

Matter of NL (Zaugg)
2022 NY Slip Op 32974(U)
July 26, 2022
Family Court, Warren County
Docket Number: Docket No. XXXXX
Judge: Paulette M. Kershko
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STATE OF NEW YORK COUNTY OF WARREN
FAMILY COURT

In the Matter of

NL

[DOB: _____, 2021]

A Child under Eighteen Years of Age

Alleged to be Severely Abused/Abused/Neglected by

TYLER M. ZAUGG,;

DECISION AND ORDER

File

Docket No.:

Respondent.

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL MUST BE TAKEN WITHIN THIRTY DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, THIRTY-FIVE DAYS FROM THE MAILING OF THE ORDER TO THE APPELLANT BY THE CLERK OF THE COURT, OR THIRTY DAYS AFTER SERVICE BY A PARTY OR ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.

APPEARANCES: Barbara Lynne Gifford, Esq.
(Counsel for Petitioner, Warren County Dept of Social Services, "DSS")
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Lake George, NY 12845

Brian D. Pilatzke, Esq. (Counsel for Tyler M. Zaugg, "Respondent")
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1340 State Route 9
Lake George, New York 12845

Linda Richardson, Esq. (Attorney for Child, "AFC")
87 Halls Pond Road
Salem, New York

MOTION PAPERS:

1 - Notice of Motion of DSS, filed April 28, 2022;

2 - Attorney Affirmation of Barbara Lynne Gifford, Esq., duly sworn to on the

28th day of April, 2022, together with Exhibits A - E¹; and
3 - Memorandum of Law in Support of Motion for Summary Judgment, seeking an Order upon Fact-Finding adjudicating the subject child, NL, born _____, 2021, to be severely abused, abused and neglected by Tyler M. Zaugg.

Kershko, J.,

On September 8, 2021, DSS filed a Neglect/Abuse/Severe Abuse Petition, alleging that on or about July 4, 2021, Respondent neglected, abused and severely abused the subject child when he inflicted serious, life-threatening and non-accidental injuries on the subject child, causing the child's death, on July 16, 2021. DSS now moves for a summary judgment adjudication on the petition based upon a certificate of conviction of the Respondent who was convicted of Manslaughter in the First Degree (Penal Law 125.20[4]) and Assault in the Second Degree (Penal Law 120.05[9]). The Respondent and the Attorney for the Child did not submit any papers in support or opposition to the motion.²

¹ **Exhibit A** – (I) certified copy of Warren County Indictment No: 70115- 21/001, dated July 9, 2021, charging Tyler Zaugg with Assault in the First Degree, a class B violent felony, in violation of New York State Penal Law 120.10(3); Assault in the Second Degree, a class D violent felony in violation of New York State Penal Law 120.05(9); Assault in the Second Degree, a class D violent felony in violation of New York State Penal Law 120.05(9); and Endangering the Welfare of a Child, a class A misdemeanor, in violation of New York State Penal Law 260.10(1); (II) certified copy of Warren County Indictment No: 70159-21/001, dated August 13, 2021, charging Tyler Zaugg with Murder in the Second Degree, a class A-1 felony, in violation of New York State Penal Law 125.25(4); Manslaughter in the First Degree, a class B violent felony, in violation of New York State Penal Law 125.20(4); Endangering the Welfare of a Child, a class A misdemeanor, in violation of New York State Penal Law 260.10(1); **Exhibit B** – certified copy of the Plea Allocution Minutes of Tyler Zaugg, in Warren County Court, on February 8, 2022, the Hon. Robert Smith presiding; **Exhibit C** – certified copy of Certificate of Conviction of Tyler Zaugg to Manslaughter in the First Degree, a class B violent felony, in violation of New York State Penal Law 125.20(4) with a determinate sentence of imprisonment of 25 years and 5 years of Post-Release supervision and Assault in the Second Degree, a class D violent felony in violation of New York State Penal Law 120.05(9) with a determinate sentence of 7 years and 5 years of Post-Release supervision; **Exhibit D** – copy of the Neglect, Abuse and Severe Abuse Family Court Petition, dated September 8, 2021; and **Exhibit E** – Proposed Order on Motion.

² DSS filed an ex parte letter with a Stipulated Agreement of the parties, signed by counsel and the Respondent, purporting to consent to a finding of severe abuse. The Court provided a copy of the ex parte letter and Stipulated Agreement to all counsel. The Stipulated Agreement was not made a part of the Summary Judgment motion.

The relevant and undisputed facts are as follows:

- a) The subject child was born on _____, 2021, to non-respondent parent DML and the Respondent.
- b) The child died on July 16, 2021.
- c) On September 8, 2021, almost two months after the death of the child, DSS filed a petition in this Court, against the Respondent, seeking an adjudication that the Respondent had neglected, abused and severely abused the child.
- d) DSS does not allege that the Respondent is the parent or person legally responsible for any other siblings or half-siblings of the child or any other children for whom the Respondent is legally responsible or are under his care.³

The NYS Legislature has determined that the underlying purpose of filing a petition, pursuant to Article ten of the Family Court Act (“FCA”) is “...to protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being.” FCA 1011. Notwithstanding that purpose, it is well settled case law that the Court does not have jurisdiction over a neglect matter of a deceased child as the child cannot be the subject of a neglect petition. See Matter of Stephanie WW., 213 A.D.2d 818 (3d Dept 1995). Furthermore, a deceased child can only be the subject of an abuse or severe abuse petition, when there are surviving children to protect, which would be paramount in termination of parental rights proceedings, as to them, pursuant to FCA 1051(e) and Social Services Law 384-b (4)(e). See In re Alijah C., 1 NY3d 375, 390 (2004). Finally, FCA 1051(c) requires the Court to dismiss a petition when facts are insufficient to sustain the petition.

³ Nor is there any allegation that the Respondent was a sperm donor, that he has zygotes that have been cryogenically preserved, for later use or that a child has been conceived through assisted reproduction, subject to the Child Parent Security Act, which can result in parentage being established, by consent and intent, prior to the birth of the child. See “Beyond Surrogacy: Parentage Under the Child Parent Security Act” 93-Aug NYSBJ 30.

Accordingly, based upon 1-3 and for the reasons set forth herein, the Court hereby denies the summary judgment motion and dismisses the petition, based upon insufficient facts to sustain the petition, due to lack of subject matter jurisdiction, pursuant to FCA 1051(c).

Dated: July 26, 2022

PMK

**Hon. PAULETTE M. KERSHKO,
Family Court Judge**