

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

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_____AD3d_____

Submitted - November 27, 2006

STEPHEN G. CRANE, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
ROBERT A. SPOLZINO, JJ.

2006-06614

DECISION & ORDER

In the Matter of David Edward D. (Anonymous).
Suffolk County Department of Social Services,
appellant, v Michelle D. (Anonymous), et al.,
respondents.

(Docket Nos. N-11529-06, N-11530-06)

Christine Malafi, County Attorney, Central Islip, N.Y. (Steven B. Nacht of counsel),
for appellant.

Glenn Gucciardo, Northport, N.Y., for respondent Michelle D.

Robert C. Mitchell, Central Islip, N.Y. (Kathleen Phillips of counsel), for respondent
Brian D.

Kenneth J. Molloy, East Islip, N.Y., Law Guardian for the child.

In related child neglect proceedings pursuant to Family Court Act article 10, the
petitioner appeals, as limited by its brief, from so much of an order of the Family Court, Suffolk
County (Budd, J.), dated July 11, 2006, as, after a hearing, denied its application for continued
removal of the subject child and returned custody of the child to the father.

ORDERED that the order is affirmed insofar as appealed from, without costs or
disbursements.

December 26, 2006

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MATTER OF D. (ANONYMOUS), DAVID EDWARD

In determining a removal application pursuant to Family Court Act § 1027, the court must "engage in a balancing test of the imminent risk [to the child's life or health] with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal" (*Nicholson v Scoppetta*, 3 NY3d 357, 380). Accordingly, the court must "balance [the] risk against the harm removal might bring" (*Nicholson v Scoppetta, supra* at 378). Since the Family Court had the advantage of viewing the witnesses and assessing their character and credibility, its determination should not be disturbed unless it lacks a sound and substantial basis in the record (*see Matter of Jennifer R.*, 29 AD3d 1003, 1004; *Matter of John Robert P. v Vito C.*, 23 AD3d 659, 661).

Here, the petitioner failed to establish that the imminent risk to the child's life or health if he remained with the father outweighed any harm that the child's removal might bring. The Family Court, thus, properly determined that it was in the child's best interests to be returned to his father. The Family Court also properly determined that the imminent risk to the child from the mother could be eliminated by issuing an order of protection prohibiting her from unsupervised contact with the child (*see Family Ct Act §§ 1027[b][IV], 1028[e]; Nicholson v Scoppetta, supra* at 378-379).

CRANE, J.P., KRAUSMAN, GOLDSTEIN and SPOLZINO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court