

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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**CAF 22-00406**

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

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IN THE MATTER OF JOSAPH M.

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MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WANDA A., RESPONDENT-APPELLANT.  
(APPEAL NO. 3.)

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF  
COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ELIZABETH deV. MOELLER  
OF COUNSEL), FOR PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered July 30, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent Wanda A. claims that she received ineffective assistance of counsel during the hearing to determine whether to reappoint a guardian ad litem, and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent appeals in appeal No. 1 from an order that appointed a guardian ad litem for her pursuant to CPLR 1202. In appeal No. 2, respondent appeals from an order granting petitioner's application for a subpoena duces tecum with respect to respondent's medical and mental health treatment records. In appeal No. 3, respondent appeals from an order of fact-finding and disposition that, inter alia, adjudged the subject child to be neglected.

As a preliminary matter, we note that, shortly after issuing the order in appeal No. 1, Family Court terminated the representation by the guardian ad litem, and we therefore dismiss the appeal from the order in appeal No. 1 as moot (*see Chase Natl. Bank of City of N.Y. v von Kageneck*, 260 App Div 941, 941 [2d Dept 1940]; *cf. Matter of Elliot Z. [Joseph Z.]*, 165 AD3d 682, 683 [2d Dept 2018]; *see generally Matter of Wellman v Surlles*, 185 AD2d 464, 465 [3d Dept 1992]).

We further note that respondent does not raise any issues with respect to the order in appeal No. 2 and has therefore abandoned any contentions with respect thereto (see *Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1634 [4th Dept 2018], lv denied 32 NY3d 915 [2019]; *Matter of Jaquish v Town Bd. of Town of German Flatts*, 160 AD3d 1372, 1372-1373 [4th Dept 2018]; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]). We thus dismiss the appeal from the order in appeal No. 2.

Contrary to respondent's contention in appeal No. 3, because she failed to appear at the fact-finding hearing and because her attorney, although present, did not participate in the hearing, the order of fact-finding and disposition was entered upon respondent's default (see *Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]; *Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, 1598-1599 [4th Dept 2011], lv denied 17 NY3d 713 [2011]). No appeal lies from an order entered upon the default of the appealing party (see CPLR 5511; *Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]). Nevertheless, respondent's appeal from the order brings up for review "matters which were the subject of contest" before the court (*James v Powell*, 19 NY2d 249, 256 n 3 [1967], rearg denied 19 NY2d 862 [1967]), i.e., respondent's claim that she was denied effective assistance of counsel at the hearing to determine whether to reappoint a guardian ad litem (see generally *Matter of Buljeta v Fuchs*, 209 AD3d 730, 732 [2d Dept 2022]; *Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080-1081 [4th Dept 2019]).

Respondent contends that she was denied effective assistance of counsel based on counsel's statements to the court at that hearing that counsel was unable to communicate with respondent and that respondent was not cooperating with her. We reject that contention. "[C]ourts cannot shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such. There is a duty on the courts to protect such litigants" (*Matter of Jesten J.F. [Ruth P.S.]*, 167 AD3d 1527, 1528 [4th Dept 2018] [internal quotation marks omitted]). Thus, the court, on its own initiative or upon the motion of "any other party to the action," may appoint a guardian ad litem (CPLR 1202 [a] [3]) to appear on behalf of "an adult incapable of adequately prosecuting or defending [their] rights" (CPLR 1201). When an attorney becomes "aware of their client's apparent incompetence, it [is] incumbent upon . . . counsel to move, pursuant to CPLR 1202 (a) (3), for appointment of a guardian ad litem to protect [their client's] interests" (*Brewster v John Hancock Mut. Life Ins. Co.*, 280 AD2d 300, 300 [1st Dept 2001]; see e.g. *Jesten J.F.*, 167 AD3d at 1528; *Matter of Anastasia E.M. [Niasia F.]*, 146 AD3d 887, 888 [2d Dept 2017]). Inasmuch as counsel's comments were relevant to the court's determination whether to appoint a guardian ad litem, we conclude that respondent failed to demonstrate the absence of a strategic or other legitimate explanation for counsel's alleged shortcomings (see *Matter of Bryleigh E.N. [Derek G.]*, 187 AD3d 1685, 1687 [4th Dept 2020]; see also *People v Boodrow*, 205 AD3d 1134, 1137 [3d Dept 2022]; *People v Ellis*, 169 AD2d 838, 839 [2d Dept 1991], lv

*denied* 77 NY2d 960 [1991]).

Entered: November 17, 2023

Ann Dillon Flynn  
Clerk of the Court