State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019 526262

In the Matter of JACK NN.,
Alleged to be a
Neglected Child.

CHENANGO COUNTY DEPARTMENT
OF SOCIAL SERVICES,
Respondent;

SARAH OO. et al.,
Appellants.

(Proceeding No. 1.)

MEMORANDUM AND ORDER

In the Matter of MOLLY OO.
and Another, Alleged to
be Neglected Children.

CHENANGO COUNTY DEPARTMENT
OF SOCIAL SERVICES,
Respondent;

SARAH OO. et al.,
Appellants.

(Proceeding No. 2.)

Calendar Date: May 2, 2019

Before: Garry, P.J., Mulvey, Aarons, Rumsey and Pritzker, JJ.

Christopher Hammond, Cooperstown, for Sarah OO., appellant.

Karen A. Leahy, Cortland, for Norman NN., appellant.

Chenango County Department of Social Services, Norwich (Sarah Fitzpatrick of counsel), for Chenango County Department of Social Services, respondent.

Lisa Natoli, Norwich, attorney for the children.

Garry, P.J.

Appeals from three orders of the Family Court of Chenango County (Revoir Jr., J.), entered May 5, 2017 and December 29, 2017, which granted petitioner's applications, in two proceedings pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected.

Respondent Sarah OO. (hereinafter the mother) is the mother of the three subject children (born in 2013, 2009 and 2007). Respondent Norman NN. (hereinafter the father) is the father of the youngest child. Before these proceedings were commenced, the mother, the father and the youngest child lived together. The two older children were in the primary physical custody of their father, a nonparty, and had parenting time with the mother at respondents' home three weekends per month.

In May 2016, petitioner received a report of drug use in respondents' home, conducted a home visit that revealed unsafe and unsanitary conditions and removed the youngest child from respondents' care. Petitioner then commenced these neglect proceedings alleging, as pertinent here, that the conditions in respondents' home on the day of the removal placed the children at risk of imminent harm. In proceeding No. 1, petitioner sought an order placing the youngest child in its custody and adjudicating him to be neglected. In proceeding No. 2, petitioner sought an order requiring the two older children's visitation with the mother to be supervised and adjudicating them to be neglected. Following a hearing pursuant to Family Ct

Act § 1027, the youngest child's removal was continued. A fact-finding hearing was then scheduled; respondents appeared for the hearing but left the courthouse before it began. Family Court denied requests for an adjournment by respondents' respective counsel, found respondents to be in default, conducted the hearing in their absence, and found that the children had been neglected by respondents. After a dispositional hearing, the court placed the youngest child in the care of maternal relatives and placed respondents under petitioner's supervision upon certain conditions. In a separate order, the court continued the older children's placement with their father and directed the mother's visitation with them to be supervised. Respondents appeal from the fact-finding and dispositional orders, opposed by petitioner and the attorney for the children.[1]

We reject respondents' claim that Family Court erred in denying their counsel's requests for adjournment of the fact-finding hearing. Family Ct Act § 1048 (a) authorizes adjournment of such a hearing upon a showing of good cause, a "determination [that] lies within the sound discretion of the hearing court upon a balanced consideration of all relevant factors" (Matter of Lillian SS. [Brian SS.], 146 AD3d 1088, 1094 [2017] [internal quotation marks and citation omitted], lvs denied 29 NY3d 919, 992 [2017]). When respondents left the courthouse, they claimed that they were going to the emergency room at a nearby hospital to seek treatment for the father, who was allegedly suffering from chest pains. However, court officers stated that respondents had departed immediately after being informed that there was an outstanding warrant for the father's arrest, and that he would be taken into custody after the fact-finding hearing. The court waited approximately two hours to act on the adjournment request following respondents' departure, and during this time tried without success to confirm whether respondents had, in fact, gone to the emergency room.

[1] The father's notice of appeal references only one of the dispositional orders but contests Family Court's actions as to all three children. We "exercise our discretion to deem the [father's] appeal as having been taken from both orders" (Matter of Mark WW. v Jennifer B., 158 AD3d 1013, 1015 n 2 [2018]; see CPLR 5520 [c]).

The court then denied the adjournment, finding that respondents' explanation was "rather suspect" and noting that they had neither returned to court nor communicated with their counsel after their departure. At the conclusion of the fact-finding hearing, a caseworker testified that she had called respondents' cell phone and received no answer, and that she had learned from hospital staff that the father had not been seen at the local emergency room that day.

Although a parent has a due process right to be present at proceedings pursuant to Family Ct Act article 10, "that right is not absolute" (Matter of Elizabeth T. [Leonard T.], 3 AD3d 751, 753 [2004]; accord Matter of Jasper QQ., 64 AD3d 1017, 1019 [2009], lv denied 13 NY3d 706 [2009]). Pursuant to Family Ct Act § 1042, a court may proceed with a hearing in a Family Ct Act article 10 proceeding in a parent's absence, so long as the subject child is represented by counsel, and the absent parent may thereafter move to vacate the resulting order and schedule a rehearing. Respondents have not availed themselves of this remedy (see Matter of Cheyenne OO. [Cheyenne QQ.], 135 AD3d 1096, 1096-1097 [2016]). In any event, Family Court properly balanced the appropriate factors, including its assessment of the credibility of respondents' explanation for their absence, and we find no abuse of discretion in its determination (see Matter of Lillian SS. [Brian SS.], 146 AD3d at 1094; Matter of Konard M., 257 AD2d 919, 920 [1999]; Matter of Sara KK., 226 AD2d 766, 767 [1996], lv denied 88 NY2d 808 [1996]).

Respondents next contend that the findings of neglect are not supported by a preponderance of the evidence because Family Court improperly relied upon testimony elicited at the temporary removal hearing. At the outset of the fact-finding hearing, upon petitioner's request and over the objections of respondents' counsel, Family Court took judicial notice of the nonhearsay testimony of petitioner's caseworker that had been presented at the removal hearing, as well as photographs in evidence at the temporary removal hearing and the court's resulting findings. Petitioner additionally offered police reports showing that respondents had each been charged with endangering the welfare of a child and unlawful possession of

marihuana based upon the conditions in the home when the youngest child was removed, as well as a certificate of conviction showing that the mother had been convicted of endangering the welfare of a child.[2] Family Court admitted the police reports for the limited purpose of showing that respondents were charged with those offenses on the date of the removal, while redacting the supporting narratives and affidavits because they contained hearsay. Petitioner based its direct case upon these submitted documents and the record of the removal hearing, and rested without presenting further testimony or evidence.

As a general rule, "a court may take judicial notice of its own prior proceedings and orders and is vested with broad discretion in determining the parameters for proof to be accepted at the hearing" (Matter of Shirley v Shirley, 101 AD3d 1391, 1394 [2012] [internal quotation marks and citations omitted]; see Matter of Curley v Klausen, 110 AD3d 1156, 1160 [2013]; Matter of Carrie B. v Josephine B., 81 AD3d 1009, 1009 n 1 [2011], lv dismissed 17 NY3d 773 [2011]; Matter of Benjamin v Benjamin, 48 AD3d 912, 914 [2008]; Matter of Anjoulic J., 18 AD3d 984, 986 [2005]). Here, respondents assert that Family Court improperly took judicial notice of the testimony from the temporary removal hearing, relying upon Matter of Christina A. (216 AD2d 928, 928 [1995]), in which the Fourth Department found that a court erred in a similar matter by taking judicial notice of prior testimony without first making a finding that the witnesses were unavailable (see CPLR 4517; Matter of Dillon S., 249 AD2d 984, 984 [1998]). We need not address the question of whether CPLR 4517 applies in the instant case, as this matter is factually distinguishable.

Here, additional evidence supported the neglect finding. The temporary removal hearing and the neglect proceedings were based upon precisely the same factual issue – that is, the condition of respondents' home on the day of the youngest child's removal. Following the temporary removal hearing,

[2] The charges against the father were the basis for the arrest warrant against him and had not yet been resolved at the time of the fact-finding hearing.

Family Court made detailed factual findings regarding this issue. Specifically, the court found that the condition of the home was "deplorable, unsafe and unsanitary." There was garbage in almost every corner of the home, only one working sink with no bath or shower, and the toilet and sinks were "caked in filth." The court further found that loose medications, uncapped syringes, suboxone wrappers and marihuana remnants were scattered throughout the house in areas readily accessible to the children, and the house contained hydroponic growing equipment that was "likely" being used to grow marihuana.[3] The court found that the youngest child's sleeping area was a tent in the living room, located near garbage and marihuana remnants.

As Family Court noted in response to petitioner's judicial notice request, these findings were directly pertinent to the neglect proceedings. In addition to petitioner's proof that respondents were charged with crimes and the mother was convicted of endangering the welfare of a child based upon the conditions in the home, the court's prior findings fully established that respondents placed the subject children in danger of imminent harm as a result of the conditions in the home (see Matter of Heyden Y. [Miranda W.], 119 AD3d 1012, 1013-1014 [2014]; Matter of Raven B. [Melissa K.N.], 115 AD3d 1276, 1280 [2014]; Matter of Aiden L., 47 AD3d 1089, 1090-1091 [2008]; Matter of Krista L., 20 AD3d 783, 784-785 [2005]). Respondents' contention that the court improperly relied upon hearsay is without merit. Although some hearsay evidence was admitted during the temporary removal hearing, most of the testimony – and all of the court's subsequent findings – were based upon the caseworker's direct observations. Moreover, the court was entitled to draw a strong adverse inference against respondents because of their failure to testify at the fact-finding hearing (see Matter of Heyden Y. [Miranda W.], 119 AD3d at 1014; Matter of Stevie R. [Arvin R.], 97 AD3d 906, 907 [2012]). Accordingly, although it would have been a better practice for petitioner to present testimony at the fact-finding hearing that confirmed the

[3] In its bench decision immediately following the temporary removal hearing, Family Court rejected the credibility of the father's claim that this equipment was used to grow tomatoes, stating several factual grounds for this finding.

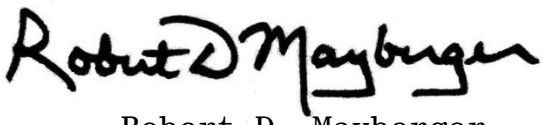
caseworker's observations on the day of the removal, any error that may have resulted from the admission of her prior testimony without a finding of unavailability was harmless under the particular circumstances presented (see Matter of Patrick M. [Patrick MM.], 166 AD3d 882, 883 [2018]; Matter of Kinara C. [Jerome C.], 89 AD3d 839, 840-841 [2011]; Matter of Beth M. v Susan T., 81 AD3d 1396, 1396 [2011]).

We reject the father's contention that petitioner failed to fulfill its obligation to make reasonable efforts to strengthen the parent-child relationship and reunify the family (see Family Ct Act § 1052 [b] [i] [A]). Among other things, petitioner provided respondents with the regular services of a parent aide, referred them to drug and alcohol programs and recommended parenting courses, domestic violence counseling and mental health evaluations and treatment. Petitioner further met regularly with respondents and facilitated weekly visitation with the children. Respondents partially complied by meeting with the parenting aide, cleaning their home and maintaining it in an acceptable condition after the father's mother moved in with them. However, the mother failed to successfully complete drug and alcohol treatment, elected not to participate in mental health or domestic violence counseling or parenting classes, and eventually stopped all visitation with the two older children. The father likewise failed to participate in mental health and domestic violence counseling and parenting classes, and was discharged unsuccessfully from three separate substance abuse programs. Although respondents now assert that transportation difficulties prevented them from taking full advantage of the services offered to them, their assigned caseworker testified that they never brought any such difficulties to her attention and that resources would have been available to assist them had they done so. The record thus establishes that petitioner made reasonable efforts toward reunification and that "any failure in that respect was caused by [respondents'] own conduct" (Matter of Milicia NN., 30 AD3d 722, 723 [2006]; see Matter of Cloey S. [Anthony T.], 99 AD3d 1080, 1081 [2012]; Matter of Telsa Z. [Denise Z.], 90 AD3d 1193, 1195 [2011], lv denied 18 NY3d 806 [2012]).

Mulvey, Aarons, Rumsey and Pritzker, JJ., concur.

ORDERED that the orders are affirmed, without costs.

ENTER:



Robert D. Mayberger
Clerk of the Court