

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

Matter of Sebastian R. (Debra S.)

2019 NY Slip Op 02708 (App. Div. 2019) · No. 2018-03368; 2018-03369 · Decided April 10, 2019

SUMMARY

The Appellate Division, Second Department reviewed a Family Court proceeding involving a finding that the mother derivatively neglected the subject child. The court dismissed portions of the appeal concerning consent-based disposition orders and affirmed the derivative-neglect finding, concluding that the mother's prior neglect of four older children supported summary judgment.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Ruth C. Balkin, J.P.; Leonard B. Austin, J.; Hector D. LaSalle, J.; Angela G. Iannacci, J.
JURISDICTION	New York
DECIDED	April 10, 2019
DOCKET	2018-03368; 2018-03369
DISPOSITION	other
PROCEDURAL POSTURE	The mother appealed from a Family Court order granting the Administration for Children's Services summary judgment on derivative neglect and from a subsequent order of disposition placing the child with the father under supervision and restricting the mother's parental access to supervised visits.
STANDARD OF REVIEW	The court reviewed the Family Court's summary-judgment determination and whether the mother raised a triable issue of fact; the derivative-neglect finding was reviewed because it was contested below.
PRECEDENTIAL VALUE	published
PARTIES	Debra S. v. Administration for Children's Services

TOPICS

family law procedure

parental rights

appellate procedure

summary judgment

standard of review

PRACTICE AREAS

family law

child welfare

appellate procedure

QUESTIONS PRESENTED

1. Whether the appeal from the Family Court order granting summary judgment was properly before the Appellate Division after entry of the order of disposition.
2. Whether an appeal lies from portions of an order of disposition entered upon the mother's consent.
3. Whether the mother derivatively neglected the subject child based on the prior neglect of four older children.
4. Whether the mother raised a triable issue of fact or otherwise established that the condition underlying the prior neglect findings no longer existed.

HOLDINGS

1. The appeal from the order dated June 28, 2017, was dismissed because the appealed portion was superseded by the order of disposition and was reviewable on the appeal from that disposition order.
2. The appeal from the portions of the order of disposition that placed the child with the father under supervision and limited the mother's parental access to supervised access was dismissed because no appeal lies from an order entered upon the consent of the appealing party.
3. The appeal was properly before the court insofar as it brought up for review the finding of derivative neglect because that finding had been contested in Family Court.
4. The Family Court properly granted summary judgment finding that the mother derivatively neglected the subject child.

KEY QUOTATIONS

“The appeal from so much of the order of disposition as released the child, upon consent, to the custody of the father under the petitioner's supervision and directed that the mother would have only supervised parental access with the child must be dismissed, as no appeal lies from an order entered upon the consent of the appealing party” ([*1])

“The petitioner made a prima facie showing of derivative neglect of the child based on a prior finding that the mother had neglected four of her older children” ([*2])

FACTUAL BACKGROUND

The mother had previously been found to have neglected four older children. Although the neglectful conduct predated the birth of the subject child, the Appellate Division concluded that the conduct was sufficiently proximate in time, considering its nature and other pertinent circumstances, to support an inference that the condition continued. The mother presented no evidence rebutting the agency's prima facie showing or establishing that the condition no longer existed.

PROCEDURAL HISTORY

The Family Court, Queens County, granted summary judgment finding that the mother derivatively neglected the subject child. In a later order of disposition, entered upon consent as to custody and supervised access, the court released the child to the father's custody under agency supervision. The Appellate Division dismissed the appeal from the earlier order as superseded, dismissed the appeal from the consent portions of the disposition order, and affirmed the order insofar as it reviewed the derivative-neglect finding.

DISPOSITION

other

CASES CITED

- Matter of Naphtali A. [Winifred A.], 165 AD3d 781
- Matter of Maurice M. [Suzanne H.], 158 AD3d 689
- James v Powell, 19 NY2d 249, 256 n 3
- Matter of Kiera N. (Shasha F.), 167 AD3d 620, 621
- Matter of Jerell P. (Qubilah G.), 157 AD3d 443
- Matter of Camarrie B. (Maria R.), 107 AD3d 409
- Matter of Delilah D. (Richard D.), 155 AD3d 723
- Matter of Hope P. (Stephanie B.), 149 AD3d 947, 948
- Matter of Baby Boy D. (Adanna L.), 144 AD3d 1026
- Matter of Madison B. (Daniel B.), 123 AD3d 1027
- Matter of Jeremiah I.W. (Roger H.W.), 115 AD3d 967

OPINION

Matter of Sebastian R. (Debra S.) 2019 NY Slip Op 2708

PER CURIAM.

Matter of Sebastian R. (Debra S.) (2019 NY Slip Op 02708) Matter of Sebastian R. (Debra S.) 2019 NY Slip Op 02708 Decided on April 10, 2019 Appellate Division, Second 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 on April 10, 2019

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Second Judicial Department RUTH C. BALKIN, J.P.

LEONARD B. AUSTIN

HECTOR D. LASALLE

ANGELA G. IANNACCI, JJ. 2018-03368

2018-03369 (Docket No. N-21700-15) [*1]In the Matter of Sebastian R. (Anonymous).

Administration for Children's Services, petitioner-respondent; Debra S. (Anonymous), appellant, et al., respondent. Mark Diamond, New York, NY, for appellant. Zachary W. Carter, Corporation Counsel, New York, NY (Scott Shorr and Elina Druker of counsel), for petitioner-respondent. Janet E. Sabel, New York, NY (Dawne A. Mitchell and Riti P. Singh), attorney for the child.

DECISION & ORDER In a proceeding pursuant to Family Court Act article 10, the mother appeals from (1) an order of the Family Court, Queens County (Diane Costanzo, J.), dated June 28, 2017, and (2) an order of disposition of the same court dated February 22, 2018. The order dated June 28, 2017, insofar as appealed from, granted that branch of the petitioner's motion which was for summary judgment on so much of the petition as sought a finding that the mother derivatively neglected the subject child. The order of disposition dated February 22, 2018, insofar as appealed from, upon the order dated June 28, 2017, and upon consent, released the child to the custody of the father under the petitioner's supervision and directed that the mother would have only supervised parental access with the child. ORDERED that the appeal from the order dated June 28, 2017, is dismissed, without costs or disbursements, as the portion of that order appealed from was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further, ORDERED that the appeal from so much of the order of disposition as released the child, upon consent, to the custody of the father under the petitioner's supervision and directed that the mother would have only supervised parental access with the child, is dismissed, without costs or disbursements; and it is further, ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements. The appeal from so much of the order of disposition as released the child, upon consent, to the custody of the father under the petitioner's supervision and directed that the mother would have only supervised parental access with the child must be dismissed, as no appeal lies from an order entered upon the consent of the appealing party (see *Matter of Naphtali A. [Winifred A.]*, 165 AD3d 781; *Matter of Maurice M. [Suzanne H.]*, 158 AD3d 689). However, the appeal from so [*2]much of the order of disposition as brings up for review the finding of derivative neglect is properly before the Court, as the finding of derivative neglect was the subject of contest in the Family Court (see *James v Powell*, 19 NY2d 249, 256 n 3; *Matter of Kiera N. (Shasha F.)*, 167 AD3d 620, 621). We agree with the Family Court's determination granting that branch of the petitioner's motion which was for summary judgment on so much of the petition as sought a finding that the mother derivatively neglected the child. The petitioner made a prima facie showing of derivative neglect of the child based on a prior finding that the mother had neglected four of her older children (see *Matter of Jerell P. [Qubilah G.]*, 157 AD3d 443; *Matter of Camarrie B. [Maria R.]*, 107 AD3d 409). The mother failed to raise a triable issue of fact in opposition. Although the prior acts of neglect occurred before the subject child was born, taking into account the nature of the mother's conduct and other pertinent considerations, the conduct that formed the basis for a finding of neglect as to the older children is so proximate in time to the instant derivative proceeding that it can reasonably be concluded that the condition still exists (see *Matter of Delilah D. [Richard D.]*, 155 AD3d 723;

Matter of Hope P. [Stephanie B.], 149 AD3d 947, 948). The mother failed to sustain her burden of proving that the conduct or condition cannot reasonably be expected to exist currently or in the foreseeable future (see Matter of Hope P. [Stephanie B.], 149 AD3d at 948; Matter of Baby Boy D. [Adanna L.], 144 AD3d 1026). Since the mother failed to present any evidence to either rebut the petitioner's prima facie showing or establish that the condition leading to the neglect finding as to the other children no longer existed, we agree with the Family Court's finding of derivative neglect (see Matter of Madison B. [Daniel B.], 123 AD3d 1027; Matter of Jeremiah I.W. [Roger H.W.], 115 AD3d 967). BALKIN, J.P., AUSTIN, LASALLE and IANNACCI, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court