

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

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Submitted - December 11, 2008

PETER B. SKELOS, J.P.  
MARK C. DILLON  
WILLIAM E. McCARTHY  
RANDALL T. ENG, JJ.

2008-01285  
2008-01286

DECISION & ORDER

In the Matter of Nancy C. (Anonymous), appellant, v  
Alison C. (Anonymous), respondent.  
(Appeal No. 1)

In the Matter of Brianna C. (Anonymous).  
Alison C. (Anonymous), respondent; Nancy C.  
(Anonymous), appellant.  
(Appeal No. 2)

(Docket Nos. O-4517-07, G-4693-07)

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Pauline E. Braun, Brooklyn, N.Y., for appellant.

Salvatore C. Adamo, New York, N.Y., for respondent.

Tracy Cass Mackenzie, Poughkeepsie, N.Y., attorney for the child Brianna C.

In a family offense proceeding pursuant to Family Court Act article 8, and a related proceeding pursuant to Family Court Act article 6 for the appointment of a guardian of the person of Brianna C., a minor, Nancy C., the mother of Brianna C., appeals from (1) an order of protection of the Family Court, Dutchess County (Forman, J.), dated November 16, 2007, which, inter alia, directed that she stay away from Brianna C. until November 16, 2008, and (2) an order of the same court, also dated November 16, 2007, which, after a hearing, appointed a guardian ad litem for her and, in effect, granted the petition and appointed a guardian of the person of Brianna C.

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MATTER OF C. (ANONYMOUS), BRIANNA

ORDERED that the appeal from the order of protection is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order dated November 16, 2007, in effect, granting the petition for the appointment of a guardian of the person of Brianna C., and appointing a guardian of the person of Brianna C. is reversed, on the facts and in the exercise of discretion, without costs or disbursements, and the matter is remitted to the Family Court, Dutchess County, for further proceedings on the petition in accordance herewith.

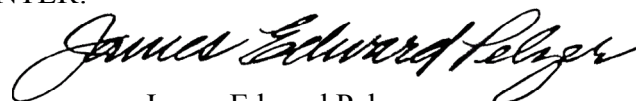
The order of protection expired by its own terms on November 16, 2008. Since the parties' rights will not be directly affected by a determination as to the propriety of the order of protection, the appeal from the order of protection has been rendered academic (*see Matter of Cooper-Winfield v Gary*, 9 AD3d 366; *Matter of Levande v Levande*, 308 AD2d 450, 451). Further, the issuance of the order of protection in this case "did not constitute a 'permanent and significant stigma which might indirectly affect the appellant's status in potential future proceedings'" (*Matter of McClure v McClure*, 176 AD2d 325, 326; *see Matter of Levande v Levande*, 308 AD2d at 451; *Matter of Cooper-Winfield v Gary*, 9 AD3d at 366).

The mother correctly contends that the Family Court improvidently exercised its discretion in appointing a guardian ad litem for her in the absence of evidence indicating that she was incapable of adequately prosecuting or defending her rights (*cf. Matter of Barbara Anne B.*, 51 AD3d 1018; *Matter of Philip R.*, 293 AD2d 547; *see CPLR 1201, 1202[a]*). Therefore, the guardian ad litem was not authorized to consent to the appointment of a guardian of the person of Brianna C.

The matter must be remitted to the Family Court, Dutchess County, for a new determination as to whether the circumstances warrant the appointment of a guardian of the person of Brianna C. While the Family Court's power under SCPA 1701 and Family Court Act § 661 permits "the [Family] [C]ourt to appoint someone other than the infant's parent as a guardian," the court must make a "threshold finding of 'abandonment, unfitness, persistent neglect [by the parent] or other extraordinary circumstances,' which is the standard used in child custody cases" (Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SPCA 1701 at 5, quoting *Matter of Merritt v Way*, 85 AD2d 666, 667, *affd* 58 NY2d 850; *see Matter of Bennett v Jeffreys*, 40 NY2d 543). Here, the record is inadequate to enable us to determine this issue.

SKELOS, J.P., DILLON, McCARTHY and ENG, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court

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