

State of New York

Court of Appeals

*Decided and Entered on the
fourteenth day of June, 2022*

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2022-267

In the Matter of Shenese Jones,
Respondent,

v.

Russell Spain,
Appellant.

Appellant having moved for leave to appeal to the Court of Appeals and for poor person relief in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion for leave to appeal is denied; and it is further

ORDERED, that the motion for poor person relief is dismissed as academic.



Lisa LeCours
Clerk of the Court

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

D64798

L/htr

_____AD3d_____

Submitted - October 19, 2020

LEONARD B. AUSTIN, J.P.
ROBERT J. MILLER
VALERIE BRATHWAITE NELSON
PAUL WOOTEN, JJ.

2018-11809

DECISION & ORDER

In the Matter of Shenese Jones, respondent,
v Russell Spain, appellant.

(Docket No. V-19624-15)

Russell Spain, Brooklyn, NY, appellant pro se.

Shenese Jones, Brooklyn, NY, respondent pro se.

In a proceeding pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Kings County (Dean Kusakabe, J.), dated August 21, 2017. The order, upon the father's failure to appear at a hearing, inter alia, granted the mother's petition for sole legal and physical custody of the subject child.

ORDERED that the appeal is dismissed, without costs or disbursements.

The parties, who were not married, are the parents of the subject child. In June 2015, the father filed a petition for sole legal and physical custody of the child, and approximately one month later, the mother filed a petition for the same relief. A hearing on the petitions was scheduled for August 21, 2017, but the father failed to appear. The Family Court dismissed the father's petition, and proceeded to inquest on the mother's petition. In an order dated August 21, 2017, after the inquest, the court, inter alia, granted the mother's petition for sole legal and physical custody of the child. The father appeals.

"No appeal lies from an order made upon the default of the appealing party" (*Matter of Saporito v Ward*, 160 AD3d 651, 651 [internal quotation marks omitted]). "The proper procedure is for the defaulting party to seek to vacate [his or her] default and, if necessary, appeal the denial of that request" (*Feldman v Feldman*, 185 AD3d 552, 554). Here, the father's failure to appear at

November 25, 2020

MATTER OF JONES v SPAIN

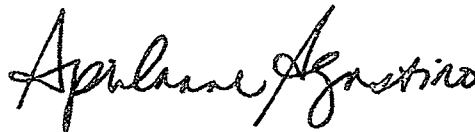
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the scheduled hearing constituted a default, and thus, his appeal from the order entered upon his default must be dismissed (*see* CPLR 5511; *Matter of Carino v Carino*, 160 AD3d 727).

AUSTIN, J.P., MILLER, BRATHWAITE NELSON and WOOTEN, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court

**Additional material
from this filing is
available in the
Clerk's Office.**