

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

D26566
O/ct

_____AD3d_____

Submitted - February 5, 2010

STEVEN W. FISHER, J.P.
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2009-02498

DECISION & ORDER

In the Matter of Afton C. (Anonymous).
Dutchess County Department of Social Services,
respondent; James C. (Anonymous), et al., appellants.
(Proceeding No. 1)

In the Matter of Katy C. (Anonymous).
Dutchess County Department of Social Services,
respondent; James C. (Anonymous), et al., appellants.
(Proceeding No. 2)

In the Matter of Ostyn C. (Anonymous).
Dutchess County Department of Social Services,
respondent; James C. (Anonymous), et al., appellants.
(Proceeding No. 3)

In the Matter of Prestyn C. (Anonymous).
Dutchess County Department of Social Services,
respondent; James C. (Anonymous), et al., appellants.
(Proceeding No. 4)

In the Matter of Trevor C. (Anonymous).
Dutchess County Department of Social Services,
respondent; James C. (Anonymous), et al., appellants.
(Proceeding No. 5)

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MATTER OF C. (ANONYMOUS), TREVOR

(Docket Nos. N-5742/07, N-5743/07,
N-5744/07, N-5745/07, N-5746/07)

Serino & MacKay, PLLC, Wappingers Falls, N.Y. (Charles J. MacKay of counsel),
for appellant James C.

Grace C., Poughkeepsie, N.Y., appellant pro se.

Ronald L. Wozniak, County Attorney, Poughkeepsie, N.Y. (Laura Gail Skojec of
counsel), for respondent.

John A. Pappalardo, White Plains, N.Y., attorney for the children Afton C., Ostyn C.,
Katy C., and Prestyn C.

Ronna L. DeLoe, Mamaroneck, N.Y., attorney for the child Trevor C.

In five related neglect proceedings pursuant to Family Court Act article 10, the father
appeals, as limited by his brief, from so much of a fact-finding order of the Family Court, Dutchess
County (Sammarco, J.), entered February 24, 2009, as, after a hearing, found that he neglected the
subject children, and the mother separately appeals from so much of the same order as found that she
neglected the subject children.

ORDERED that the order is reversed, on the law, without costs or disbursements, the
petitions are denied, and the proceedings are dismissed.

The petitioner Dutchess County Department of Social Services (hereinafter DSS) filed
neglect petitions pursuant to Family Court Act article 10 against the father and the mother alleging
that the father was an “untreated” level three sex offender who, after his release, had returned to the
family home wherein the subject children resided, and that the mother, by allowing the father to return
to the home, failed to protect the subject children. Following a fact-finding hearing, the Family Court
found that the parents had neglected the subject children. The attorney for the subject children Afton
C., Katy C., Ostyn C. and Prestyn C., joins the parents in urging reversal of the fact-finding order
appealed from.

Family Court Act § 1012(f) defines a neglected child as one “whose physical, mental
or emotional condition has been impaired or is in imminent danger of becoming impaired as a result
of the failure of his parent or other person legally responsible for his care to exercise a minimum
degree of care” by, inter alia, “unreasonably inflicting or allowing to be inflicted harm, or a substantial
risk thereof” (Family Ct Act § 1012[f][i][B]).

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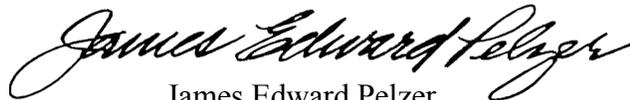
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Here, DSS failed to establish by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]) that the father's presence in the home had impaired the subject children's physical, mental, or emotional well-being, or placed them in imminent danger of such impairment (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-369). The mere fact that a designated sex offender resides in the home is not sufficient to establish neglect absent a showing of actual danger to the subject children (*see Matter of Kayla F.*, 39 AD3d 983, 985-986; *Matter of Krista L.*, 20 AD3d 783, 785; *see also Matter of Cornell v Cornell*, 290 AD2d 735, 737; *cf. Matter of Anndrena A.*, 13 AD3d 1164, 1164-1165; *Matter of Dutchess County Dept. of Social Servs. v Peter B.*, 224 AD2d 617, 617-618). Although the Family Court could properly consider the parents' evasiveness in their testimony and the father's invocation of his Fifth Amendment privilege (*see generally Kayla F.*, 39 AD3d at 985; *Matter of Nathaniel II.*, 18 AD3d 1038, 1039), the evidence was insufficient to establish that the father posed an imminent danger to the children. Since DSS did not establish that the father posed a danger to the subject children, it follows that the mother did not neglect the children by allowing the father to reside in their home. Accordingly, the Family Court erred in finding that the parents had neglected the subject children.

The father's challenge to the order of protection dated February 24, 2009, is not properly before this Court as he failed to appeal from that order.

FISHER, J.P., ANGIOLILLO, LEVENTHAL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court

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