

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

In the Matter of Brian P., Jr., David H., III, and Dylan C.

Matter of Brian P., Jr. · No. CAF 10-01425 · Decided November 18, 2011

SUMMARY

The New York Supreme Court, Appellate Division, Fourth Department affirmed an order finding that April C. neglected her youngest son and derivatively neglected her two older sons. The court held that the evidence supported a finding that the mother knew or should have known that her live-in boyfriend was physically abusing the child and failed to protect him, and it upheld the negative inference drawn from her failure to testify.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Scudder, P.J.; Smith, J.; Sconiers, J.; Gorski, J.; Martoche, J.
JURISDICTION	New York
DECIDED	November 18, 2011
DOCKET	CAF 10-01425
DISPOSITION	affirmed
PROCEDURAL POSTURE	Respondent mother appealed from a Family Court order adjudging that she neglected her youngest son and derivatively neglected her two older sons.
STANDARD OF REVIEW	The sufficiency of the evidence and neglect finding were reviewed under the applicable preponderance-of-the-evidence standard. Preservation of the judicial-bias claim was reviewed under ordinary appellate preservation principles.
PRECEDENTIAL VALUE	Published appellate memorandum and order; precedential value under New York law is not otherwise specified in the opinion.
PARTIES	April C. v. Niagara County Department of Social Services

TOPICS

- family law procedure
- evidence
- burden of proof
- preservation of error
- appellate procedure

PRACTICE AREAS

family law

child neglect

child protective proceedings

appellate procedure

evidence

QUESTIONS PRESENTED

1. Whether the evidence was legally sufficient to establish that the mother neglected her youngest son.
2. Whether the mother's efforts to obtain medical care negated the neglect finding.
3. Whether the Family Court properly drew a negative inference from the mother's failure to testify at the fact-finding hearing.
4. Whether the mother's claim that the Family Court was biased was preserved for appellate review and, if so, had merit.

HOLDINGS

1. The evidence supported the Family Court's finding that the mother neglected her youngest son because she knew or should have known of the physical abuse and failed to take reasonable steps to avoid the risk of harm.
2. The mother's repeated efforts to obtain medical care did not, as a matter of law, negate the neglect finding where she failed to prevent the known or reasonably knowable risk of physical abuse by her live-in boyfriend.
3. The Family Court was permitted to draw a negative inference against the mother based on her failure to testify at the fact-finding hearing.
4. The mother's judicial-bias contention was unpreserved because she did not raise it in a manner preserving the issue for appellate review; in any event, the claim lacked merit.

KEY QUOTATIONS

“In determining whether a parent exercised the minimum degree of care, the court must consider what “a reasonable and prudent parent [would have done] . . . under the circumstances then and there existing”” (1182)

“A child may be found to be neglected when the parent knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly” (1182)

FACTUAL BACKGROUND

The mother took her youngest son to a doctor on multiple occasions and to the hospital when directed. The Family Court nevertheless found that she knew or should have known that the child was being physically abused by her live-in boyfriend and failed to avoid the risk of harm because she continued living with the boyfriend and allowed him to babysit the child.

PROCEDURAL HISTORY

The Niagara County Department of Social Services commenced a proceeding under Family Court Act article 10. After a fact-finding proceeding, the Family Court, Niagara County, entered an order on June 7, 2010, finding that April C. neglected her youngest child and derivatively neglected her two older children. The Appellate Division unanimously affirmed the order without costs.

DISPOSITION

affirmed

CASES CITED

- Nicholson v. Scoppetta, 3 N.Y.3d 357, 370
- Matter of Jessica P., 46 A.D.3d 1142, 1143
- Matter of Sarah C., 245 A.D.2d 1111
- Matter of Lynelle W., 177 A.D.2d 1008
- Matter of Raymond D., 45 A.D.3d 1415
- Matter of Angel L.H., 85 A.D.3d 1637
- Matter of Warrior v. Beatman, 79 A.D.3d 1770, lv. dismissed, 16 N.Y.3d 819
- Matter of Roystar T., 72 A.D.3d 1569, lv. denied, 15 N.Y.3d 707
- Matter of Murdock v. Murdock, 183 A.D.2d 769

OPINION

PER CURIAM.

SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department 1182 CAF 10-01425 PRESENT: SCUDDER, P.J., SMITH, SCONIERS, GORSKI, AND MARTOCHE, JJ. IN THE MATTER OF BRIAN P., JR., DAVID H., III, AND DYLAN C. NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER PETITIONER-RESPONDENT; APRIL C., RESPONDENT-APPELLANT, AND JOHN J., RESPONDENT.

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT. LAURA A. WAGNER, LOCKPORT, FOR PETITIONER-RESPONDENT. DEBORAH J. SCINTA, ATTORNEY FOR THE CHILDREN, KENMORE, FOR BRIAN P., JR., DAVID H., III, AND DYLAN C. Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered June 7, 2010 in a proceeding pursuant to Family Court Act article 10.

The order, among other things, adjudged that respondent April C. had neglected the subject children. It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs. Memorandum: Respondent mother appeals from an order determining that she neglected her youngest son and that she derivatively neglected her two older sons.

We affirm. We reject the mother's contention that the evidence of neglect was legally insufficient and that the fact that she diligently sought medical care for her youngest son negated a finding of neglect. Pursuant to Family Court Act § 1012 (f) (i) (B), a neglected child is one "whose physical, mental or emotional condition... is in imminent danger of becoming impaired as a result of the failure of his [or her] parent... to exercise a minimum degree of care... by unreasonably inflicting or allowing to be inflicted harm...." In determining whether a parent exercised the minimum degree of care, the court must consider what "a reasonable and prudent parent [would have done]... under the circumstances then and there existing" (*Nicholson v Scoppetta*, 3 NY3d 357, 370).

A child may be found to be neglected when the parent knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly (see *Matter of Jessica P.*, 46 AD3d 1142, 1143; *Matter of Sarah C.*, 245 AD2d 1111; *Matter of Lynelle W.*, 177 AD2d 1008).

Although the mother took her youngest son to the doctor on multiple occasions and to the hospital when directed, -2- 1182 CAF 10-01425 Family Court's finding that she knew or should have known that the child was being physically abused by her live-in boyfriend, who is also a respondent in this proceeding, and that she failed to take steps to avoid the risk of harm to the child when she continued to live with the boyfriend and allowed him to babysit is supported by the requisite preponderance of the evidence (see § 1046 [b] [i]).

Contrary to the mother's further contention, the court was permitted to draw a negative inference against the mother based on her failure to testify at the fact-finding hearing (see *Matter of Raymond D.*, 45 AD3d 1415).

Finally, the mother failed to preserve for our review her contention that the court was biased against her, as evidenced by certain statements made by the court in denying her motion to dismiss the petition at the close of petitioner's case (see generally *Matter of Angel L.H.*, 85 AD3d 1637).

In any event, that contention is without merit (see *Matter of Warrior v Beatman*, 79 AD3d 1770, lv dismissed 16 NY3d 819; *Matter of Roystar T.*, 72 AD3d 1569, lv denied 15 NY3d 707; *Matter of Murdock v Murdock*, 183 AD2d 769). Entered: November 18, 2011 Patricia L. Morgan Clerk of the Court