

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

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Argued - June 5, 2018

MARK C. DILLON, J.P.
SHERI S. ROMAN
SYLVIA O. HINDS-RADIX
VALERIE BRATHWAITE NELSON, JJ.

2017-05585

DECISION & ORDER

In the Matter of Latasha Beauford Simmons, petitioner,
v John Aaron Ford, respondent-respondent;
Malachi S. (Anonymous), nonparty-appellant.

(Docket No. U-16301-15)

Karen P. Simmons, Brooklyn, NY (Janet Neustaetter and Barbara H. Dildine of counsel), attorney for the child, the nonparty-appellant Malachi S.

Fredericka P. Bashir, Brooklyn, NY, for respondent-respondent.

Zachary W. Carter, Corporation Counsel, New York, NY (Aaron Bloom and Daniel Matza-Brown of counsel), for petitioner.

In a proceeding pursuant to Family Court Act article 5-B, the child appeals from an order of the Family Court, Kings County (Sharon A. Bourne-Clarke, J.), dated April 17, 2017. The order directed the dismissal of the mother's petition for failure to prosecute.

ORDERED that the order is reversed, on the facts and in the exercise of discretion, without costs or disbursements, the petition is reinstated, and the matter is remitted to the Family Court, Kings County, for further proceedings consistent herewith.

In this child support and paternity proceeding, the mother, who resides in Pennsylvania, failed to appear on April 17, 2017, a date scheduled for a continued equitable estoppel hearing. Despite the fact that the mother had appeared on all prior court dates, and was in the middle of her testimony at the hearing, the Family Court denied the child's request for an adjournment, and

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instead directed dismissal of the petition for failure to prosecute. The child, Malachi S., appeals.

Initially, we reject the respondent's contention that the appeal must be dismissed on grounds of aggrievement and appealability (*see* CPLR 5511).

Here, as the child and the mother correctly contend, the request for an adjournment was reasonable and there was no indication of intentional default or willful abandonment. Under these circumstances, the Family Court improvidently exercised its discretion in directing the dismissal of the petition for failure to prosecute rather than granting the child's request for an adjournment (*see Matter of Brudasca v Cottone*, 110 AD3d 1067; *Pileri v Pileri*, 218 AD2d 691). Accordingly, the matter must be remitted to the Family Court, Kings County, for a continued equitable estoppel hearing and for a determination thereafter (*see Matter of Tralisa R. v Max S.*, 145 AD3d 727).

DILLON, J.P., ROMAN, HINDS-RADIX and BRATHWAITE NELSON, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court