

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

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Argued - April 27, 2007

WILLIAM F. MASTRO, J.P.  
JOSEPH COVELLO  
DANIEL D. ANGIOLILLO  
THOMAS A. DICKERSON, JJ.

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2006-09563

DECISION & ORDER

In the Matter of Nurayah J. (Anonymous).  
Suffolk County Department of Social Services,  
appellant; Faiza J. (Anonymous), respondent.

(Docket No. N-857-06)

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Christine Malafi, County Attorney, Central Islip, N.Y. (Jeffrey A. Adolph of counsel), for appellant.

Robert C. Mitchell, Central Islip, N.Y. (Jorge L. Rosario of counsel), for respondent.

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

In a child protective proceeding pursuant to Family Court Act article 10, the petitioner appeals from an order of the Family Court, Suffolk County (Sweeney, J.), entered October 4, 2006, which, *inter alia*, dismissed the proceeding and determined that the subject child is destitute as defined by Social Services Law § 371(3).

ORDERED that the order is affirmed, without costs or disbursements.

The subject child was temporarily removed from the respondent mother by the petitioner Suffolk County Department of Social Services, upon consent (*see* Family Ct Act § 1021). The respondent's consent and the subsequent removal occurred while both the respondent and the child were in the hospital, a few days after the birth of the child. The respondent was 16 years old at the time of the removal and was herself a foster child. Within three days of the removal, the petitioner filed a petition pursuant to Family Court Act article 10 alleging, *inter alia*, that the respondent's history of behavioral problems and prior misconduct placed the child at risk of neglect. After dismissing the child protective proceeding on the ground that the respondent's due process

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rights were violated by the petitioner, inter alia, for noncompliance with Family Court Act § 1021, the Family Court placed the child with the petitioner, finding that she was “destitute” as defined by Social Services Law § 371(3).

We find that the Family Court properly dismissed the proceeding, albeit on a different ground than the ground relied upon by the Family Court. Contrary to the Family Court’s determination, the petitioner complied with Family Court Act § 1021 by annexing to the petition the respondent’s written consent to temporary removal. The petitioner also provided the respondent with written notice, inter alia, informing her when the petition would be filed, whom to contact for visitation, of her right to a hearing to request the return of the subject child, of her right to counsel, and whom to contact to obtain assigned counsel. Contrary to the respondent’s contention, nothing in the Family Court Act or the Social Services Law lessens, increases, or otherwise changes the responsibilities of the petitioner when it is faced with caring for the offspring of a foster child (*see Matter of Ta Fon Edward J.B.*, 6 AD3d 611; *Matter of Lawrence Children*, 1 Misc 3d 156, 163-164).

However, as the petitioner failed to establish, prima facie, that the child was neglected by the respondent, the child protective proceeding was properly dismissed by the Family Court. The petitioner failed to offer any evidence to establish the allegations in the petition.

Contrary to the petitioner’s contention, the Family Court providently exercised its discretion in denying its motion made during the inquest to conform the pleadings to the proof to include certain post-petition conduct of the respondent (*see* Family Ct Act § 1051[c]). Under the circumstances, the respondent would have been unduly prejudiced by a granting of the motion (*cf. Matter of LeVonn G.*, 20 AD3d 530; *Matter of Nikole B.*, 263 AD2d 622).

Under the unique circumstances of this case, the Family Court did not err in finding that the child was destitute as defined under Social Services Law § 371(3). Social Services Law § 398(1) grants the petitioner “powers” and “duties” to “[a]ssume charge of and provide support for any destitute child who cannot be properly cared for in his home.” A child is destitute when, through no neglect on the part of the parent, guardian, or custodian, he or she is (1) destitute or homeless, (2) in a state of want or suffering due to lack of sufficient food, clothing, or shelter, or medical or surgical care, (3) a person under the age of 18 years who is absent from his legal residence without the consent of his parent, legal guardian, or custodian, or (4) a person under the age of 18 who is without a place of shelter where supervision and care are available (*see* Social Services Law § 371[3]). As the respondent is currently unable to provide the child with food, clothing, or shelter so that the child is in a state of want, the child is destitute.

The petitioner’s remaining contention is without merit.

MASTRO, J.P., COVELLO, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:   
James Edward Pelzer

Clerk of the Court