

# State of New York Court of Appeals

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## MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 112 SSM 11  
In the Matter of Mason H., &c.

Broome County Department of  
Social Services,  
Respondent;  
Joseph H.,  
Appellant.

Submitted by Sandra M. Colatosti, for appellant.  
Submitted by Thomas P. Coulson, for respondent.  
Submitted by John A. Cirando, for the child.

### MEMORANDUM:

The order of the Appellate Division should be reversed, without costs, and the petition dismissed.

An order terminating parental rights may be entered upon the ground that a child's parent "abandoned such child for the period of six months immediately prior to the date on

which the petition is filed in the court” (Social Services Law § 384-b [4] [b]). A child is “abandoned” within the meaning of Social Services Law § 384-b, if the “parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency” (id. § 384-b [5] [a]). Parents are presumed able to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still presumed able to communicate with their children absent proof to the contrary (see id. §§ 384-b [2] [b]; [5] [a]; Matter of Annette B., 4 NY3d 509, 514 [2005]).

The petitioner agency bears the burden of proving abandonment by clear and convincing evidence (see Social Services Law § 384-b [3] [g] [i]; Matter of Annette B., 4 NY3d at 514). Here, petitioner’s caseworker testified that respondent—who was incarcerated—did not visit with the child or communicate with the caseworker or other agency personnel in the six months preceding the filing of the abandonment petition. However, the record is bereft of evidence establishing that respondent failed to communicate with the child, directly or through the child’s foster parent, during the relevant time period. Thus, petitioner did not meet its burden of demonstrating, by clear and convincing evidence, that respondent abandoned the child.

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On review of submissions pursuant to section 500.11 of the Rules, order reversed, without costs, and the petition dismissed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided June 14, 2018