

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

In re Eustace B.

76 A.D.2d 428 · Decided August 10, 2010

SUMMARY

The Appellate Division, First Department reversed the Family Court’s denial of the respondent mother’s motion to vacate her default at a child-neglect fact-finding hearing and dismissed the neglect petition under Family Court Act § 1051(c). The court also dismissed the appeal from the fact-finding order as taken from a non-appealable order, and concluded alternatively that the agency’s evidence did not establish neglect by a preponderance of the evidence.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York
WRITING FOR THE COURT	Andrias, J.P.; Friedman, J.; McGuire, J.; Acosta, J.; DeGrasse, J.
JURISDICTION	New York
DECIDED	August 10, 2010
DISPOSITION	reversed
PROCEDURAL POSTURE	Respondent mother appealed from a Family Court order denying, sub silentio, her motion to vacate her default at a fact-finding hearing and dismiss a neglect petition. She also appealed from the ensuing order of fact-finding entered after an inquest on her default.
STANDARD OF REVIEW	The Appellate Division reviewed the denial of the motion to vacate the default for whether respondent established a nonwillful failure to appear and a meritorious defense. It also assessed whether the agency established neglect by a preponderance of the evidence.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion; precedential value is not otherwise characterized in the source text.
PARTIES	Respondent mother v. Agency

TOPICS

- family law procedure
- appellate procedure
- parental rights
- standard of review
- remedies

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether respondent's default at the fact-finding hearing should be vacated based on the absence of willfulness and the existence of a meritorious defense.
2. Whether the neglect petition should be dismissed under Family Court Act § 1051(c) because the court's aid was no longer needed.
3. Whether the separate appeal from the fact-finding order entered after the default was taken from a non-appealable order.
4. Whether the agency's evidence established neglect by a preponderance of the evidence.

HOLDINGS

1. The motion to vacate respondent's default should have been granted because there was no evidence that her failure to appear was willful and she demonstrated a meritorious defense to the neglect petition.
2. The neglect petition should be dismissed because the court's aid was not needed where the child had been released to respondent's custody and there was no basis for continued supervision or respondent's participation in agency referrals.
3. The appeal from the order of fact-finding entered after the inquest was dismissed because the order was non-appealable.
4. Even apart from dismissal under Family Court Act § 1051(c), the agency's evidence did not establish neglect by a preponderance of the evidence.

KEY QUOTATIONS

“we are cognizant that family courts in many counties across the state have crushing case loads, extremely difficult family issues to decide, and limited time to make fair and informed determinations in what are often chaotic and highly charged emotional cases” (at 429)

FACTUAL BACKGROUND

The child was being raised as a model person and student and wished to continue living securely in his mother's custody. The neglect petition arose from an isolated domestic-violence incident between respondent and her boyfriend, but that relationship had ended. Family Court had released the child to respondent's custody, indicating that court supervision and the agency's referrals were not needed. Respondent's counsel advised the court that respondent was on her way to the fact-finding hearing, which had been scheduled for 4:00 p.m. to accommodate her work schedule, and respondent had attended prior court dates without incident.

PROCEDURAL HISTORY

Family Court, New York County, denied respondent mother's motion to vacate her default and dismiss the neglect petition, and entered a fact-finding order following an inquest. The Appellate Division unanimously

reversed the order denying the motion, granted the motion, and dismissed the petition. It dismissed the separate appeal from the fact-finding order because that order was non-appealable.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The motion to vacate respondent's default was granted and the neglect petition was dismissed. The separate appeal from the fact-finding order was dismissed as taken from a non-appealable order.

CASES CITED

- Matter of Kayla B., 262 A.D.2d 137 (1999)
- Matter of Kirk V., 60 A.D.3d 427 (2009)
- Matter of Taina M., 32 A.D.3d 210, 211 (2006)
- Alix A. v. Erika H., 45 A.D.3d 394, 394-395 (2007)
- Matter of Mursol B., 266 A.D.2d 76, 76 (1999)
- Nicholson v. Scoppetta, 3 N.Y.3d 357, 368 (2004)

OPINION

PER CURIAM.

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about June 5, 2009, which, insofar as appealed from, denied, sub silentio, respondent mother's motion to vacate her default at the fact-finding hearing on April 14, 2009, and to dismiss the petition, unanimously reversed, on the law, without costs, the motion granted, and the petition dismissed.

Appeal from order of fact-finding, same court and Judge, entered on or about June 24, 2009, following an inquest on April 14, 2009 upon respondent's default, unanimously dismissed, without costs, as taken from a non-appealable order. Respondent persuasively argues that the neglect petition should have been dismissed pursuant to Family Court Act § 1051 (c) because the court's "aid" was not needed here, inasmuch as, in releasing the child to respondent's custody, the court in effect determined that there was no basis for supervision or for respondent's participation in referrals made by the agency.

It was established that the child was being raised as a model, person and student and wished to continue residing in the security of his mother's custody. Furthermore, the domestic violence incident between respondent and her boyfriend was isolated (see Matter of Kayla B., 262 AD2d 137 [1999]), and, in any event, that relationship had ended (see Matter of Kirk V, 60 AD3d 427 [2009]).

As to respondent's motion to vacate her default in appearing at the fact-finding hearing, we find that there is both an absence of evidence that respondent's failure to appear was willful, and a demonstration of a meritorious defense to the neglect petition, warranting reversal of the trial court's denial of the motion (see *Matter of Taina M.*, 32 AD3d 210, 211 [2006]).

While "we are cognizant that family courts in many counties across the state have crushing case loads, extremely difficult family issues to decide, and limited time to make fair and informed determinations in what are often chaotic and highly charged emotional cases" (*Alix A. v Erika H.*, 45 AD3d 394, 394-395 [2007]), we find that the court's decision to deny respondent's counsel's request for a second call and to proceed to the fact-finding hearing by inquest was ill considered, given the fact that the court scheduled the case for 4:00 p.m. to accommodate respondent's work schedule and respondent's counsel informed the court that respondent was "on her way," and the fact that respondent had attended the other scheduled court dates *429without incident (see *Matter of Mursol B.*, 266 AD2d 76, 76 [1999]).

Moreover, all these facts, as well as the positive relationship between respondent and the child, were brought to the court's attention again when respondent moved to vacate. Inexplicably, the court denied the motion. Were it not for our dismissal of the petition pursuant to Family Court Act § 1051 (c), we would further find that the agency's evidence at the hearing failed to establish neglect (see Family Court Act § 1012 [f] [i]; § 1046 [a] [viii]) by a preponderance of the evidence (see Family Court Act § 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

The agency's proof that the child felt "scared and nervous" during the isolated domestic violence incident did not establish that respondent had failed to exercise a minimum degree of care, or that the child's mental or emotional condition was impaired or in imminent danger of being impaired as a result of the altercation (see *id.*; *Kayla B.*, 262 AD2d at 137).

Concur—Andrias, J.P., Friedman, McGuire, Acosta and DeGrasse, JJ.