

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

Matter of Taveon J. (Selina T.)

2022 NY Slip Op 05512 (App. Div. 2022) · No. NN-21325/18; NN-21326/18; Appeal Nos. 16313-16313A; Case Nos. 2021-02056, 2021-02057 · Decided October 4, 2022

SUMMARY

The Appellate Division, First Department, unanimously affirmed a Family Court disposition order finding that the respondent mother neglected the children by failing to enforce an order of protection against her boyfriend. The court dismissed as moot the appeal concerning temporary dispositional conditions and dismissed the separate appeal from the fact-finding order as subsumed in the disposition appeal.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Per Curiam; Gische, J.P.; Friedman, J.; Scarpulla, J.; Rodriguez, J.; Higgitt, J.
JURISDICTION	New York
DECIDED	October 4, 2022
DOCKET	NN-21325/18; NN-21326/18; Appeal Nos. 16313-16313A; Case Nos. 2021-02056, 2021-02057
DISPOSITION	affirmed
PROCEDURAL POSTURE	The mother appealed from a Family Court order of disposition that incorporated review of a fact-finding order determining that she neglected the children. She also appealed from the dispositional conditions imposed until the next permanency hearing and separately appealed from the fact-finding order.
STANDARD OF REVIEW	Whether the neglect finding was supported by a preponderance of the evidence; evidentiary rulings and the drawing of a negative inference were reviewed for legal correctness and abuse of discretion where applicable.
PRECEDENTIAL VALUE	Published New York Appellate Division decision; precedential within the First Department subject to later treatment.

TOPICS

family law

evidence

hearsay

mootness

appellate procedure

PRACTICE AREAS

family law

evidence

appellate procedure

QUESTIONS PRESENTED

1. Whether the evidence established by a preponderance of the evidence that the mother neglected the children by failing to enforce an order of protection and thereby placing their physical or psychological safety at imminent risk of impairment.
2. Whether the recording of Taveon's 911 call was properly admitted as an excited utterance without corroboration.
3. Whether Taveon's consistent statements to an ACS investigator and a police officer were sufficiently corroborated for admission.
4. Whether Family Court properly drew a negative inference from the mother's failure to testify.
5. Whether the appeal from dispositional conditions that expired by their own terms was moot.
6. Whether the separate appeal from the fact-finding order was subsumed in the appeal from the order of disposition.

HOLDINGS

1. The neglect finding was supported by a preponderance of the evidence because the mother failed to enforce the final order of protection against her boyfriend, placing the children's physical and psychological safety at imminent risk of impairment.
2. The recording of Taveon's statements to the 911 operator was properly admitted as an excited utterance and did not require corroboration.
3. Taveon's consistent statements to an ACS investigator and a police officer were properly admitted because they were sufficiently corroborated by the 911 recording and other evidence.
4. Family Court properly drew a negative inference from the mother's failure to testify.
5. The appeal from the portion of the dispositional order setting conditions until the next permanency hearing was moot because the order expired by its own terms.

FACTUAL BACKGROUND

The mother had been subject to a final order of protection issued for the benefit of her eleven-year-old child, Taveon, against her boyfriend in a prior neglect proceeding. During the incident underlying this proceeding, Taveon reported in a 911 call that the boyfriend was choking the mother and had threatened to kill him; Taveon

was also crying during the call and at the police station afterward. The mother failed to enforce the order of protection and did not testify at the fact-finding hearing.

PROCEDURAL HISTORY

Family Court, New York County, entered a fact-finding order on or about February 25, 2020, finding that respondent mother neglected the subject children. It later entered an order of disposition on or about May 27, 2021. The Appellate Division affirmed the order of disposition to the extent it reviewed the neglect finding, dismissed as moot the appeal concerning conditions that had expired by their own terms, and dismissed the separate appeal from the fact-finding order as subsumed in the disposition appeal.

DISPOSITION

affirmed

CASES CITED

- Matter of Serenity H. [Tasha S.], 132 AD3d 508, 509 (1st Dept 2015)
- Matter of Jasmine A. [Albert G.], 120 AD3d 1125, 1125 (1st Dept 2014)
- Matter of Valentino R. [Dina R.], 128 AD3d 562, 562 (1st Dept 2015)
- Matter of Madison M. [Nathan M.], 123 AD3d 616, 617 (1st Dept 2014)
- People v Bryant, 180 AD3d 442, 442 (1st Dept 2020), lv denied 35 NY3d 968 (2020)
- Matter of Lydia K. [Lucille K.], 112 AD2d 306, 307 (2d Dept 1985), affd 67 NY2d 681 (1986)
- Matter of Nicole V. [Lawrence V.], 71 NY2d 112, 118 (1987)
- Matter of Zelda McM. [Patrick L.-O. McM.], 154 AD3d 573, 574 (1st Dept 2017)
- Matter of Amondie T. [Karen S.], 107 AD3d 498, 498-499 (1st Dept 2013)

OPINION

PER CURIAM.

Matter of Taveon J. (Selina T.) (2022 NY Slip Op 05512) Matter of Taveon J. (Selina T.) 2022 NY Slip Op 05512 Decided on October 04, 2022 Appellate Division, First 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: October 04, 2022 Before: Gische, J.P., Friedman, Scarpulla, Rodriguez, Higgitt, JJ. Docket No. NN-21325/18, NN-21326/18 Appeal No. 16313-16313A Case No. 2021-02056, 2021-02057 [*1]In the Matter of Taveon J., and Another, Children Under the Age of Eighteen Years etc., Selina T., Respondent-Appellant, Dorian P., Respondent.

Administration for Children's Services, Petitioner-Respondent. Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant. Sylvia O. Hinds-Radix, Corporation Counsel, New York (Eva L. Jerome of counsel), for respondent. Karen Freedman, Lawyers for Children,

Inc., New York (Shirim Nothenberg of counsel), attorney for the child Taveon J. Andrew J. Baer, New York, attorney for the child Eternity T. Order of disposition, Family Court, New York County (Maria Arias, J.), entered on or about May 27, 2021, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about February 25, 2020, which found that respondent mother neglected the subject children, unanimously affirmed, and the appeal from that portion of the order of disposition setting conditions for the mother until the next permanency hearing, unanimously dismissed, without costs, as moot.

Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition. The finding of neglect against the mother is supported by a preponderance of the evidence establishing that she placed the children's physical and psychological safety in imminent risk of impairment by refusing to enforce a final order of protection issued against her boyfriend and in favor of the child Taveon in a prior neglect proceeding (see *Matter of Serenity H.* [Tasha S.], 132 AD3d 508, 509 [1st Dept 2015]; *Matter of Jasmine A.* [Albert G.], 120 AD3d 1125, 1125 [1st Dept 2014]).

Taveon, who was then 11 years old, is heard crying on a tape of a 911 call, in which he reported that the mother's boyfriend allegedly choked her and then threatened to kill Taveon; the caseworker also testified that Taveon was crying at the police station after the incident. This evidence establishes, among other things, that the mother risked Taveon's emotional health by failing to enforce the order of protection issued on his behalf (see *Matter of Valentino R.* [Dina R.], 128 AD3d 562, 562 [1st Dept 2015]; *Matter of Madison M.* [Nathan M.], 123 AD3d 616, 617 [1st Dept 2014]).

The tape of Taveon's statements to the 911 operator that the boyfriend was choking his mother was properly admitted into evidence as an excited utterance, which does not require corroboration (see *People v Bryant*, 180 AD3d 442, 442 [1st Dept 2020], lv denied 35 NY3d 968 [2020]; *Matter of Lydia K.* [Lucille K.], 112 AD2d 306, 307 [2d Dept 1985], *affd* 67 NY2d 681 [1986]).

Taveon's consistent out-of-court statements to an Administration for Children's Services investigator and a police officer immediately after the incident were properly admitted because they were sufficiently corroborated by the 911 tape and other evidence (see *Matter of Nicole V.* [Lawrence V.], 71 NY2d 112, 118 [1987]).

In addition, the court properly drew a negative inference from the mother's failure to testify (see *Matter of Zelda McM.* [Patrick L.-O. McM.], 154 AD3d 573, 574 [1st Dept 2017]). The appeal from the portion of the dispositional order setting conditions for the mother until the next permanency hearing is moot because the order expired by its own terms (see *Matter of Amondie T.* [Karen S.], 107 AD3d 498, 498-499 [1st Dept 2013]).

We have considered the mother's remaining contentions and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT[*2]. ENTERED: October 4, 2022

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