

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

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CAF 07-02445

PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ.

IN THE MATTER OF ISAIAH H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ISHTAR G., RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC.,
BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ISAIAH H.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 15, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order found that respondent permanently neglected her child and terminated respondent's parental rights.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, petitioner's motion is denied, and the matter is remitted to Family Court, Erie County, for a hearing on the petition.

Memorandum: Family Court erred in granting petitioner's motion for a default order finding that respondent mother permanently neglected her son and thereafter, following a dispositional hearing, terminating her parental rights with respect to him pursuant to Social Services Law § 384-b. The mother's failure to appear at the fact-finding hearing on the issue of permanent neglect "does not automatically constitute a default," in view of the fact that the attorney for the mother appeared on her behalf and requested an adjournment (*Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300; *Matter of Shemeco D.*, 265 AD2d 860). "A party who is represented at a scheduled court appearance by an attorney has not failed to appear" (*Matter of Sales v Gisendaner*, 272 AD2d 997, 997).

We therefore reverse the order, deny petitioner's motion, and remit the matter to Family Court for a hearing on the petition.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court