

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

In re Elijah NN.

66 A.D.3d 1157 (N.Y. App. Div. 2009) · Decided October 22, 2009

SUMMARY

The New York Appellate Division, Third Department, affirmed a Family Court determination that a child was neglected under Family Court Act article 10. The court held that postpetition evidence should not have been considered at fact-finding, but concluded that the prepetition evidence concerning the respondent’s cognitive limitations, memory problems, unstable housing, and inability to manage medications and finances was sufficient to establish neglect by a preponderance of the evidence.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Garry, J.; Rose, J.E.; Kane, J.; Stein, J.; McCarthy, J.
JURISDICTION	New York
DECIDED	October 22, 2009
DISPOSITION	affirmed
PROCEDURAL POSTURE	Respondent appealed from a Family Court order adjudicating her child neglected in a proceeding under Family Court Act article 10 and continuing the child's placement in foster care.
STANDARD OF REVIEW	The Appellate Division gave great deference to Family Court's determination and reviewed whether a preponderance of the evidence established neglect.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Respondent v. Petitioner

TOPICS

- family law procedure
- parental rights
- evidence
- preservation of error
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Family Court improperly considered postpetition evidence during the fact-finding hearing.
2. Whether the remaining prepetition evidence was sufficient to establish that the child was neglected under Family Court Act § 1012(f)(i)(B).

HOLDINGS

1. Postpetition evidence concerning respondent's parenting abilities should not have been considered at the fact-finding hearing because it was admitted to prove factual matters rather than solely for impeachment, and the petition had not been conformed to the proof or supplemented with additional petitions.
2. The prepetition evidence was sufficient to establish by a preponderance of the evidence that the child was neglected because respondent's cognitive and memory impairments, combined with her circumstances and conduct, demonstrated an actual failure to exercise the minimum degree of care and placed the child in imminent danger of impairment.

KEY QUOTATIONS

“In general, postpetition evidence should not be considered during a fact-finding hearing” (1159)

“Although the evidence of respondent’s parenting abilities would properly have been considered for dispositional purposes, it should not have been considered at the fact-finding hearing.” (1159)

“The prepetition evidence was sufficient to support the finding of neglect.” (1159-1160)

“Giving “great deference” to the court’s determination, we find that a preponderance of the evidence established that the child was neglected within the meaning of the statute.” (1160)

FACTUAL BACKGROUND

Respondent had physical limitations, cognitive deficits, and severe memory problems resulting from multiple sclerosis, a seizure disorder, and a brain injury. Before and during pregnancy, she required assistance with medical appointments, transportation, medication management, finances, and housing, and experienced at least one seizure caused by a medication error. The evidence also showed unstable housing and an unsuitable living arrangement, while a psychologist opined that respondent could not care for a child without the consistent presence and involvement of another person.

PROCEDURAL HISTORY

Petitioner commenced an article 10 neglect proceeding shortly after the child's birth. After a fact-finding hearing, Family Court adjudicated the child neglected; following a dispositional hearing, it continued foster-care placement with a permanency goal of returning the child to respondent. The Appellate Division held that postpetition evidence should not have been considered at fact finding but concluded that the admissible prepetition evidence independently supported the neglect finding, and affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Ashley X., 50 A.D.3d 1194, 1196 (N.Y. App. Div. 2008)
- Matter of Jewle I., 44 A.D.3d 1105, 1107 (N.Y. App. Div. 2007)
- Matter of Jessica YY., 258 A.D.2d 743, 747 (N.Y. App. Div. 1999)
- Matter of Sara X., 122 A.D.2d 795, 797 (N.Y. App. Div. 1986), appeal dismissed, 69 N.Y.2d 707 (1986)
- Matter of Darlene T., 28 N.Y.2d 391, 396 (1971)
- Nicholson v. Scopetta, 3 N.Y.3d 357, 369-370 (2004)
- Matter of Katie R., 251 A.D.2d 698, 699 (N.Y. App. Div. 1998), leave to appeal denied, 92 N.Y.2d 809 (1998)
- Matter of Markus MM., 17 A.D.3d 747, 748 (N.Y. App. Div. 2005)
- Matter of Nassau County Dept. of Social Servs. v. Denise J., 87 N.Y.2d 73, 79 (1995)
- Matter of Mary Kate VV., 59 A.D.3d 873, 875 (N.Y. App. Div. 2009), leave to appeal denied, 12 N.Y.3d 711 (2009)

OPINION

GARRY, J.

Garry, J. Appeal from an order of the Family Court of Delaware County (Becker, J.), entered July 30, 2008, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate respondent's child to be neglected.

The child who is the subject of this proceeding was born to respondent in December 2007. Respondent suffers from physical limitations, cognitive difficulties and memory problems resulting from multiple sclerosis, a seizure disorder, and a brain injury.

Before and during the pregnancy, petitioner assisted her with scheduling, transportation and managing her medications through its Adult Protective Services and Public Health Nursing divisions. In addition, petitioner managed respondent's finances as her representative payee after allegedly learning that she habitually spent her monthly Social Security benefits within days of receiving them on such purchases as marihuana and cigarettes.

During respondent's pregnancy, she allegedly tested positive for marihuana. In addition, she did not have a stable living situation, moving frequently before and during her pregnancy. One day after the child was born, petitioner commenced this proceeding seeking a determination pursuant to Family Ct Act article 10 that he was neglected on the ground that respondent's limited physical and cognitive functioning and her continued high-risk behaviors hindered her ability to care for him safely and appropriately.

After a hearing pursuant to Family Ct Act § 1027, respondent and the child were placed together in a foster home. Shortly thereafter, petitioner moved by order to show cause to have the child placed in its custody. With respondent's consent, the child was placed in foster care pending the disposition of this proceeding.

After a fact-finding hearing in April 2008, Family Court determined the child to have been neglected. A dispositional hearing followed in July 2008, after which the court continued the child's placement in foster care with a permanency goal of returning him to respondent's custody. Respondent now appeals. Respondent first contends that Family Court improperly considered postpetition evidence during the fact-finding hearing, consisting of the testimony of the foster mother—who temporarily housed respondent and her child after the child's *1159birth—as to respondent's behavior, memory lapses, and parenting skills during that period.

The court also considered a Child Protective Services summary investigative report addressing events that took place both before and after the petition was filed. "In general, postpetition evidence should not be considered during a fact-finding hearing" (Matter of Ashley X., 50 AD3d 1194, 1196 [2008] [citation omitted]), although such evidence may be admitted for impeachment purposes when the respondent is given sufficient notice to avoid surprise or prejudice (see *id.*; Matter of Jewle I., 44 AD3d 1105, 1107 [2007]).

Here, upon the objection of respondent's counsel, the court ruled that it would consider postpetition evidence to the extent that it was admitted to prove respondent's impairments existing at the time the petition was filed.

Thus, the evidence was admitted "to prove... factual matters" and not for the purpose of impeachment (Matter of Ashley X., 50 AD3d at 1196). Further, petitioner did not move to conform the petition's pleadings to the proof except with regard to the child's date of birth, nor did it file any additional petitions (see Matter of Jessica YY., 258 AD2d 743, 747 [1999]; Matter of Sara X., 122 AD2d 795, 797 [1986], appeal dismissed 69 NY2d 707 [1986]).

Although the evidence of respondent's parenting abilities would properly have been considered for dispositional purposes (see Matter of Darlene T., 28 NY2d 391, 396 [1971]), it should not have been considered at the fact-finding hearing. Respondent contends that in the absence of the postpetition evidence, the remaining evidence was insufficient to support Family Court's determination of neglect.

A neglected child, as defined by statute, specifically includes one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" (Family Ct Act § 1012 [f] [i] [B] [emphasis added]).

In determining whether a child is in actual or imminent danger of impairment, the court must "focus on serious harm or potential harm to the child, not just on what might be deemed

undesirable parental behavior” (Nicholson v Scoppetta, 3 NY3d 357, 369 [2004]). Further, the parent’s failure to “exercise a minimum degree of care” (Family Ct Act § 1012 [f] [i] [B]) “must be actual, not threatened” (Nicholson v Scoppetta, 3 NY3d at 370). “Actual injury or impairment need not be found, as long as a preponderance of the evidence establishes that the child is in imminent danger of either injury or impairment” (Matter of Katie R., 251 AD2d 698, 699 [1998], lv denied 92 NY2d 809 [1998] [internal quotation marks and citations omitted]; accord Matter of Markus MM., 17 AD3d 747, 748 [2005]).

The prepetition evidence was sufficient to support the finding of neglect. While respondent’s use of marijuana during her pregnancy, standing alone, would not have been sufficient (see Matter of Nassau County Dept. of Social Servs. v Denise J., 87 NY2d 73, 79 [1995]; Matter of Markus MM., 17 AD3d at 748), the testimony of several social services providers amply demonstrated the severe impact of respondent’s cognitive deficits and memory problems on her ability to exercise a “minimum degree of care” (Family Ct Act § 1012 [f] [i] [B]) for her child and even for herself.

There was testimony that, even with frequent reminders, respondent regularly forgot her medical appointments and could not manage her regimen of medications without the assistance of a public health nurse. Even with this assistance, she had difficulty remembering to take her medications on-time, resulting in at least one seizure during her pregnancy caused by a medication error.

She could not manage her finances without assistance and could not maintain stable housing, moving at least four times during her pregnancy and choosing not to stay in an appropriate adult home located for her by petitioner some weeks before the child’s birth. There was evidence that her mother’s home, where she was living when the petition was filed, was unsuitable because of, among other things, the mother’s alleged alcohol abuse and a volatile mother-daughter relationship that included physical altercations.

A psychologist who evaluated respondent testified that she had a borderline IQ and an extremely low ability to retain and store memory. He opined that respondent’s cognitive and memory limitations would prevent her from being able to care for a child without the consistent presence and involvement of another person.

Finally, respondent herself testified that, although she wanted her child, she could not care for him without assistance. Giving “great deference” to the court’s determination (Matter of Mary Kate VV., 59 AD3d 873, 875 [2009], lv denied 12 NY3d 711 [2009]), we find that a preponderance of the evidence established that the child was neglected within the meaning of the statute.

Rose, J.E, Kane, Stein and McCarthy, JJ., concur. Ordered that the order is affirmed, without costs.