

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

1233

CAF 19-00663

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF BEULAH J., IVORY J., AND
EBONY J.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DARLENE H., RESPONDENT,
AND JOHNNY J., RESPONDENT-APPELLANT.

KIMBERLY M. SEAGER, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF
COUNSEL), FOR RESPONDENT-APPELLANT.

KIMBERLY M. SEAGER, FULTON, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL),
FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Onondaga County
(Michael L. Hanuszczak, J.), entered March 21, 2019 in a proceeding
pursuant to Social Services Law § 384-b. The order, among other
things, terminated the parental rights of respondent Johnny J. with
respect to the subject children.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by vacating the disposition with
respect to Ebony J., and as modified the order is affirmed without
costs and the matter is remitted to Family Court, Onondaga County, for
further proceedings in accordance with the following memorandum: In
this proceeding pursuant to Social Services Law § 384-b, respondent
father and the Attorney for the Child (AFC) for Ebony J. (hereafter
Ebony J.) each appeal from an order that, among other things,
terminated the father's parental rights with respect to the three
subject children on the ground of permanent neglect and freed those
children for adoption.

By failing to raise the issue below, the father waived his
contention that the petition was improperly filed before the children
had been in the care of an authorized agency for one year (*see Matter
of Brayanna G.*, 66 AD3d 1375, 1376 [4th Dept 2009], *lv denied* 13 NY3d

714 [2010]; see generally *Lacks v Lacks*, 41 NY2d 71, 75 [1976], rearg denied 41 NY2d 862, 901 [1977]). The father's related claim of ineffective assistance of counsel is not properly before us because it was raised for the first time in his reply brief (see *Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1144 [4th Dept 2014]).

Contrary to the contention of the father and Ebony J., Family Court's finding of permanent neglect is supported by clear and convincing evidence establishing that, "despite diligent efforts by petitioner to encourage and strengthen the parental relationship, [the father] failed substantially and continuously or repeatedly to plan for the future of the children for a period of more than one year following their placement with petitioner, although physically and financially able to do so" (*Matter of Susan C. [Wesley C.]*, 1 AD3d 991, 991 [4th Dept 2003]; see generally *Matter of Star Leslie W.*, 63 NY2d 136, 142-143 [1984]). We reject the father's further contentions that the interests of Beulah J. and Ivory J. are not best served by terminating his parental rights with respect to them (see *Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1502 [4th Dept 2015]) and that the court abused its discretion in denying his request for a suspended judgment.

We agree with the father and Ebony J., however, that a new dispositional hearing for that child is required because terminating the father's parental rights to Ebony J. makes her a legal orphan and because the AFC who jointly represented the children at trial failed to zealously advocate for Ebony J.'s position concerning adoption and focused instead on her sisters' conflicting position on that issue (see *Matter of Dominique A.W.*, 17 AD3d 1038, 1039-1041 [4th Dept 2005], lv denied 5 NY3d 706 [2005]; see also *Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1595 [4th Dept 2012], lv dismissed 21 NY3d 975 [2013]; see generally *Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147 [4th Dept 2016]). We therefore modify the order by vacating the disposition as to Ebony J., and we remit the matter to Family Court for appointment of a new AFC and a new dispositional hearing for that child. In light of our determination, we do not consider the remaining contentions advanced by the father or Ebony J.