

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

301

CAF 12-00498

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF CHESTER J. THOMAS, SR.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

GABRIELLE C. SMITH, RESPONDENT-RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF
COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered February 23, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Monroe County, for further proceedings on the petition.

Memorandum: Petitioner, an inmate at a correctional facility, contends that Family Court erred in summarily dismissing his petition alleging that respondent violated a prior order based on his failure to appear by video or telephone for proceedings held on a specified adjourned date. We agree. Although Family Court was entitled to dismiss the petition with prejudice for failure to prosecute based on the existence of "exceptional circumstances or an unreasonable neglect to prosecute" (*Matter of Stacey O. v Donald P.*, 137 AD2d 965, 966), here there were no such exceptional circumstances, nor can it be said on this record that there was an "unreasonable neglect to prosecute" (*id.*). Indeed, the record before us does not establish the basis for petitioner's failure to appear by telephone or video from the correctional facility but, rather, the court merely stated on the record that its staff had attempted to call the correctional facility and "didn't get through." We therefore reverse the order, reinstate the petition and remit the matter to Family Court for further proceedings on the petition.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court