

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

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CAF 10-00916

PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

IN THE MATTER OF THOR C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CAROL C., RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF
COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR THOR C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 29, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Cattaraugus County, for a new fact-finding hearing on the issue of respondent's alleged neglect of her son.

Memorandum: Respondent mother appeals from an order that, inter alia, adjudged that she neglected her son. We agree with the mother that Family Court violated her right to due process by refusing to permit her to testify during the fact-finding phase of the proceeding (see *Matter of Patricia C.*, 63 AD3d 1710, 1711; *Matter of Barbara R.*, 66 AD2d 800). "The right to be heard is fundamental to our system of justice . . . [and p]arents have an equally fundamental interest in the liberty, care and control of their children" (*Matter of Jung [State Commn. on Jud. Conduct]*, 11 NY3d 365, 372-373). The court's order was based on, inter alia, a prior order in which it found that the mother neglected her son's three siblings based in part on her failure to take appropriate action with respect to those children when she was informed that one of them had been sexually abused by their father, and we affirmed that prior order (*Matter of Anastasia C.*, 78 AD3d 1579, lv denied ___ NY3d ___ [Mar. 31, 2011]). The mother's son, however, was not a subject of the proceeding resulting in that prior order, and the mother therefore should have been afforded an opportunity to be heard in response to the new evidence offered by petitioner in the instant proceeding (see *Patricia C.*, 63 AD3d at

1711).

Entered: April 29, 2011

Patricia L. Morgan
Clerk of the Court