

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

In the Matter of

NOTICE OF MOTION

A F. P

Docket No. S-xxxxxx-08/10B

A Person Alleged to Be in Need of
Supervision,

Respondent.

PLEASE TAKE NOTICE that upon the annexed affirmation of Tanya J. Conley, Esq., attorney for Respondent, dated the 17th day of June, 2010, and upon all the prior proceedings herein, a motion will be made to this Court, the Hon. Joseph G. Nesser, thereof, at 3rd Floor, 361 Hall of Justice, Rochester, New York 14614, on the _____ day of _____, at a.m./p.m. or as soon thereafter as counsel may be heard for the following orders:

- 1.) Dismissing the Petition as jurisdictionally defective and facially insufficient;
and
- 2.) Vacating any and all orders of probation currently in effect; and
- 3.) Granting such other and further relief as may be requested by the Respondent

Dated: June 17, 2010
Rochester, New York

Yours, etc

Tanya J. Conley, Esq.
Attorney for the Child

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

In the Matter of

A F. P

Docket No. S-xxxxx-08/10B

AFFIRMATION

A Person Alleged to Be in Need of
Supervision,

Respondent.

TANYA J. CONLEY, ESQ., an attorney admitted to practice law in the State of New York does hereby affirm, this 17th day of June, 2010, under penalty of perjury, that the following, upon information and belief, is true:

1. I am an attorney duly licensed to practice law in the State of New York and I am associated with Stephen R. Weisbeck, Esq., Legal Aid Society, Juvenile Justice Division. Monroe County Family Court assigned Legal Aid Society to be the attorney of record for the Respondent, AF P.
2. This affirmation is submitted in support of Respondent's attached Motion.
3. The within proceeding was commenced in the Monroe County Family Court, upon the arraignment of the Respondent on June 16, 2010 on a person in need of supervision petition alleging the Respondent violated terms and conditions of probation.
4. The Legal Aid Society was assigned to represent the Respondent at the arraignment and the Respondent appeared and entered a general denial to the charges.

5. Unless otherwise specified, all allegations of fact contained in this affirmation are based upon information and belief, the sources thereof include the petition, conversations with my client, supporting depositions, and discovery already received.

PROCEDURAL POSTURE

6. Respondent was originally adjudicated a Person in Need of Supervision and placed on an order of probation supervision on January 9, 2009. The Order is attached to the current petition as Exhibit A.

7. The order expired on January 11, 2010. All of the allegations contained in the petition occurred after January 11, 2010.

8. On December 23, 2009, the Respondent appeared on a violation petition that had been filed by Monroe County Probation Department. In February 2010, Family Court did place Respondent on a subsequent term of probation, over the objection of the Respondent. After the original order expired on January 11, 2010, at the next court appearance, the Respondent moved to dismiss the petition because the order had expired and had not been tolled. The Court denied Respondent's motion and placed the Respondent on another term of probation. The Respondent is currently appealing the February 2010 order.

DISMISSAL OF THE PETITION

9. The current petition should be dismissed as jurisdictionally defective. The allegations of the petition allege that the Respondent violated terms and conditions of an order that has since expired.

10. The current order of probation that is in effect should be vacated and declared a nullity.

11. New York Family Court Act Section 779-a, entitled *declaration of delinquency concerning juvenile delinquents and persons in need of supervision*, states in part that “if, at any time during the period of a disposition of probation, the court has reasonable cause to believe the respondent has violated a condition of the disposition, it may declare the respondent delinquent and file a written declaration of delinquency. Upon such filing, the respondent shall be declared delinquent of his disposition of probation and such disposition shall be tolled...” Absent the filing of the declaration of delinquency the Respondent’s disposition of probation was not tolled and therefore expired on January 11, 2010.

11. The Monroe County Presentment Agency’s argument in opposition to Respondent’s motion articulated the legal premise that because the Respondent admitted jurisdiction prior to the expiration of the order, the Violation Petition did not need to be dismissed. However, on December 23, 2009, the Court had jurisdiction over the Respondent, as the terms and conditions of probation did not expire until January 11, 2010. Unless the order was tolled, the order expired January 11, 2010. The order was not tolled because the probation department never filed a declaration of delinquency, as required by Family Court Act §779-a.

12. The failure to file the statutorily required declaration of delinquency is a non-waivable jurisdictional defect. In 2002, the Court of Appeals dismissed a proceeding where papers were erroneously filed with the Clerk of the Supreme and County Courts, as opposed to the County Clerk. Such a failure has been equated to a nonfiling, and thus, a “non-waivable jurisdictional defect” rendering the proceeding a nullity. *Matter of Mendon Ponds Neighborhood Association v. Dehm*, 98 N.Y.2d 745 [2002]. See also *Miller v. Waters*, 51

A.D.3d 113 [3rd Dept. 2009] quoting *Mendon Ponds*. Non-waivable jurisdictional defects can be raised at any stage in the proceedings. (See *In the Matter of Jonathan M.*, 61 A.D.3d 1374 [4th Dept. 2009]) Although the decision denying Respondent's motion to dismiss is not appealable as a matter of right, the appeal from a subsequent order of disposition brings up for review the prior order. See *In the Matter of James L.*, (4th Dept. June 11, 2010) Since the failure to comply with substantive statutory requirements constitutes a non-waivable jurisdictional defect, the order must be reversed at the Appellate Division, or in the alternative, Family Court could vacate the order. (see *Leslie H v. Carol M.D.*, 47 A.D.3d 716 (2nd Dept. 2008); *Matter of Rajan M.*, 35 A.D.3d 863 (2nd Dept. 2006)

13. The statutory language regarding the necessity of a declaration of delinquency in order to toll the dispositional order of probation is clear and plain. However, the Family Court did not sign the declaration of delinquency. Article 7 requires a petition to be filed alleging a violation of the terms and conditions of probation. However, the filing does not toll the expiration of the underlying order. If a case is resolved prior to the expiration of the dispositional order placing a child on probation, the filing of a declaration of delinquency is not necessary. However, in order to assert jurisdiction over the child, the order must not expire and must be tolled. *In the Matter of Brittany M.*, 51 A.D.3d 1303 (3rd Dept. 2008). In *Brittany*, the Third Department stated, "On June 4, 2007, petitioner filed a petition alleging that the respondent had violated the terms and conditions of her probation and Family Court signed a declaration of delinquency." Hence, the proper procedure to toll the a probation order about to expire is illustrated in the *Brittany* case. The Court further stated, "Thus, we find that respondent remained under the jurisdiction of Family Court until June 19, 2007, that the filing

of a violation petitions, **as well as the making of a declaration of delinquent** at any time prior to that date was permissible.” *Id.* (Emphasis added)

14. The *Brittney* decision called for legislative action to address the inconsistencies between Family Court Act Articles 3 and 7. The New York State Assembly and Senate have introduced such legislation under Bill No, A08505 and S3876. Copies of the proposed legislation are attached to this motion as Exhibit A and can be found at 2009 NY A.B. 8505 (NS), and 2009 NY S.B. 3876 (NS). The bills were introduced and referred to committee. In the Bill Memorandum explaining the need for the legislation, the Legislature stated:

“The last two amendments to the PINS statutes in this measure would delineate procedures for violations of orders of suspended judgments and violations of probation, drawing upon existing juvenile delinquency procedures. See Family Court Act §§360.2, 360.3. Violations of both orders of probations and suspended judgments would require the filing of a verified petition, a hearing...”

The proposed legislation repeals Family Court Act §779-a requirements of filing a declaration of delinquency, and proposed that filing a petition would toll the dispositional order as an operation of law. The legislation has not passed and the current statute still requires a making of a declaration of delinquency to toll the order.

15. Based on the above referenced case law, current statutory language and the proposed legislation, it is likely that the Appellate Division will reverse the Family Court’s assertion of jurisdiction over the Respondent in January and February of 2010. It is also likely that the Appellate Division would either dismiss the petition or declare the proceedings that occurred post January 11, 2010 null and void.

16. Family Court has the ability to vacate a prior order. Vacating the prior order would moot the appeal, and Respondent would not need to pursue the appeal.

WHEREFORE, it is respectfully requested that the relief demanded herein be granted
in all respects.

Dated: June 17, 2010

Rochester, New York

Yours etc.,

Tanya J. Conley, Esq.
Attorney for the Child