

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

Matter of Irena K. v. Francesco S.

2019 NY Slip Op 05066 (N.Y. Ct. App. 2019) · No. 9695, 9694 · Decided June 25, 2019

SUMMARY

The Appellate Division, First Department modified a Family Court order finding that respondent committed several family offenses and granting a five-year order of protection. The court vacated the findings of assault in the second degree, criminal obstruction of breathing or blood circulation, and one count of sexual misconduct, while affirming findings of harassment, coercion, one count of sexual misconduct, and the order of protection.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Renwick, J.P.; Manzanet-Daniels, J.; Webber, J.; Oing, J.
JURISDICTION	New York
DECIDED	June 25, 2019
DOCKET	9695, 9694
DISPOSITION	other
PROCEDURAL POSTURE	Respondent appealed from a Family Court order following a fact-finding determination that he committed multiple family offenses and the issuance of a five-year order of protection.
STANDARD OF REVIEW	The family-offense findings were reviewed for support by a fair preponderance of the hearing evidence; the Family Court's credibility determinations were accepted unless unsupported by the record.
PRECEDENTIAL VALUE	Published Appellate Division opinion
PARTIES	Francesco S. v. Irena K.

TOPICS

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PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the evidence supported the Family Court's findings that respondent committed harassment in the second degree and coercion in the second degree.
2. Whether the evidence supported the finding of two counts of sexual misconduct.
3. Whether the evidence supported the finding of assault in the second degree based on respondent's biting petitioner's earlobe.
4. Whether the evidence supported the finding of two counts of criminal obstruction of breathing or blood circulation.
5. Whether the five-year order of protection was appropriate.

HOLDINGS

1. The findings that respondent committed harassment in the second degree and two counts of coercion in the second degree were supported by a fair preponderance of the hearing evidence.
2. The record supported only one count of sexual misconduct, requiring vacatur of one of the two sexual-misconduct findings.
3. The finding of assault in the second degree was unsupported because the evidence did not establish that respondent's teeth constituted a dangerous instrument or that he intended to cause serious physical injury.
4. The findings of two counts of criminal obstruction of breathing or blood circulation were unsupported because the evidence did not establish that respondent intended to impede petitioner's normal breathing or blood circulation.
5. The five-year order of protection was appropriate because aggravating circumstances constituted an immediate and ongoing danger to petitioner.

KEY QUOTATIONS

*“Nevertheless, her testimony fails to establish that respondent intended to impede her normal breathing or blood circulation” ([*2])*

FACTUAL BACKGROUND

Respondent threatened petitioner that he would take steps necessary to cause her to lose her immigration status and rights to the child if she stopped prostituting herself to him. Petitioner testified that respondent engaged in sexual conduct with her, including biting her earlobe and covering her nose or mouth during sex. She acknowledged that she expected payment during the first alleged rape incident and did not communicate nonconsent, and she did not tell respondent she was having trouble breathing during the two relevant incidents.

PROCEDURAL HISTORY

Family Court, New York County, found that respondent committed assault in the second degree, two counts of criminal obstruction of breathing or blood circulation, two counts of sexual misconduct, two counts of coercion in the second degree, and harassment in the second degree. The court issued a five-year order of protection in favor of petitioner. The Appellate Division modified the order on the law by vacating the findings of assault, both obstruction counts, and one sexual-misconduct finding, and otherwise affirmed.

DISPOSITION

other

CASES CITED

- Matter of Everett C. v. Oneida P., 61 A.D.3d 489 (1st Dep't 2009)
- Matter of Lisa S. v. William V., 95 A.D.3d 666 (1st Dep't 2012)
- Matter of Kenrick C., 143 A.D.3d 600, 601 (1st Dep't 2016)

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