

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

D32608
W/kmb

_____AD3d_____

Submitted - September 22, 2011

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2010-11203

DECISION & ORDER

In the Matter of James S. (Anonymous).
Administration for Children's Services, respondent;
Kathleen S. (Anonymous), appellant.
(Proceeding No. 1)

In the Matter of Nicholas R. W. (Anonymous).
Administration for Children's Services, respondent;
Kathleen S. (Anonymous), appellant.
(Proceeding No. 2)

(Docket Nos. N-4975/09, N-4976/09)

Cabelly & Calderon, Jamaica, N.Y. (Alan S. Cabelly of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Pamela Seider Dolgow
of counsel), for respondent.

Steven Banks, New York, N.Y. (Tamara A. Steckler and Claire V. Merkin of
counsel), attorney for the children.

In two related child protective proceedings pursuant to Family Court Act article 10,
the mother appeals from an order of fact-finding of the Family Court, Richmond County (Wolff, J.),
dated October 22, 2010, which, after a hearing, found that she had neglected the child James S. and
derivatively neglected the child Nicholas R.W.

ORDERED that the order of fact-finding is affirmed, without costs or disbursements.

October 25, 2011

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MATTER OF S. (ANONYMOUS), JAMES
MATTER OF W. (ANONYMOUS), NICHOLAS R.

Contrary to the mother's contention, the Family Court's finding of neglect as to the child James S., based on her use of excessive corporal punishment, is supported by a preponderance of the evidence (*see* Family Ct Act § 1012[f][i][B]; § 1046[b][i]). That child's out-of-court statement regarding the use of corporal punishment by the mother was sufficiently corroborated by a caseworker's observation of the injury (*see Matter of Isaiah S.*, 63 AD3d 948, 949; *Matter of Derek J.*, 56 AD3d 558, 558-559; *Matter of Joshua B.*, 28 AD3d 759, 760-761). That evidence, together with a negative inference drawn from the mother's failure to testify, was sufficient to support the Family Court's finding of neglect as to James S. (*see Matter of Maria Daniella R. [Maria A.]*, 84 AD3d 1384; *Matter of Charlie S. [Rong S.]*, 82 AD3d 1248; *Matter of Imman H.*, 49 AD3d 879). Furthermore, since the mother's conduct toward James S. demonstrated a fundamental defect in her understanding of parental duties relating to the care of children, there was sufficient evidence from which to make a finding of derivative neglect as to the child Nicholas R.W. (*see* Family Ct Act § 1046[a][i]; *see also Matter of Devontay M.*, 56 AD3d 561; *Matter of Nicholas L.*, 50 AD3d 1141).

In addition to the single incident of use of excessive corporal punishment, which is sufficient to sustain a finding of neglect (*see Matter of Alexander J.S. [David S.]*, 72 AD3d 829, 830; *Matter of Rachel H.*, 60 AD3d 1060, 1061), the Family Court's finding that the mother had previously engaged in a pattern of erratic conduct that demonstrated her inability to provide the children with proper supervision or guardianship is supported by a preponderance of the evidence (*see Matter of Ahanti R.*, 66 AD3d 1031, 1032; *Matter of Lester M.*, 44 AD3d 944, 945).

ANGIOLILLO, J.P., DICKERSON, CHAMBERS and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court