

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH DEPARTMENT

In re Charity W.

79 A.D.3d 1722, 914 N.Y.S.2d 841 (N.Y. App. Div. 4th Dep't 2010) · Decided December 30, 2010

SUMMARY

The New York Appellate Division affirmed an order denying a mother's motion to vacate a default finding of permanent neglect in a proceeding to terminate her parental rights. The court held that the mother was not deprived of effective assistance of counsel because the record showed that she and her attorney had notice of the continued hearing date and that counsel had attempted to present a meritorious defense.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Department
WRITING FOR THE COURT	Scudder, P.J.; Carni, J.; Lindley, J.; Pine, J.; Gorski, J.
JURISDICTION	New York
DECIDED	December 30, 2010
DISPOSITION	affirmed
PROCEDURAL POSTURE	Respondent mother appealed from an order of Family Court, Onondaga County, denying her motion to vacate an order of fact-finding and disposition entered after she failed to appear for the second day of a fact-finding hearing in a proceeding to terminate her parental rights for permanent neglect.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Respondent mother v. Petitioner

TOPICS

- termination of parental rights
- family law procedure
- default judgment
- appellate procedure

PRACTICE AREAS

- family law
- appellate procedure
- termination of parental rights

QUESTIONS PRESENTED

1. Whether the mother's assigned attorney was ineffective for failing to ensure that she knew when to appear for the continuation of the fact-finding hearing.
2. Whether the mother's assigned attorney was ineffective for failing to provide a meritorious defense in support of the motion to vacate the order entered upon her default.

HOLDINGS

1. The mother's assigned attorney was not ineffective because both the mother and counsel were notified of the continuation date, and the mother did not dispute that she was present when the date was designated.
2. Counsel was not ineffective because the record established that counsel attempted to provide the requisite meritorious defense; the fact that Family Court found the preferred defense lacking in merit did not establish ineffective assistance.

KEY QUOTATIONS

“Indeed, the mother merely states generally that her attorney “may not have clearly informed her” of the date of the continuation of the fact-finding hearing, but she does not dispute that she was present in court when the date was designated.” (1723)

“Although the court determined that the preferred defense lacked merit, that determination does not establish that the mother’s attorney was ineffective.” (1723)

FACTUAL BACKGROUND

In a proceeding to terminate her parental rights on the ground of permanent neglect, the respondent mother failed to appear for the second day of the fact-finding hearing. Both the mother and her assigned attorney had been notified of the continuation date, and the mother had been present when the date was designated. Family Court found permanent neglect, later reopened the dispositional hearing to allow the mother to testify and present evidence, and nevertheless again determined that termination of parental rights was in the child's best interests.

PROCEDURAL HISTORY

Family Court proceeded with the fact-finding hearing in the mother's absence and found that she had permanently neglected the subject child. The court then conducted a dispositional hearing, awarded custody and guardianship to the petitioner, and terminated the mother's parental rights. Family Court denied the mother's motion to vacate the permanent-neglect finding but reopened the dispositional hearing in the interests of justice; after the mother testified and presented evidence, the court adhered to its prior determination. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Michael F., 16 AD3d 1116 [2005]

OPINION

PER CURIAM.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered September 8, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, denied respondent's motion to vacate an order of fact-finding and disposition dated April 27, 2009. It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding to terminate her parental rights on the ground of permanent neglect, respondent mother failed to appear at the second day of the fact-finding hearing. Family Court proceeded with the fact-finding hearing in the absence of the mother and concluded that she had permanently neglected the subject child. Immediately following the fact-finding hearing, the court conducted a dispositional hearing and determined that it was in the child's best interests to award custody and guardianship of the child to petitioner.

The mother thereafter moved to vacate the order entered upon her default, asserting that she had misunderstood the court's statement concerning the continuation date of the fact-finding hearing. The court denied that part of the mother's motion with respect to the finding of permanent neglect, but the court in effect granted that part of the motion with respect to the dispositional phase of the proceedings by reopening the dispositional hearing "in the interests of justice" in order to afford the mother the opportunity to testify and present evidence.

The mother testified at the reopened dispositional hearing, whereupon the court adhered to its prior determination to terminate her parental rights. On appeal, the mother contends that she was deprived of effective assistance of counsel because her assigned attorney failed to ensure that she knew when to appear in court for the continuation of the fact-finding hearing, and failed to provide a meritorious defense in support of the motion to vacate the order entered upon her default.

We reject that contention. The record establishes that both the mother and her attorney were notified *1723of the continuation date of the fact-finding hearing and, under the circumstances, it cannot be said that the mother's attorney was ineffective for failing to do more to ensure that the mother would be present on that date (see generally *Matter of Michael F.*, 16 AD3d 1116 [2005]).

Indeed, the mother merely states generally that her attorney "may not have clearly informed her" of the date of the continuation of the fact-finding hearing, but she does not dispute that she was present in court when the date was designated. Contrary to the further contention of the mother, the record establishes that her attorney did in fact attempt to provide the requisite meritorious defense in support of the motion.

Although the court determined that the preferred defense lacked merit, that determination does not establish that the mother's attorney was ineffective. Present — Scudder, P.J., Carni, Lindley, Pine

and Gorski, JJ.

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