

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

D21391  
O/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - November 10, 2008

HOWARD MILLER, J.P.  
THOMAS A. DICKERSON  
JOHN M. LEVENTHAL  
ARIEL E. BELEN, JJ.

2007-05777

DECISION & ORDER

In the Matter of Ayodele Ademoli J. (Anonymous).  
Catholic Guardian Society and Home Bureau,  
respondent; Elizabeth O. (Anonymous), appellant.

(Docket No. B-2687-01)

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Robert Marinelli, Brooklyn, N.Y., for appellant.

Magovern & Sclafani, New York, N.Y., for respondent.

Steven Banks, New York, N.Y. (Tamara Steckler and Marcia Egger of counsel),  
attorney for the child.

In a proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights by reason of her mental illness, the mother appeals from an order of the Family Court, Queens County (Salinitro, J.), dated June 5, 2007, which denied her motion to vacate an order of fact-finding and disposition of the same court dated May 18, 2005, terminating her parental rights and transferring guardianship and custody of the child to the Commissioner of Social Services of the City of New York and Catholic Home Bureau for Dependent Children.

ORDERED that the order dated June 5, 2007, is affirmed, without costs or disbursements.

The Family Court did not improvidently exercise its discretion in denying the appellant's motion pursuant to CPLR 5015(a)(2). CPLR 5015(a)(2) provides that the court that issues an order may relieve a party from it upon such terms as may be just where newly-discovered

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evidence exists which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial. Newly-discovered evidence is evidence which was in existence but undiscoverable with due diligence at the time of judgment (*see Sieger v Sieger*, 51 AD3d 1004, 1005; *Matter of Jenna R.*, 207 AD2d 403, 404; *Pezenik v Milano*, 137 AD2d 748). The newly-discovered evidence must be material, cannot be merely cumulative, and cannot be of such a nature as would merely impeach the credibility of an adverse witness (*see Matter of Catapano*, 17 AD3d 673, 674).

We agree with the Family Court that the report of a psychiatric expert, which was not in existence at the time of the Family Court's order of fact-finding and disposition, does not meet the criteria for newly-discovered evidence (*see Matter of Jenna R.*, 207 AD2d 403; *Pezenik v Milano*, 137 AD2d at 748-749). We further note that the report merely attacked the credibility of the expert testimony presented by the petitioner, and provided evidence cumulative to the expert testimony presented by the appellant (*see Matter of Jenna R.*, 207 AD2d 403).

MILLER, J.P., DICKERSON, LEVENTHAL and BELEN, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court