APPELLANT.

WILLIAM D. BRODERICK, JR., ATTORNEY FOR THE CHILDREN, ELMA, APPELLANT
PRO SE.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR
RESPONDENT-APPELLANT.

FERN S. ADELSTEIN, OLEAN, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered April 21, 2014 in a proceeding pursuant to Family Court Act article 6. The order awarded sole custody of the parties' children to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Cattaraugus County, for compliance with 22 NYCRR 202.44.

Memorandum: Respondent mother and the Attorney for the Children (AFC) appeal from an order adopting the report of the Referee that recommended granting petitioner father's petition to modify an existing custody order. We agree with the AFC that Family Court erred in adopting the Referee's report without providing the parties with notice of the filing of the report and affording them an opportunity to object to it (see 22 NYCRR 202.44 [a]; *Matter of Wilder v Wilder*, 55 AD3d 1341, 1341). The record establishes that the Referee was authorized only to hear the matter and issue a report inasmuch as the mother did not consent to the referral to the Referee for a final determination on the father's petition. We therefore reverse the order, and we remit the matter to Family Court for compliance with 22 NYCRR 202.44 (see *Wilder*, 55 AD3d at 1341). Pending the court's determination upon remittal, the custody and visitation provisions in

the order appealed from shall remain in effect.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court