

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

D25758
Y/cb

_____AD3d_____

Argued - December 14, 2009

JOSEPH COVELLO, J.P.
DANIEL D. ANGIOLILLO
RUTH C. BALKIN
SANDRA L. SGROI, JJ.

2008-11342

DECISION & ORDER

In the Matter of Leon K. (Anonymous).
Administration for Children's Services, respondent;
Marilyn O. (Anonymous), et al., appellants.
(Proceeding No. 1)

In the Matter of Lashawn K. (Anonymous).
Administration for Children's Services, respondent;
Marilyn O. (Anonymous), et al., appellants.
(Proceeding No. 2)

In the Matter of Tiffany R. (Anonymous).
Administration for Children's Services, respondent;
Marilyn O. (Anonymous), et al., appellants.
(Proceeding No. 3)

(Docket No. N-492-05, N-493-05, N-494-05)

Robert Hauser, Mineola, N.Y., for appellant Marilyn O. (Anonymous).

Steven P. Forbes, Jamaica, N.Y., for appellant Milton R. (Anonymous).

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Larry A. Sonnenshein and Edward F.X. Hart of counsel), for respondent.

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MATTER OF K. (ANONYMOUS), LEON
MATTER OF K. (ANONYMOUS), LASHAWN
MATTER OF R. (ANONYMOUS), TIFFANY

Steven Banks, New York, N.Y. (Tamara A. Steckler, and Clarie V. Merkine), attorney for the children.

In three related child protective proceedings pursuant to Family Court Act article 10, the father and mother separately appeal from an order of the Family Court, Queens County (McGowan, J.), dated November 5, 2008, which, upon a decision of the same court (Friedman, J.), dated December 4, 2006, inter alia, in effect, granted the petitioner's motion for summary judgment on the issue of their abuse of the child Lashawn K. and derivative abuse of the children Leon K. and Tiffany R., and on the issue of their severe abuse of the child Lashawn K. and derivative severe abuse of the children Leon K. and Tiffany R.

ORDERED that the order is modified, on the law, by deleting the provision thereof, in effect, granting that branch of the petitioner's motion which was for summary judgment on the issue of the parents' severe abuse of Lashawn K. and derivative severe abuse of the children Leon K. and Tiffany R., and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

"A determination in a criminal action may be given collateral estoppel effect in a Family Court proceeding where the identical issue has been resolved, and the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct" (*Matter of Javon T.*, 64 AD3d 608, 608; *see Matter of Ajay P.*, 60 AD3d 681; *Matter of Desiree C.*, 7 AD3d 522). Here, the Administration for Children's Services (hereinafter ACS), with the support of the attorney for the children, moved for summary judgment against the parents on the issues of abuse and severe abuse, establishing that the mother pleaded guilty to assault in the second degree (Penal Law § 120.05[2]), and the father pleaded guilty to attempted assault in the second degree (Penal Law §§ 110.00 120.05[2]), for their commission of the same abusive acts alleged in the petitions. Notably, in their plea allocutions, both parents admitted that the assault victim was the child Lashawn K. Based upon these submissions, an award of summary judgment was proper on the issue of whether the parents abused Lashawn K. and derivatively abused Leon K. and Tiffany R. (*see Family Ct Act § 1012[e][i] & [ii]*; *see also Matter of Arianna L.*, 55 AD3d 733; *Matter of Lester M.*, 44 AD3d 944).

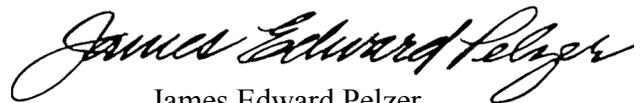
However, with respect to the issue of severe abuse, even though the convictions satisfied Social Services Law § 384-b(8)(a)(iii)(C), an award of summary judgment was improper, since, as ACS properly concedes on appeal, ACS failed to establish that it either made "diligent efforts to encourage and strengthen the parental relationship" which were unsuccessful, or that a demonstration of such efforts was excused (*see Social Services Law § 384-b[8][a][iv]*, *Matter of Candace S.*, 38 AD3d 786, 788; *Matter of Latifah C.*, 34 AD3d 798; *see also Matter of Rebecca KK.*, 40 AD3d 1195). Because a finding of severe abuse "is admissible, and often central, in a subsequent proceeding to terminate parental rights (*see Family Ct Act § 1051[e]*; Social Services Law § 384-b[4][e]), it must be based on clear and convincing evidence (*see Family Ct Act § 1051[e]*), and must include, inter alia, a finding that 'the agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the [parent], when such efforts

will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future” (*Matter of Latifah C.*, 34 AD3d 798, quoting Social Services Law § 384-b[8][a][iv]). In light of this determination, an award of summary judgment on the issue of derivative severe abuse also was improper. We note that ACS may attempt to establish the allegations of severe abuse and derivative severe abuse in further fact-finding proceedings.

The parties’ remaining contentions are without merit.

COVELLO, J.P., ANGIOLILLO, BALKIN and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court