

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, THIRD DEPARTMENT**

Matter of Jerrell OO. (Andrew OO.)

2018 NY Slip Op 04044 (N.Y. Ct. App. 2018) · No. 523466 · Decided June 7, 2018

SUMMARY

The New York Appellate Division, Third Department, affirmed an order restoring a neglect proceeding after the respondent substantially failed to comply with the terms of an adjournment in contemplation of dismissal. The court rejected arguments that the petitioner acted maliciously or in bad faith, finding the restoration was supported by the respondent's failure to permit home access and cooperate with the caseworker.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Pritzker, J.; Lynch, J.P.; Devine, J.; Mulvey, J.; Aarons, J.
JURISDICTION	New York
DECIDED	June 7, 2018
DOCKET	523466
DISPOSITION	affirmed
PROCEDURAL POSTURE	Respondent appealed from a Family Court order that restored a neglect proceeding after he substantially failed to comply with the terms and conditions of an adjournment in contemplation of dismissal and reiterated a derivative neglect finding.
STANDARD OF REVIEW	Whether Family Court's determination that respondent substantially failed to comply with the ACD terms was supported by the record.
PRECEDENTIAL VALUE	Published New York Appellate Division memorandum decision
PARTIES	Andrew OO. v. Saratoga County Department of Social Services

TOPICS

family law procedure

appellate procedure

family law

standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Family Court properly found that Andrew OO. substantially failed to comply with the terms and conditions of the adjournment in contemplation of dismissal.
2. Whether the Department's motion to restore the neglect proceeding was malicious or made in bad faith.
3. Whether the Department's letter declining to present evidence or seek additional orders at the dispositional hearing demonstrated malice or bad faith.

HOLDINGS

1. Family Court properly determined that respondent substantially failed to comply with the ACD conditions requiring access and cooperation.
2. The court rejected respondent's claim that the Department's motion to restore the proceeding was malicious or made in bad faith.
3. The Department's letter stating that it would present no evidence and seek no further orders or services did not demonstrate malice or bad faith.

KEY QUOTATIONS

“Respondent's bedroom, which is a part of the home and a place where the younger child sleeps, is a reasonable and foreseeable place that petitioner would need to inspect.” (at 2)

“Therefore, Family Court's determination that respondent failed to substantially observe the terms and conditions of the ACD was amply supported by the record” (at 2)

FACTUAL BACKGROUND

Andrew OO. admitted allegations that he neglected an older child and derivatively neglected a younger child who slept in his bedroom. During the one-year ACD period, a Department caseworker made 19 scheduled home visits, left seven letters, and left several telephone messages, but Andrew was not present for the visits and did not cooperate with the Department. Access to his bedroom was blocked by a keypad, and the Appellate Division found that the bedroom was a reasonable and foreseeable place for the Department to inspect.

PROCEDURAL HISTORY

The Saratoga County Department of Social Services commenced a Family Court Act article 10 neglect proceeding alleging that Andrew OO. neglected an older child and derivatively neglected a younger child. Andrew admitted the allegations, and Family Court entered a neglect and derivative neglect finding while adjourning the proceeding in contemplation of dismissal for one year under Family Ct Act § 1039(a). After the Department moved to restore the proceeding based on alleged violations of the ACD conditions, Family Court held a hearing, found substantial noncompliance, restored the proceeding, and later imposed no additional conditions or restrictions after the Department declined to present evidence or seek further orders. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of James S. [Annemarie R.], 90 AD3d 1099, 1100-1101 (3d Dep't 2011)
- Matter of Brent B., 279 AD2d 817, 818 (3d Dep't 2001), lv denied 96 NY2d 712 (2001)

OPINION

PER CURIAM.

Matter of Jerrell OO. (Andrew OO.) (2018 NY Slip Op 04044) Matter of Jerrell OO. (Andrew OO.) 2018 NY Slip Op 04044 Decided on June 7, 2018 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: June 7, 2018 523466 [*1]In the Matter of JERRELL OO., Alleged to be a Neglected Child.

SARATOGA COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent; ANDREW OO., Appellant. Calendar Date: April 24, 2018 Before: Lynch, J.P., Devine, Mulvey, Aarons and Pritzker, JJ. Law Offices of Martin & Martin, Glens Falls (Michael S. Martin of counsel), for appellant. Steven M. Dorsey, County Attorney, Ballston Spa (Michael J. Hartnett of counsel), for respondent.

Nicole R. Rodgers, Saratoga Springs, attorney for the child. Pritzker, J. MEMORANDUM AND ORDER Appeal from an order of the Family Court of Saratoga County (Skoda, J.), entered October 8, 2015, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject child to be derivatively neglected. Petitioner commenced this neglect proceeding alleging that respondent, who is the maternal uncle of two children (born in 1999 and 2004), neglected the older child and derivatively neglected the younger child.

In March 2014, respondent admitted the allegations contained in the petition and, based upon the admission, Family Court made a finding of neglect and derivative neglect, further ordering that the proceeding be adjourned in contemplation of dismissal (hereinafter ACD) for one year (see Family Ct Act § 1039 [a]).

The ACD directed respondent to comply with certain terms and conditions. In January 2015, petitioner moved to restore the proceeding to Family Court's calendar with respect to only the younger child (see Family Ct Act § 1039 [e]) based upon allegations that [*2]respondent violated two terms and conditions of the ACD by denying petitioner's caseworker access to respondent's

bedroom during home visits and failing to cooperate with petitioner by not meeting or contacting the assigned caseworker.

Family Court conducted a hearing and, after determining that respondent substantially failed to comply with these terms of the ACD, the neglect proceeding was restored and, as respondent already admitted neglect, the matter was scheduled for a dispositional hearing. Petitioner subsequently informed Family Court by letter that it would not be presenting any evidence at the dispositional hearing nor would it be seeking any further orders or remedial services.

Family Court then issued an order, reiterating the derivative neglect finding and, on consent of the parties, imposed no additional conditions or restrictions upon respondent. Respondent now appeals. We affirm. Petitioner's caseworker testified at the hearing that she made 19 scheduled visits to respondent's home, left seven letters for respondent at his home and left several telephone messages for respondent during the pendency of the ACD.

The caseworker testified that respondent was not home for any of those visits and that she was prevented access to respondent's bedroom as there was a keypad on the door. We reject respondent's argument that the home was controlled by his parents and that, because the ACD does not specifically mention his bedroom as a place to be searched, he was not aware of the requirement that petitioner have access to his bedroom.

Respondent's bedroom, which is a part of the home and a place where the younger child sleeps, is a reasonable and foreseeable place that petitioner would need to inspect. Furthermore, the ACD made clear that respondent was required to cooperate with petitioner, and one of the caseworker's letters specifically requested access to respondent's bedroom.

The testimony at the hearing also established that respondent failed to contact and cooperate with petitioner, and we find no merit to respondent's argument that there is no proof that he received the caseworker's telephone messages or letters given the testimony that respondent called the caseworker's office at least once.

Moreover, given the significant number of home visits, letters and telephone messages left for respondent, it is highly likely that he was aware that petitioner was attempting to contact him but that he failed to respond.

Therefore, Family Court's determination that respondent failed to substantially observe the terms and conditions of the ACD was amply supported by the record (see generally *Matter of James S. [Annemarie R.]*, 90 AD3d 1099, 1100-1101 [2011]; *Matter of Brent B.*, 279 AD2d 817, 818 [2001], lv denied 96 NY2d 712 [2001]).[FN1] Further, we cannot agree with respondent's contention that petitioner's motion to restore the proceeding was malicious and made in bad faith.

It is evident from the record that petitioner's motion was filed based upon respondent's failure to adhere to the terms and conditions of the ACD. We also disagree with respondent's argument that the letter written by petitioner to Family Court, prior to the dispositional hearing, demonstrated petitioner's malice.

The letter stated that petitioner would not be presenting any evidence at the hearing nor would it be seeking any orders or services, as its involvement was only hurting the younger child, who clearly enjoyed his relationship with respondent and never verbalized any concerns.

Therefore, we do not discern any malice or bad faith on the part of petitioner. Lynch, J.P., Devine, Mulvey and Aarons, JJ., concur. ORDERED that the order is affirmed, without costs. Footnotes
Footnote 1: Respondent did not testify and offered no evidence at the hearing.