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

Decided and Entered: May 16, 2024 CV-23-0020

In the Matter of JOSEPH GG., Alleged to be a Neglected Child.

ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent;

CHRYSTAL FF., Appellant.

MEMORANDUM AND ORDER

Calendar Date: March 25, 2024

Before: Egan Jr., J.P., Lynch, Reynolds Fitzgerald, Ceresia and Powers, JJ.

Constantina Hart, Kauneonga Lake, for appellant.

Ulster County Department of Social Services, Kingston (*Rebecca L. Balzac* of counsel), for respondent.

William P. Pape, Cottekill, attorney for the child.

Powers, J.

Appeal from an order of the Family Court of Ulster County (Anthony McGinty, J.), entered December 1, 2022, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected.

Respondent (hereinafter the mother) and Wayne GG. (hereinafter the father)[1] are the parents of the subject child (born in 2008). As background, in August 2018 the child was adjudicated to be a person in need of supervision and placed on probation for failing to attend school regularly. In June 2019, it was alleged that he had violated probation, and Family Court adjourned the violation petition in contemplation of dismissal on the condition that the child attend school regularly. When the child continued not to attend school, the petition was later restored to the calendar, and the child was again placed on probation in July 2020.

Petitioner commenced this Family Ct Act article 10 proceeding alleging that the mother had neglected the child by failing to ensure the child's attendance in school and that he receive mental health counseling. Family Court issued a temporary order requiring, among other things, that the mother ensure that the child attend school or receive approved home instruction. Following a fact-finding hearing, the subject child was adjudicated as neglected. The child was later removed and placed in petitioner's care following a dispositional hearing. The mother appeals.

"To establish educational neglect, petitioner was required to prove by a preponderance of the evidence that the child['s] 'physical, mental or emotional condition has been impaired or [was] in imminent danger of becoming impaired' due to respondent['s] failure to provide [him] with an adequate education" (*Matter of Santino B. [Lisette C.]*, 93 AD3d 1086, 1087 [3d Dept 2012] [citation omitted], quoting Family Ct Act § 1012 [f] [i] [A]; *see Matter of Abel XX. [Jennifer XX.]*, 182 AD3d 632, 633-634 [3d Dept 2020]). "In determining whether respondent[ ] failed to exercise a minimum degree of care, the critical inquiry is whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances" (*Matter of Bonnie FF. [Marie VV.]*, 220 AD3d 1078, 1079-1080 [3d Dept 2023] [internal quotation marks, ellipsis and citations omitted]; *see Matter of Nina VV. [Wendy VV.]*, 216 AD3d 1215, 1216 [3d Dept 2023]). "We accord great deference to Family Court's findings and credibility determinations and we will not disturb them, unless they are unsupported by a sound and substantial basis in the record" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1244 [3d Dept 2023] [internal quotation marks and citations omitted]; *see Matter of Joshua R. [Kimberly R.]*, 216 AD3d 1219, 1220 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]).

[1] Although named as a respondent in the initial petition and found to have neglected the child, the father passed away during the pendency of this appeal and has been removed as a party.

School records demonstrate that the child had 61 unexcused absences during the 2018-2019 school year; 93 unexcused absences during the 2019-2020 school year; 50 unexcused absences during the 2020-2021 school year; and as of March 2022, at the time the record was created, had accumulated 60 unexcused absences during the 2021-2022 school year. The mother largely attributed the child's absences to his separation anxiety, which he had been diagnosed with at approximately five years old. Starting in September 2020, the mother underwent a six-month chemotherapy treatment and, in March 2021, a surgery to further treat her cancer diagnosis. According to the mother, this medical treatment left her unable to fight with the child to attend school. The mother testified that when she attempted to get the child to attend school, he would throw himself on the ground, lock himself in his bedroom and become aggressive. In the mother's view, neither taking away the child's access to video games or other privileges, nor providing the child with incentives to attend school was successful. Yet, the father testified that they only took away the child's privileges for short periods, and when these efforts were deemed unsuccessful, his privileges would be restored. The child was engaged in mental health counseling for short stints, however, the mother explained that this was unsuccessful because he did not like his counselor and refused to attend, and he was therefore dismissed from treatment.

A probation officer, who was assigned to the child's case in April 2021, testified that during his time working with the child the mother would provide "vague" medical reasons as to why the child could not attend school, though she failed to provide documentation to substantiate these reasons. The probation officer explained that the mother appeared to be cooperative at first by agreeing to take certain recommended actions but then failed to follow through. This included an occurrence when the mother had agreed to remove the child's video gaming system from his bedroom if he failed to attend school, yet, when the child subsequently did not attend, the mother rescinded this agreement. Notably, the probation officer detailed that the only time the child has consistently attended school was a period during which he was enrolled in a residential school as a condition of his probation. The social worker for the child's school testified that she worked with the family, conducted home visits and communicated with petitioner in an effort to get the child to attend school, all to no avail. This included offering the child an alternative school schedule from 3:30 p.m. to 5:00 p.m., as a reduced class size was thought to be better for the child's anxiety; however, he still failed to attend. The mother reported to the social worker that she had tried to get the child to attend school on this alternative schedule but he refused to get into the vehicle. The social worker explained that these truancy issues were also prevalent while classes were fully remote during the COVID-19 pandemic, indicating that the child would log into class and

then log off. The social worker echoed the mother's testimony that the child was referred to counseling services, although he was dismissed for failing to attend.

The record demonstrates that in each of the preceding four school years the child has had more than 50 unexcused absences, with as many as 93 during the 2019-2020 school year; this "unrebutted evidence of excessive school absences is sufficient to establish educational neglect" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d at 1244 [internal quotation marks, brackets and citations omitted]). While not minimizing the mother's health issues resulting from her cancer diagnosis, we note that the child's school records and the testimony adduced at the fact-finding hearing demonstrate that the child's truancy was a longstanding issue that predated her cancer diagnosis and was not a result of her illness. Despite the mother's testimony that she took steps to address the child's truancy, the record demonstrates that, when presented with pushback from the child, she regularly failed to institute recommendations that she had initially agreed to. Moreover, the mother failed to secure mental health counseling for the child until ordered to do so by Family Court, despite being aware of his anxiety and the impact on his school attendance. Contrary to the mother's assertion, this has impacted the child's education detrimentally, as demonstrated by her testimony that he had failed to successfully complete the eighth grade. According deference to Family Court's factual findings and credibility determinations, we find that a sound and substantial basis exists for its determination that the mother neglected the child (*see Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d 1224, 1228 [3d Dept 2023]; *Matter of Anthony FF. [Lisa GG.]*, 105 AD3d 1273, 1274 [3d Dept 2013]; *Matter of Santino B. [Lisette C.]*, 93 AD3d at 1088-1089; *Matter of Shannen AA. [Melissa BB.]*, 80 AD3d 906, 908 [3d Dept 2011], *lv denied* 16 NY3d 709 [2011]).

As to the mother's challenge to the dispositional order removing the child from her care, "[a] dispositional order in a neglect proceeding must reflect a resolution consistent with the best interests of the child after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record" (*Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d at 1228 [internal quotation marks, brackets and citations omitted]; *accord Matter of Kaitlyn SS. [Antonio UU.]*, 184 AD3d 961, 966 [3d Dept 2020]). "The factors to be considered in making the determination include the parent['s] capacity to properly supervise the child[ ], based on current information and the potential threat of future neglect" (*Matter of Joshua R. [Kimberly R.]*, 216 AD3d at 1223-1224 [internal quotation marks, ellipses and citations omitted]). At the dispositional hearing, a caseworker for petitioner testified that he investigated a range of placement options but had eliminated family placement as an option because those family members

proposed did not believe they could get the child to attend school. The caseworker explained that although therapeutic foster placement was an option for the child, he believed this would be unsuccessful in motivating the child to attend school. The mother conceded that since the finding of neglect the child had not attended school, and she had not completed the necessary paperwork to enroll the child in homeschooling. The mother and the father explained that they were considering private school for the child and believed this would be beneficial for him because of the small class size. Based upon the foregoing, and deferring to Family Court's credibility determinations, we are satisfied that Family Court's finding that removal was in the child's best interests has a sound and substantial basis in the record (*see id*. at 1224; *Matter of Jamel HH. [Linda HH.]*, 155 AD3d 1379, 1380 [3d Dept 2017]; *cf. Matter of Obed O. [Veronica G.]*, 102 AD3d 575, 575 [1st Dept 2013]).[2]

Egan Jr., J.P., Lynch, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

[2] We have been advised by the attorney for the child that the child has been successfully attending school and engaging in counseling while in his placement.