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

Decided and Entered: December 26, 2024 CV-24-1097

In the Matter of AYANNA O., Alleged to be a Neglected Child.

ST. LAWRENCE COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondent;

MEMORANDUM AND ORDER

AMANDA M.,
Appellant.

(And Three Other Related Proceedings.)

Calendar Date: November 20, 2024

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

Laurie L. Paro, Canton, for appellant.

Stephen D. Button, County Attorney, Canton (*Keith S. Massey Jr.* of counsel), for respondent.

Trinidad M. Martin, Glens Falls, attorney for the children.

Clark, J.P.

Appeals from four amended orders of the Family Court of St. Lawrence County (Andrew S. Moses, J.), entered June 21, 2024, which, in four proceedings pursuant to

Family Ct Act article 10, temporarily removed the subject children from respondent's custody.

Respondent (hereinafter the mother) is the mother of the five subject children (born in 2009, 2013, 2014, 2015 and 2018). Following reports that the children had missed a significant number of school days in the 2023-2024 school year, among other things, petitioner filed four neglect petitions against the mother, alleging educational neglect and lack of supervision.[1] Upon the mother's initial appearance on February 26, 2024, Family Court issued temporary orders of supervision which, as relevant to this appeal, required the mother to undergo a mental health evaluation and cooperate with any recommended treatment. In May 2024, based on information contained in the mother's mental health evaluation and the children's school progress reports, petitioner sought to temporarily remove the children from the home pursuant to Family Ct Act § 1027. Following a hearing, Family Court found that removal was necessary to avoid imminent risk to the children's lives or health, removed the children from the mother's home and placed them in the care and custody of petitioner. The mother appeals.[2]

At any time after a petition pursuant to Family Ct Act article 10 is filed, either the petitioner or the attorney for the children may apply for, or Family Court may sua sponte order, a hearing to determine whether judicial intervention is required to protect the children's best interests, including a consideration of whether the children should be removed from the care of their parent (*see* Family Ct Act § 1027 [a] [iii]). If, upon such a

[1] Where the information was known, each petition named the father of the corresponding child or children as a nonrespondent parent.

[2] The mother filed five notices of appeal – one for each child – from a temporary order, entered May 22, 2024, which granted petitioner's application to temporarily remove the five subject children from the mother's care during the pendency of the proceedings; said order also reflected that amended orders would follow. Thereafter, Family Court issued four amended temporary orders of removal, entered June 21, 2024; three of the amended orders pertained to one subject child each, while the last amended order corresponded to the two remaining children. Although the mother's appeal from the May 2024 order was superseded by the issuance of the June 2024 amended orders, "we exercise our discretion to treat the appeal[s] as having been taken from the amended order[s]" (*Matter of C.M. v Z.N.*, 230 AD3d 1409, 1410 n 2 [3d Dept 2024]; *see* CPLR 5520 [c]). We denied the mother's motion for a stay of the order during the pendency of her appeals (2024 NY Slip Op 72496[U] [3d Dept 2024]).

hearing, the court determines "that removal is necessary to avoid imminent risk to the child[ren]'s li[ves] or health, it shall remove or continue the removal of the child[ren]" (Family Ct Act § 1027 [b] [i]). In considering a removal application, Family Court "must engage in a balancing test of the imminent risk with the best interests of the child[ren] and, where appropriate, the reasonable efforts made to avoid removal or continuing removal" (*Nicholson v Scoppetta*, 3 NY3d 357, 380 [2004]; *see* Family Ct Act § 1027 [b] [i], [ii]; *Matter of Lily A. [Tenise ZZ.]*, 227 AD3d 1205, 1206 [3d Dept 2024]). On appeal, we defer to Family Court's factual and credibility determinations, and its decision to direct the removal or continued removal of children will be upheld if it is supported by a sound and substantial basis in the record (*see Matter of Lily A. [Tenise ZZ.]*, 227 AD3d at 1207; *Matter of Tyler Y. [Katrina Y.]*, 202 AD3d 1327, 1329 [3d Dept 2022]).

Here, at the mother's initial appearance, Family Court issued temporary orders of supervision requiring, among other things, that the mother undergo a mental health evaluation and cooperate with recommended treatment. The mother underwent said evaluation, where she reported various conspiratorial ideations that led her to believe that the children would be trafficked or harmed at school.[3] The evaluator lacked information to suggest that the mother would intentionally harm the children, but the mother's affect and delusions led him to opine that the mother was "unstable psychiatrically" and that she was likely suffering from delusional disorder, persecutory type.[4] The evaluator thus recommended that the mother engage in mental health treatment and that she be closely monitored, as he feared that she may inadvertently harm the children. The harm posed by the mother was most readily present in the children's schooling, as the five subject children continued to miss approximately 50% of school days and were all failing their respective classes. The record also reflects that petitioner engaged in reasonable efforts to avoid the need for a removal. Although the mother agreed to engage with mental health treatment, she declined her primary caseworker's assistance to enroll and, as of the hearing, had not done so on her own. Further, the mother refused to engage in other

[3] The neglect petitions allege that the mother believed that a school employee was a sex offender, as he resembled an individual she had seen on that registry, and that some of the children reported carrying knives to school to defend themselves against potential kidnapping.

[4] The evaluator lacked sufficient information but also suspected bipolar disorder, schizophrenia or other related disorders as possible diagnoses.

recommended services, among them a substance abuse evaluation and treatment,[5] parenting education or homemaker services, asserting that she had no need for them. The caseworkers also checked on the children's school progress, followed up with the mother and, on at least two occasions, arranged for a school bus to return to pick up the children after the school day had started. Upon removal, the children were placed with family members. Deferring to Family Court's credibility assessments, a sound and substantial basis in the record supports its determination that, despite petitioner's reasonable efforts to avoid removal, removing the children from the mother's care was in their best interests, as it was necessary to avoid imminent risk to their lives or health[6] (*see Matter of Lily A. [Tenise ZZ.]*, 227 AD3d at 1206-1207; *Matter of Renezmae X. [Kimberly X.]*, 161 AD3d 1247, 1248 [3d Dept 2018], *lv dismissed* 31 NY3d 1140 [2018]; *Matter of Julissia B. [Navasia J.]*, 128 AD3d 690, 691 [2d Dept 2015]; *compare Matter of David J.*, 205 AD2d 881, 884 [3d Dept 1994], *appeal dismissed* 84 NY2d 905 [1994]).[7]

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[5] According to the primary caseworker, the mother declined substance abuse treatment because she was "past [90] days sober."

[6] Following oral argument, the mother made certain concerning allegations about the senior caseworker – not the primary caseworker – involved in this matter, and petitioner and the attorney for the children provided responsive letters. Inasmuch as these allegations are outside the record, which is sufficient for our review, we decline to consider them (*see* CPLR 5526; *Matter of Cori XX. [Michael XX.-Katherine XX.]*, 155 AD3d 113, 117 [3d Dept 2017]; *Matter of Thomas X. [Megan X.]*, 80 AD3d 832, 834 n [3d Dept 2011], *lv denied* 16 NY3d 710 [2011]; *compare Matter of Michael B.*, 80 NY2d 299, 318 [1992]).

[7] We share the mother's concern about the use of a negative inference against a parent who declines to testify at a removal hearing. "Unlike the fact-finding hearing, which represents a culmination of the adjudicatory process, a [removal] hearing occurs at the very beginning of the case, indeed prior to discovery, interviews, investigation by the parent's attorney, or comprehensive case record analysis. In short, counsel cannot be well prepared, and lacks the ability needed to weigh the pros and cons of client testimony" (Merril Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1028; *contra Matter of Jacob P.*, 37 AD3d 836, 838 [2d Dept 2007]). Nevertheless, in light of our determination – which we have reached *without* the use of such inference – we need not reach the mother's contention.

As to the mother's assertion that the notice of the removal hearing was deficient, we note that petitioner's application comports with the statutory requirements (*see* Family Ct Act §§ 1023; 1027 [a] [iv]). Further, the removal hearing was held in accordance with the statute and, at said hearing, the mother was represented by counsel and had a full opportunity to be heard (*see* Family Ct Act §§ 1023; 1027 [a] [iii]). To the extent not expressly addressed herein, the mother's remaining arguments have been reviewed and lack merit.[8]

Lynch, Reynolds Fitzgerald, Ceresia and Powers, JJ., concur.

ORDERED that the amended orders are affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

[8] The attorney for the children opposed removal at the Family Ct Act § 1027 hearing, but the appellate attorney for the children supports affirmance of Family Court's decision.