

**Matter of Renaud v Mattingly**

2010 NY Slip Op 32607(U)

September 20, 2010

Supreme Court, New York County

Docket Number: 105894/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Index Number : 105894/2010

RENAUD, ANNETTE

vs.

MATTINGLY, JOHN

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/20/10

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York  
County of New York: Part 10

In the Matter of the Application of  
Annette Renaud,

Petitioner,

Decision/Order

For a Judgment Under Article 78 of the  
Civil Practice Law and Rules,

Index# 105894/10  
Mot. Seq. # 001

-against-

John Mattingly, Commissioner of the  
New York City Administration for Children's  
Services, New York Foundling, and Gladys Carrion,  
Commissioner of New York State Office of  
Children and Family Services,

Respondents.

Recitation, as required by CPLR §2219(a), of the papers considered in the review  
of this (these) motion(s):

PAPERS	NUMBERED
Notice of Petition, Petition.....	1
State Respondent's Verified Answer, exhibits.....	2
Respondent Mattingly Verified Answer.....	3
AJR affirm., exhibits.....	4
DB affd.....	5
Answer of New York Foundling.....	6
Reply, exhibits.....	7

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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
144B).

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

This Article 78 proceeding challenges the determination of respondents John  
Mattingly, as Commissioner of Administration of Children's Services ("ACS") and New  
York Foundling ("Foundling") to revoke petitioner's (sometimes "Renaud") foster care  
license. It also challenges the decision of respondent Carrion, as Commissioner of the  
New York State Office of Children and Family Services ("OCFS") to deny Renaud's

request to conduct a Fair Hearing on her challenge to the revocation.

ACS, insofar as pertinent here, is the agency that is responsible for children who are in the custody of the City of New York (the "City") and for providing adequate foster care for such children. The City contracts with authorized foster care agencies, that are, in turn, responsible for recruiting, investigating and certifying (licensing) foster parents. SSL §376. Foundling is an authorized foster care agency within the meaning of SSL § 376. OCFS is the New York State agency responsible for overseeing Fair Hearings.

An Article 78 proceeding is a special proceeding. It may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised. CPLR § 409 [b]; CPLR §§ 7801, 7804 (h). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial. CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 (1984); Battaglia v. Schumer, 60 A.D.2d 759 (4<sup>th</sup> Dept 1977).

In 2006, the City obtained custody of six minor children, who were siblings and/or half siblings. The children were placed with Renaud, who is their biological aunt (the children's deceased mother's sister)<sup>1</sup>. On March 12, 2007, Foundling certified Renaud as a "kinship" foster parent. The children remained in Renaud's custody until November 6, 2009, when they were removed, following an ACS investigation and

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<sup>1</sup>There is a question about whether Renaud is actually biologically related to the children. The resolution of this collateral dispute, however, has no impact on the instant Article 78 proceeding.

\* 4]  
determination by Foundling that the children were in imminent danger.

Renaud requested, and was granted, an "independent review" of the removal of the children, which was held on November 17, 2009. 18 NYCRR § 443.5(a)(2). The Review Officer, (a social worker with Foundling who otherwise had no prior contact with the case) determined on November 23, 2009, that the children should not be returned to Renaud. Among other reasons for the Officer's finding, were her conclusions that she had "serious concerns regarding disciplinary methods used by" petitioner. In addition, the Review officer reported her "concerns about Ms. Renaud's ability to protect these children at the time."

On December 23, 2009, ACS recommended that Foundling close petitioner's foster home and revoke her foster care certificate. On January 7, 2010 Renaud was informed that her foster care home was being closed immediately and her foster care certificate was revoked. On April 5, 2010 Renaud requested a Fair Hearing to challenge the revocation of her foster care certification. The request for a Fair Hearing on the revocation of her foster care certification was denied by OCFS on April 7, 2010.

Renaud also requested and was granted a Fair Hearing to challenge the decision by ACS and Foundling to remove the children from her home. By decision dated May 13, 2010 the decision to remove the children was affirmed. After the Fair Hearing, Renaud challenged the determination in Federal Court. By decision dated August 9, 2010, the Federal District Court dismissed Renaud's complaint. Presently, Renaud is seeking permission to intervene in a Permanency Hearing in Family Court concerning the placement of the children who were removed from her home.

The applicable standard of review for a proceeding brought under Article 78 is

whether the challenged administrative decision was: [1] made in violation of lawful procedure; [2] affected by an error of law; or [3] arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion. CPLR § 7803 (3). An agency abuses its exercise of discretion if its administrative orders lack a rational basis. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law." Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co., 34 NY2d 222, 231 (1974); see also: Matter of Colton v. Berman, 21 NY2d 322, 329 (1967).

Renaud's challenge in this case is really two pronged. She claims that the denial of a Fair hearing to challenge the revocation of her foster care certification violated her due process rights. She also claims that the underlying decision to revoke her foster care certification was arbitrary and capricious.

Right to a Fair Hearing

OCFS operates the Bureau of Special Hearings. It provides hearings whenever a particular statute provides that a hearing is required to be held. In the absence of such statutory authority, it denies any request for a hearing. SSL §§ 22, 400, 422(8), 424-a. There is no particular statute that requires OCFS to conduct a testimonial hearing to review a decision, by ACS and an authorized foster care agency, to revoke a foster care parent's certification. Thus, the decision by OCFS to deny the request for a Fair Hearing violated no existing law or statute.

Petitioner claims only in the most general terms that due process requires that a testimonial hearing be held before a foster care certification is revoked. In general, a

[\* 6]

hearing is required where expressly required by statute or where an agency adversely affects property rights. Honey Dippers Septic Tank Services, Inc. v. Landi, 198 AD2d 402 (2<sup>nd</sup> dept. 1993); see also: Matter of Hecht v. Monaghan, 307 NY 461 (1954). It is important to distinguish that this particular Article 78 challenges only the revocation of the foster care certification. Rights regarding removal of the six minor children carry with it other due process rights, which were addressed at a Fair Hearing and in the Federal Court action.

At bar, foster care certification is not the type of license that carries with it due process rights to a Fair Hearing. It is not a property right. It does not impact on the holder's ability to earn a living. While a foster care provider is entitled to a financial stipend, that money is to provide services to the child. See: 18 NYCRR §§ 427.6; 443.3(p). Moreover, due process does not always require a hearing on the merits in every civil case. See: Swartz v. City of Corning, 46 AD3d 1364 (4<sup>th</sup> dept. 2007).

Consequently, the Court holds that OCFS's denial of a Fair Hearing was not affected by any error of law or made in violation of lawful procedure.

#### Determination Revoking Foster Care Certification

Renaud's additional argument is that the underlying determination revoking her foster care certification was arbitrary and capricious. The main thrust of her argument is that ACS and Foundling should not have considered her prior history as a foster care provider and/or the most recent removal of the six minor children in deciding whether to revoke her certification as a foster care provider. The Court rejects this argument. Clearly petitioner's past history as a foster care provider is directly relevant to her fitness to serve as a provider in the future. ACS and Foundling's reliance on this

history is neither arbitrary nor capricious.

Also unavailing are Renaud's arguments that by revoking her foster care license, she will be unable to be reunited with the children if she prevails in her collateral court cases. Were she to prevail in those action, then any court awarding the children to her in a foster parent capacity could require that ACS re-certify her. See: In re: Jermaine H., 26 Misc.3d 891 (Fam. Ct. Mo. Cty. 2009); Goldstein v. Lavine, 100 Misc.2nd 126 (NY Sup. Ct. 1979).


In accordance herewith, it is hereby:

ORDERED and ADJUDGED that the petition is denied, and it is further

ORDERED and ADJUDGED that any requested relief not otherwise expressly granted herein is denied and that this constitutes the decision and order of the Court.

Dated: New York, NY  
September 20, 2010

SO ORDERED:

  
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J.G. J.S.C.

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