

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

D32115
Y/prt

_____AD3d_____

Argued - June 24, 2011

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
ANITA R. FLORIO
PLUMMER E. LOTT, JJ.

2010-05427

DECISION & ORDER

In the Matter of N. (Anonymous) Children.
Administration for Children's Services, respondent;
Angela N. (Anonymous), appellant.

(Docket No. N-30520-09)

Tennille M. Tatum-Evans, New York, N.Y., for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Stephen J. McGrath and Julie Steiner of counsel), for respondent.

Steven Banks, New York, N.Y. (Tamara A. Steckler and Selene D'Alessio of counsel), attorney for the children.

In a child protective proceeding pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Kings County (Hamill, J.), dated May 10, 2010, which granted the petitioner's motion for summary judgment on the issue of neglect, determined that the mother had neglected the subject children, and denied her cross motion for summary judgment dismissing the petition.

ORDERED that the order is modified, on the law, by deleting the provisions thereof granting the petitioner's motion for summary judgment and determining that the mother had neglected the subject children, and substituting therefor a provision denying the motion; as so modified, the order is affirmed, without costs or disbursements.

July 12, 2011

Page 1.

MATTER OF N. (ANONYMOUS), CHILDREN

Contrary to its contention, the petitioner, Administration for Children's Services (hereinafter ACS), failed to establish its prima facie entitlement to judgment as a matter of law on the issue of neglect with respect to the subject children (*see* Family Ct Act § 1012[f][i]). In support of its motion, ACS included the evidence submitted at a hearing held pursuant to Family Court Act § 1028 (hereinafter the 1028 hearing). The evidence submitted at the 1028 hearing failed to establish that the mother neglected her children. Moreover, most of the evidence submitted by ACS at the 1028 hearing was hearsay. Although hearsay evidence is permitted in a 1028 hearing, it is not permitted in a fact-finding hearing (*see* Family Ct Act § 1046 [b][iii]; § 1046[c]). Consequently, hearsay evidence cannot be the basis for granting summary judgment in lieu of a fact-finding hearing.

The Family Court did not err in denying the mother's cross motion for summary judgment dismissing the petition. A 1028 hearing occurs prior to discovery (*see* Sobie, Practice Commentaries, McKinney's Judiciary Court Acts of NY, Book 29A, Family Court Act § 1028, at 265). Under the facts of this case, the parties have not had the opportunity to prepare their cases, and they should be given the opportunity to do so.

RIVERA, J.P., COVELLO, FLORIO and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court