

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

Decided and Entered: February 25, 2021

530165

In the Matter of AIDEN LL. and
Others, Alleged to be
Neglected Children.

SULLIVAN COUNTY DEPARTMENT OF
FAMILY SERVICES,
Respondent;

MEMORANDUM AND ORDER

TONIA C.,
Appellant.

Calendar Date: January 14, 2021

Before: Garry, P.J., Lynch, Clark, Aarons and Colangelo, JJ.

Ivy M. Schildkraut, Rock Hill, for appellant.

Sullivan County Department of Family Services, Monticello
(Constantina Hart of counsel), for respondent.

Jane M. Bloom, Monticello, attorney for the children.

Aarons, J.

Appeal from an order of the Family Court of Sullivan
County (McGuire, J.), entered August 22, 2019, which granted
petitioner's application, in a proceeding pursuant to Family Ct
Act article 10, to adjudicate the subject children to be
neglected.

Respondent is the maternal great aunt of three children (born in 2013, 2016 and 2018). The children were removed from the custody of their mother and, pursuant to three separate orders, respondent had legal and physical custody of them. These orders provided that the children's mother would have visitation with the children as supervised by respondent or respondent's designee. Petitioner commenced this neglect proceeding in 2019 alleging that respondent permitted the maternal grandmother to care for the children alone, despite warnings from petitioner's caseworkers that the maternal grandmother was not an appropriate resource for the children. Petitioner also alleged that respondent permitted the mother to have unsupervised visitation with the youngest child and that the youngest child was physically abused during such visitation. Following a hearing, Family Court granted the petition. Respondent appeals.

Petitioner bore the burden of proving by a preponderance of the evidence "first, that the children's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and, second, that the actual or threatened harm to the children is a consequence of the failure of [the respondent] to exercise a minimum degree of care in providing the children with proper supervision or guardianship" (Matter of Kieran XX. [Kayla ZZ.], 154 AD3d 1094, 1095 [2017] [internal quotation marks and citation omitted]; see Matter of Raelene B. [Alex D.], 179 AD3d 1315, 1317 [2020]; Matter of Lilliana K. [Ronald K.], 174 AD3d 990, 991 [2019]). "There are two prongs: actual or imminent danger, and failure to exercise a minimum degree of care" (Matter of Javan W. [Aba W.], 124 AD3d 1091, 1091 [2015] [citation omitted], lv denied 26 NY3d 905 [2015]). As to the former, "[a]ctual impairment or injury is not required, but only that it be near or impending" (Matter of Xavier II., 58 AD3d 898, 899 [2009] [internal quotation marks and citation omitted]; see Matter of Afton C. [James C.], 17 NY3d 1, 9 [2011]). Regarding the latter, "the relevant inquiry is whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances" (Matter of Mark WW. v Jennifer B., 158 AD3d 1013, 1015 [2018] [internal quotation

marks and citations omitted]; see Matter of Maggie YY. [Lisa ZZ.], 172 AD3d 1562, 1562-1563 [2019]).

The hearing evidence discloses that respondent was told by numerous caseworkers from Child Protective Services that the maternal grandmother was considered to be an inappropriate caregiver based upon her history of indicated reports involving her children. This history included indicated reports involving allegations of emotional neglect and inadequate supervision. According to one caseworker, one of the indicated reports led to the removal of one of the maternal grandmother's children. The caseworker also testified that this history was reviewed during a vetting process in 2016 as part of a removal proceeding concerning two of the mother's children and that it was concluded that the maternal grandmother was an inappropriate resource for the children. The caseworker stated that this history would not have changed between 2016 and 2019. The caseworker further stated that respondent did agree at one point that the maternal grandmother was not someone who could babysit the children. Indeed, respondent testified that she was advised that the maternal grandmother was not allowed to be alone with the children. Evidence was also adduced that respondent acknowledged that the maternal grandmother had issues raising the mother and that the maternal grandmother was the reason why the mother acted the way that she did with the subject children.

The foregoing amply supports the conclusion that respondent failed to exercise a minimum degree of care when she allowed the maternal grandmother to care for the children despite multiple warnings that the maternal grandmother was an inappropriate caregiver (see Matter of Boryana D. [Victoria D.], 157 AD3d 1011, 1012 [2018]; Matter of Alaina E., 33 AD3d 1084, 1086 [2006]; Matter of Daniel DD., 142 AD2d 750, 751 [1988]). To the extent that respondent asserts that the advisements about the maternal grandmother provided by the caseworkers were unclear or never provided, Family Court credited the testimony of the caseworkers concerning their warnings to respondent.

Regarding the other prong of neglect – whether, as relevant here, the children were placed in imminent harm –

petitioner relies almost entirely on the maternal grandmother's history of indicated reports. This history, however, shows that the children were placed in, at most, possible harm (see Matter of Javan W. [Aba W.], 124 AD3d at 1092-1093). We further note that most of this history pertained to incidents that occurred over 10 years prior to the filing of the instant neglect petition. In the absence of evidence that the children were placed in imminent harm, petitioner failed to prove that respondent neglected the children when she allowed the maternal grandmother to care for the children by herself (see id.; Matter of Deshanna A., 296 AD2d 605, 606 [2002]; compare Matter of Katlyn GG. [Christine GG.], 2 AD3d 1233, 1234-1235 [2003]).

Finally, respondent did not raise any challenge to the finding that she neglected the youngest child by permitting the mother to have unsupervised visitation with him and, therefore, she has abandoned any argument with respect thereto (see Matter of Izayah J. [Jose I.], 104 AD3d 1107, 1108 n 2 [2013]). In any event, the record supports the neglect determination as to this allegation.

Garry, P.J., Lynch, Clark and Colangelo, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted that part of the petition premised upon allegations that respondent neglected the children when allowing the maternal grandmother to care for the children; petition dismissed to said extent; and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court